HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

WILLIAM DAVID BUGMY APPELLANT

AND

THE QUEEN RESPONDENT

Bugmy v The Queen
[2013] HCA 37
2 October 2013
S99/2013

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1, 3 and 4 of the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 18 October 2012.*

3. *Remit the matter to the Court of Criminal Appeal.*

On appeal from the Supreme Court of New South Wales

Representation

D Yehia SC with G A Bashir for the appellant (instructed by Aboriginal Legal Service (NSW/ACT) Ltd)

L A Babb SC with K H Alder for the respondent (instructed by Director of Public Prosecutions (NSW))

CATCHWORDS

Bugmy v The Queen

Criminal law – Appeal – Prosecution appeal against sentence – Where sole ground of appeal manifest inadequacy – Where appellate court increased offender's sentence – Whether finding of manifest inadequacy required before discretion to vary sentence enlivened.

Criminal law – Sentence – Principles – Relevance of deprived background of Aboriginal offender – Application of *Fernando* (1992) 76 A Crim R 58 – Whether effect of social deprivation diminishes with time and repeat offending – Whether social deprivation has same mitigatory effect for all purposes of punishment – Whether courts should take into account unique circumstances of Aboriginal offenders and high rate of incarceration of Aboriginal Australians when sentencing Aboriginal offender – Whether approach to sentencing Aboriginal offenders in *R v Gladue* [1999] 1 SCR 688 and *R v Ipeelee* [2012] 1 SCR 433 should be followed.

Words and phrases – "deprived background", "*Fernando* considerations", "manifestly inadequate", "residual discretion".

Crimes (Sentencing Procedure) Act 1999 (NSW), s 5(1).

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The appellant adhered to pleas of guilty in the District Court of New South Wales (Lerve ADCJ) to two offences under s 60A(1) of the *Crimes Act* 1900 (NSW) ("the Crimes Act") and to one offence under s 33(1)(b) of the Crimes Act. Section 60A(1) makes it an offence to assault a correctional officer[1] while the officer is acting in the execution of his or her duty. Section 33(1)(b) makes it an offence to cause grievous bodily harm to a person with intent to cause harm of that kind.

2 The appellant was sentenced to an effective sentence comprising a non-parole period of four years and three months and a balance of term of two years[2]. Judge Lerve recommended that the appellant should be released at the expiration of the non-parole period, subject to his parole order being conditioned on supervision that might require that he undergo treatment for alcohol and substance abuse in a residential programme.

3 The Director of Public Prosecutions ("the Director") appealed to the New South Wales Court of Criminal Appeal on the ground that the sentences were manifestly inadequate. The Director later filed additional grounds of appeal, which contended that Judge Lerve had failed to properly assess the objective seriousness of the offence and had given too much weight to the appellant's subjective case.

4 The Court of Criminal Appeal (Hoeben JA, Johnson and Schmidt JJ) upheld the Director's additional grounds of appeal with respect to the sentence for the s 33(1)(b) offence. The Court said that these findings made it unnecessary to decide whether the sentence was manifestly inadequate. The Court re-sentenced the appellant for the s 33(1)(b) offence to a non-parole period

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1 Under s 60AA(i), a correctional officer is a "law enforcement officer" for the purposes of s 60A(1).

2 Concurrent, fixed terms of eight months' imprisonment commencing on 8 January 2011 were imposed for the s 60A(1) offences. A sentence of imprisonment comprising a non-parole period of four years commencing on 8 April 2011 with a balance of term of two years expiring on 7 April 2017 was imposed for the s 33(1)(b) offence.

of five years with a balance of term of two and a half years[3]. The Court did not consider whether to exercise the discretion conferred under statute to dismiss an appeal brought by the Director notwithstanding the demonstration of error ("the residual discretion")[4].

5 On 10 May 2013, Hayne, Bell and Gageler JJ granted the appellant special leave to appeal. The appeal gives rise to three issues. The determinative issue concerns the decision to allow the Director's appeal and to re-sentence the appellant without determining whether the sentence imposed by the primary judge was manifestly inadequate. For the reasons to be given, the appeal to this Court must be allowed and the Director's appeal remitted to the Court of Criminal Appeal to be determined in accordance with these reasons. The remitter makes it appropriate to address the two remaining issues, which concern the correctness of statements made by Hoeben JA, who gave the principal judgment, of the relevance of the appellant's deprived background and mental illness to his sentencing. Before turning to the appellant's grounds, there should be an account of the offence and the appellant's case.

The facts

6 At the date of these events the appellant was a remand prisoner at the Broken Hill Correctional Centre. He was upset at the prospect that his anticipated visitors might not arrive at the Centre before the close of visiting hours. A senior correctional officer, Mr Gould, agreed to make inquiries to find out if the visiting hours could be extended. The appellant was not satisfied with Mr Gould's response. He followed him into the wing office saying "I'll split you open, you cunt". Mr Gould contacted Assistant Superintendent Pitt and told him that the Emergency Team might be needed.

7 The appellant left the wing office and made a telephone call to his partner. He told her that he would "split Gould open".

8 Mr Pitt and another officer, Mr Donnelly, arrived at the scene and spoke with the appellant. The appellant threatened them in much the same terms as he had threatened Mr Gould. He then ran to a pool table and picked up a number of

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3 The Court imposed the same extent of accumulation by directing the substituted sentence to commence on 8 April 2011.

4 *Criminal Appeal Act* 1912 (NSW), s 5D.

pool balls. Mr Pitt and Mr Donnelly retreated as the appellant threw pool balls at them. This was the conduct charged as the assaults.

9 Mr Gould entered the yard and the appellant said "Gould you cunt, I told you I'm going to split you open". He threw two balls at Mr Gould, which struck his back. Mr Gould retreated into the wing office and as he attempted to secure the door a third pool ball thrown by the appellant struck him in the left eye, causing serious injury. This was the conduct charged under s 33(1)(b).

10 The appellant climbed onto the roof of the gymnasium and from this vantage point he continued to throw pool balls at the officers. Following negotiations the appellant came down from the roof and surrendered. He expressed satisfaction at having injured Mr Gould and said that he "had not finished with Gould".

11 Mr Gould experienced immediate loss of vision in his left eye. He was taken to the Broken Hill Hospital and from there he was transferred to the Royal Adelaide Hospital. He underwent a series of surgical procedures to repair the damage to his eye and the surrounding bony structures of his face. Mr Gould has lost the sight in his left eye. He suffered a great deal of pain before and after surgery. At the time of this incident Mr Gould was 43 years old. The psychological effects of the assault on him have been profound, in terms of both his diminished enjoyment of life and his career prospects.

The appellant's case

12 The appellant is an Aboriginal man who was raised in Wilcannia, a town in far-western New South Wales. He is one of a number of siblings. He grew up in a household in which alcohol abuse and violence were commonplace. He has had little formal education and is unable to read or write. He started drinking alcohol and taking prohibited drugs when he was 13 years old. He reports having witnessed his father stabbing his mother 15 times. He and his siblings all have records for violence. The appellant's record of juvenile offending commenced when he was 12 years old. From that age he was regularly detained in juvenile detention centres. When he turned 18 he was transferred to an adult prison. He has a long record of convictions including for offences of violence. He was 29 years old at the date of the present offences. He has spent much of his adult life in prison. He gives a history of repeated suicide attempts. He has maintained a long-term relationship with a woman by whom he has a daughter. He and his partner are both alcoholics. The child has been placed in the care of her maternal grandmother.

13 The appellant also has a history of head injury and of auditory hallucinations. He was seen by Dr Westmore, a psychiatrist, in July 2011. At the time the appellant was receiving anti-psychotic medication in custody. Dr Westmore considered that the auditory hallucinations may be related to alcohol abuse, although primary mental illness such as schizophrenia would need to be excluded. Dr Westmore's "Axis I" diagnosis was of conduct disorder arising in adolescence; alcohol and substance abuse; and probable episodes of depression most likely of an adjustment disorder or reactive type. Dr Westmore questioned whether the appellant might be suffering from early alcohol-related or head injury-related brain damage. In a supplementary report, Dr Westmore expressed the opinion that it was likely that the appellant's psychotic symptoms do not arise from drug or alcohol use but have a primary psychotic origin. He assessed the appellant as at risk of self-harm.

Judge Lerve's reasons

14 Judge Lerve noted that the maximum penalty for an offence under s 60A(1) is imprisonment for five years and the maximum penalty for an offence under s 33(1)(b) is imprisonment for 25 years. His Honour also noted that the s 33(1)(b) offence has a standard non-parole period of seven years[5] and in this connection he referred to this Court's decision in *Muldrock v The Queen*[6]. The appellant pleaded guilty to the offences before the Local Court and each sentence was reduced by 25 percent to reflect the utilitarian value of the early pleas[7]. His Honour considered that the s 33(1)(b) offence was aggravated by the fact that the victim was a correctional services officer[8], and by reason of the significant psychological harm suffered by Mr Gould[9]. A further matter of aggravation was the use of the pool ball as a weapon[10].

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5 *Crimes (Sentencing Procedure) Act* 1999 (NSW), Pt 4 Div 1A and Table to s 54D.

6 (2011) 244 CLR 120; [2011] HCA 39.

7 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 22(1).

8 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A(2)(a).

9 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A(2)(g).

10 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A(2)(c).

15 Judge Lerve addressed the parties' submissions respecting the objective seriousness of the s 33(1)(b) offence. He said that Mr Lawrence, who appeared for the appellant, had put in the course of oral submissions that the offence was "well below" the mid-range of seriousness. His Honour assessed that the offence was slightly less serious than the nominal mid-range of objective seriousness for an offence of this type. He said that the appellant's criminal history was a further aggravating factor[11] and signified his intention to take that factor into account in the way explained in *R v McNaughton*[12].

16 His Honour noted, turning to Dr Westmore's reports, that there was no link between the appellant's mental condition and the offence. He referred to Mr Lawrence's submission that "significant moderation to the weight to be given to general deterrence is warranted on account of the totality of the psycho-social evidence". He said that he would allow "some moderation to the weight to be given to general deterrence because of those issues".

17 Judge Lerve also noted Mr Lawrence's submission that the appellant is "an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment" and that "*Fernando* type considerations" applied. His Honour referred to the decisions in *Fernando*[13] and *Kennedy v The Queen*[14], stating that "[c]learly enough the *Fernando*/*Kennedy* type issues are present" and that it would be necessary to take these considerations into account.

18 The reference to the "*Fernando* type considerations" is to propositions stated by Wood J in sentencing an offender who had been raised in an Aboriginal community in which alcohol abuse and violence were endemic[15]. They were distilled from *Neal v The Queen*[16], a number of sentencing decisions from

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11 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 21A(2)(d).

12 (2006) 66 NSWLR 566.

13 (1992) 76 A Crim R 58.

14 [2010] NSWCCA 260.

15 *Fernando* (1992) 76 A Crim R 58 at 62-63.

16 (1982) 149 CLR 305; [1982] HCA 55.

intermediate courts of appeal[17] and materials including the Report of the Royal Commission into Aboriginal Deaths in Custody[18]. The reference to *Kennedy* is to a decision of the New South Wales Court of Criminal Appeal which corrected one misconception concerning the decision in *Fernando*, to which we will return.

The failure to consider manifest inadequacy and the residual discretion

19 The Director's appeal to the Court of Criminal Appeal was brought against each of the sentences on the ground that "the sentence pronounced was manifestly inadequate". The Director foreshadowed that additional grounds may be filed later. In a later notice, the Director signified his intention to rely on the following grounds:

> "Ground 1: His Honour failed to properly determine the objective seriousness of the offence.
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> Ground 2: His Honour failed to properly acknowledge the category of the victim as a serving prison officer in the lawful performance of his duties.
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> Ground 3: The weight his Honour afforded the [appellant]'s subjective case impermissibly ameliorated the appropriate sentence."

20 The focus of the appeal was on the sentence imposed for the intentional infliction of grievous bodily harm on Mr Gould[19]. The Court of Criminal Appeal confirmed the sentences imposed for the two assaults. Hoeben JA addressed the first and second additional grounds together. His Honour concluded that "despite the essentially discretionary nature of an assessment of the objective seriousness of an offence", Judge Lerve had erred in his assessment of the seriousness of the offence against Mr Gould[20]. Two considerations underpinned this conclusion. First, Hoeben JA considered that Judge Lerve had comprehensively misstated the

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17 *Fernando* (1992) 76 A Crim R 58 at 62, citing *Davey* (1980) 2 A Crim R 254; *Friday* (1984) 14 A Crim R 471; *Yougie* (1987) 33 A Crim R 301; *Rogers* (1989) 44 A Crim R 301; *Juli* (1990) 50 A Crim R 31.

18 *Fernando* (1992) 76 A Crim R 58 at 62.

19 *R v Bugmy* [2012] NSWCCA 223 at [29].

20 *R v Bugmy* [2012] NSWCCA 223 at [39].

submissions as to where in the nominal range of objective seriousness the offence fell[21]. Secondly, although Judge Lerve had acknowledged the fact that Mr Gould was a correctional officer as an aggravating factor, that circumstance did not appear to have played any part in his reasoning thereafter[22].

21 The third of the Director's additional grounds was also upheld. Hoeben JA agreed with the prosecution submission that the appellant's subjective case had few positive features and that Judge Lerve had failed to take into account the appellant's lack of remorse and failure to take responsibility for his conduct[23]. His Honour also considered that Judge Lerve should have given greater weight to the appellant's criminal record[24]. Finally, his Honour considered that it was an error for Judge Lerve to have moderated the consideration of general deterrence in the light of the appellant's mental illness[25].

22 The Director's additional grounds were particulars of the ground that the sentence was manifestly inadequate[26]. The Director did not complain, and the Court of Criminal Appeal did not find, that Judge Lerve applied an incorrect principle of sentencing, took into account an irrelevant matter, applied a mistaken view of the facts or failed to take into account a material consideration[27]. The conclusion that Judge Lerve "comprehensively misstated" the parties' submissions may not have been justified in light of the elaborate submissions put

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21 *R v Bugmy* [2012] NSWCCA 223 at [32].

22 *R v Bugmy* [2012] NSWCCA 223 at [35].

23 *R v Bugmy* [2012] NSWCCA 223 at [40].

24 *R v Bugmy* [2012] NSWCCA 223 at [41]-[42].

25 *R v Bugmy* [2012] NSWCCA 223 at [43]-[44], [47].

26 *Dinsdale v The Queen* (2000) 202 CLR 321 at 325 [5] per Gleeson CJ and Hayne J, 329 [22] per Gaudron and Gummow JJ; [2000] HCA 54; *Carroll v The Queen* (2009) 83 ALJR 579 at 581 [8]-[9]; 254 ALR 379 at 381-382; [2009] HCA 13; *Hili v The Queen* (2010) 242 CLR 520 at 538-539 [58]-[60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45.

27 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

on the appellant's behalf[28]. Mr Lawrence sought to dissect the assessment of the objective seriousness of the offence into component parts leading to a submission that the court "must balance a mens rea that is well below the mid-range with a result that is somewhere from the mid-range to above mid-range". In any event, as Hoeben JA recognised, the assessment of the objective seriousness of the offence was a matter for Judge Lerve. The fact that Judge Lerve did not refer to the appellant's lack of remorse and failure to take responsibility for his conduct does not suggest that his Honour failed to take into account the appellant's callous disregard for his conduct. Judge Lerve detailed this in his account of the facts of the offence.

23 In the result, the Director's appeal was allowed without determination of the sole ground of challenge.

24 The Director submits that it is implicit in the reasons of the Court of Criminal Appeal that the Court concluded that the sentence for the offence against Mr Gould was manifestly inadequate. The difficulty with acceptance of the submission is that the Court expressly refrained from making that assessment. Sentencing is a discretionary judgment and there is no single correct sentence for an offender and an offence[29]. Plainly enough the Court of Criminal Appeal disagreed with the sentence imposed by Judge Lerve and favoured a more severe sentence. The difference between the Court of Criminal Appeal's assessment of the appropriate sentence and Judge Lerve's assessment may be explained by saying that Judge Lerve gave too little weight to some factors and too much weight to other factors. However, within a range of sentences for this offence and this offender, the weight to be given to the evidence and the various, conflicting, purposes of sentencing was a matter for Judge Lerve. The authority of the Court of Criminal Appeal to substitute a sentence for that imposed by Judge Lerve was not enlivened by its view that it would have given greater weight to deterrence and less weight to the appellant's subjective case[30]. The power could only be engaged if the Court was satisfied that Judge Lerve's

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28 *R v Bugmy* [2012] NSWCCA 223 at [32].

29 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; [1998] HCA 57.

30 *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672 [15]; [1999] HCA 29.

discretion miscarried because in the result his Honour imposed a sentence that was below the range of sentences that could be justly imposed for the offence consistently with sentencing standards[31]. In that event, the Court was required to consider whether the Director's appeal should nonetheless be dismissed in the exercise of the residual discretion[32]. The Court of Criminal Appeal did not decide that the sentence for the s 33(1)(b) offence was manifestly inadequate. The Court of Criminal Appeal did not consider the exercise of the residual discretion. It follows that the appeal must be allowed.

The appellant's deprived background and mental disorder

25 In the Court of Criminal Appeal the prosecution argued that given the appellant's age and record of serious criminal offending, it had been an error for Judge Lerve to give weight to the propositions stated in *Fernando*. Hoeben JA said of this submission[33]:

> "I agree that with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish. This is particularly so when the passage of time has included substantial offending."

26 Nonetheless, Hoeben JA said that consideration of the appellant's background of social deprivation remained a matter of relevance which could properly be taken into account in sentencing. However, any reduction on this account would be "modest"[34].

27 The appellant challenges Hoeben JA's statement of the principle. He submits that the effects of childhood deprivation do not diminish with time and

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31 *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ, 306 per McHugh J; [1994] HCA 49; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 581 [15]-[16] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

32 *Green v The Queen* (2011) 244 CLR 462 at 471 [26] per French CJ, Crennan and Kiefel JJ, 506 [131] per Bell J; [2011] HCA 49.

33 *R v Bugmy* [2012] NSWCCA 223 at [50].

34 *R v Bugmy* [2012] NSWCCA 223 at [52].

with repeated incarceration. Despite his age and his long criminal record, he contends that it was open to Judge Lerve to impose a lenient sentence reflecting his reduced moral culpability for his offence.

28 The appellant's submissions travel beyond the assertion, which was not in issue in this Court, that his background of profound deprivation was of undiminished relevance in sentencing him. He relies on decisions of the Supreme Court of Canada[35] as persuasive authority for two larger propositions. First, sentencing courts should take into account the "unique circumstances of all Aboriginal offenders" as relevant to the moral culpability of an individual Aboriginal offender. Secondly, courts should take into account the high rate of incarceration of Aboriginal Australians when sentencing an Aboriginal offender. That rate was said to reflect a history of dispossession and associated social and economic disadvantage.

29 The Canadian decisions on which the appellant's argument relies are to be understood in the context of the provisions of the Canadian *Criminal Code*[36] governing the purpose and principles of sentencing. In particular, they are to be understood in the light of s 718.2(e), which requires a court that imposes a sentence to take into consideration the principle that:

> "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*." (emphasis added)

30 Section 718.2 was inserted into the *Criminal Code* as part of a package of sentencing amendments which came into force in 1996 and which significantly changed the range of penal sanctions[37]. The Supreme Court of Canada had occasion to consider the effect of these amendments on the sentencing of Aboriginal Canadians for the first time in *R v Gladue*[38]. This was an appeal against the severity of a sentence of three years' imprisonment imposed on a 19 year old Aboriginal offender who had been convicted of the manslaughter of

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35 *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

36 RSC 1985, c C-46.

37 *R v Gladue* [1999] 1 SCR 688 at 708-709 [38]-[40].

38 [1999] 1 SCR 688.

her de facto husband. At the time of the killing the offender was significantly affected by alcohol. The sentencing judge did not consider that there were any special circumstances arising from the offender's Aboriginal status given that she and the deceased had been living "off-reserve" and not "within the aboriginal community as such"[39].

31 The issue in *Gladue* was the interpretation of s 718.2(e)[40]. The Court characterised the provision as a direction to sentencing judges "to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case"[41]. The Court explained that this does not alter the fundamental duty to impose a sentence that is fit for the offender and the offence, but that it does alter the method of analysis to be applied when sentencing an Aboriginal offender[42]. The direction to pay particular attention to the circumstances of Aboriginal offenders amounts to legislative recognition that those circumstances are unique[43] and of the disproportionate incarceration of Aboriginal peoples[44]. The analysis to be undertaken when sentencing an Aboriginal offender in Canada requires the judge to take into account unique systemic or background factors which may have played a part in bringing the offender before the court[45]. In a case in which these factors have played a significant role, the sentencing judge is to consider whether imprisonment would serve to deter or to denounce crime in a manner that would be meaningful to the community of which the offender is a member[46]. This latter

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39 *R v Gladue* [1999] 1 SCR 688 at 701 [18].

40 *R v Gladue* [1999] 1 SCR 688 at 703 [24].

41 *R v Gladue* [1999] 1 SCR 688 at 706 [33].

42 *R v Gladue* [1999] 1 SCR 688 at 706-707 [33].

43 *R v Gladue* [1999] 1 SCR 688 at 708 [37].

44 *R v Gladue* [1999] 1 SCR 688 at 714-723 [50]-[65].

45 *R v Gladue* [1999] 1 SCR 688 at 723-724 [66].

46 *R v Gladue* [1999] 1 SCR 688 at 725 [69].

consideration reflects that the purposes of sentencing under the Canadian *Criminal Code* include purposes that are directed to restorative justice[47].

32 The appeal was dismissed in *Gladue.* The Court observed that, as a matter of practical reality, the more violent and serious the offence the more likely that the terms of imprisonment for Aboriginals and non-Aboriginals would be close to each other[48]. It said that the sentencing of Aboriginal offenders must proceed on an individual basis, which directs attention to the appropriate sentence for *this offence*, committed by *this offender*, harming *this victim*, in *this community*[49].

33 The observation that violent and serious offences were likely to result in sentences of imprisonment for Aboriginal offenders close to those imposed on non-Aboriginal offenders appears to have given rise to a misconception that the *Gladue* principles had no application to Aboriginal offenders charged with offences of that kind. The Supreme Court addressed this misconception in *R v Ipeelee*[50].

34 Mr Ipeelee was sentenced to three years' imprisonment for breaching a condition of his long-term supervision order ("LTSO") that he not drink alcohol. The sentencing judge considered that Mr Ipeelee's Aboriginality had been taken into account at the time he was sentenced for the offence giving rise to the LTSO and that in the circumstances his Aboriginal status was of diminished importance[51]. LeBel J, delivering the judgment of the majority of the Supreme Court, made clear that the duty imposed by s 718.2(e) applies in every case involving the sentencing of an Aboriginal offender[52]. Their Honours rejected the need to establish a causal link between systemic and background factors affecting Aboriginal offenders and the offence[53]. They explained that these factors provide

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47 *R v Gladue* [1999] 1 SCR 688 at 725-726 [70], referring to s 718(d), (e) and (f) of the *Criminal Code* (Can).

48 *R v Gladue* [1999] 1 SCR 688 at 730 [79].

49 *R v Gladue* [1999] 1 SCR 688 at 730 [80].

50 *R v Ipeelee* [2012] 1 SCR 433 at 484 [84].

51 *R v Ipeelee* [2012] 1 SCR 433 at 448 [15].

52 *R v Ipeelee* [2012] 1 SCR 433 at 484 [85].

the context in which the appropriate sentence is to be determined. They went on to state[54]:

> "This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence."

35 The appellant submits that the statements in *Gladue* and *Ipeelee* respecting the unique systemic factors applying to the sentencing of Aboriginal offenders have equal application to the sentencing of Aboriginal offenders in New South Wales. The instruction contained in s 718.2(e) of the Canadian *Criminal Code* was likened to s 5(1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"), which provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

36 One evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that s 5(1) of the Sentencing Act does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a direction of that kind does not arise for consideration in this appeal[55]. Another point of distinction is the differing statements of the purposes of punishment under the Canadian and New South Wales statutes[56]. There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

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53 *R v Ipeelee* [2012] 1 SCR 433 at 482-483 [81]-[83].

54 *R v Ipeelee* [2012] 1 SCR 433 at 483-484 [83].

55 *Racial Discrimination Act* 1975 (Cth), s 10.

56 *Criminal Code* (Can), s 718; Sentencing Act, s 3A.

37 An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. In this respect, Simpson J has correctly explained the significance of the statements in *Fernando*[57]:

> "Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime."

38 The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct[58]. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand[59]. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor[60]. To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and[61]:

> "the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects."

39 The other respect in which Wood J proposed that an offender's Aboriginality may be relevant to the sentencing determination is in a case in which because of the offender's background or lack of experience of European

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57 *Kennedy v The Queen* [2010] NSWCCA 260 at [53].

58 *Fernando* (1992) 76 A Crim R 58 at 62 (E).

59 *Fernando* (1992) 76 A Crim R 58 at 62 (C).

60 *Fernando* (1992) 76 A Crim R 58 at 62 (E).

61 *Fernando* (1992) 76 A Crim R 58 at 62-63 (E).

ways a lengthy term of imprisonment might be particularly burdensome[62]. In each of these respects, the propositions enunciated in *Fernando* conform with the statement of sentencing principle by Brennan J in *Neal*[63]:

> "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. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

40 Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

41 Mr Fernando was a resident of an Aboriginal community located near Walgett in far-western New South Wales. The propositions stated in his case are particularly directed to the circumstances of offenders living in Aboriginal communities. Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*. Nonetheless, the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic

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62 *Fernando* (1992) 76 A Crim R 58 at 63 (G).

63 (1982) 149 CLR 305 at 326.

disadvantage measured across a range of indices[64], but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.

42 It will be recalled that in the Court of Criminal Appeal the prosecution submitted that the evidence of the appellant's deprived background lost much of its force when viewed against the background of his previous offences[65]. On the hearing of the appeal in this Court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.

43 The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

44 Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult[66]. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to

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64 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage*, (2011).

65 *R v Bugmy* [2012] NSWCCA 223 at [48].

66 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14.

frustration may increase the importance of protecting the community from the offender.

45 The point was made by Gleeson CJ in *Engert* in the context of explaining the significance of an offender's mental condition in sentencing[67]:

> "A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender."

46 It does not advance the appellant's case to say, as he does, that the Court of Criminal Appeal was wrong to take into account general deterrence in concluding that Judge Lerve erred in his assessment of the objective seriousness of the offence. Consideration of the objective seriousness of the offence must take account of the fact that this was an offence committed by a prisoner against an officer in a prison. These are the "particular circumstances" to which Hoeben JA was referring when he said that it appeared that Judge Lerve had given inadequate weight to general deterrence[68]. An issue for determination on the remitter is whether the appellant's background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation, to the extent that Judge Lerve allowed.

47 The appellant's case also relies on the evidence of his mental illness. As noted, the significance of a mental disorder to sentencing was the issue in *Engert*. Gleeson CJ observed that the existence of a causal relationship between an offender's mental condition and the offence does not automatically operate to

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67 (1995) 84 A Crim R 67 at 68.

68 *R v Bugmy* [2012] NSWCCA 223 at [38].

reduce the sentence and that the absence of such a connection does not automatically mean that the sentence will not be reduced[69]. The appellant relies on the latter statement. He submits that Hoeben JA wrongly held that evidence of an offender's mental illness or disorder may *only* be taken into account when it has contributed (directly or indirectly) to the commission of the offence. Hoeben JA's conclusion that Judge Lerve erred in taking the evidence of the appellant's mental condition into account did not depend on the absence of a causal connection with the offence. His Honour accepted the prosecution submission that the general terms of Dr Westmore's diagnosis were an inadequate foundation on which to give lesser weight to the consideration of deterrence[70].

48 At the hearing before Judge Lerve, the prosecutor conceded that the appellant's "mental illness" was a circumstance "that means necessarily that he is in some ways not a great vehicle for general deterrence". The prosecution was not bound by its concession on the hearing of its appeal. However, to the extent that its stance before Judge Lerve contributed to the imposition of a sentence that is said to be inadequate, its change of position was material to consideration of the residual discretion. The circumstance that the Director's appeal is to be remitted to the Court of Criminal Appeal for determination makes it unnecessary to consider the consequences of the Court's failure to give consideration to the residual discretion before it allowed the appeal.

49 This Court is not a sentencing court. The appellant's invitation to the Court to dismiss the Director's appeal must be rejected. The Director's appeal has not been determined. The question of whether the sentence is manifestly inadequate must be remitted to the Court of Criminal Appeal.

Orders

50 The following orders should be made.

1. Allow the appeal.

2. Set aside the orders of the Court of Criminal Appeal allowing the Director's appeal and quashing the sentence imposed in the District Court on 16 February 2012 in respect of count 3 and substituting a

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69 *Engert* (1995) 84 A Crim R 67 at 71.

70 *R v Bugmy* [2012] NSWCCA 223 at [47].

sentence of imprisonment with a non-parole period of five years to commence on 8 April 2011 and to expire on 7 April 2016 with a balance of term of two years and six months to commence on 8 April 2016 and to expire on 7 October 2018.

3. Remit the Director's appeal to the Court of Criminal Appeal.

51 GAGELER J. To enliven the discretion of the Court of Criminal Appeal, under s 5D of the *Criminal Appeal Act* 1912 (NSW), to vary a sentence and impose such sentence as to it seems proper, the Director of Public Prosecutions must establish that the sentence under appeal either: (1) turned on one or more specific errors of principle or of fact; or (2) in the totality of the circumstances was unreasonable or plainly unjust[71].

52 The Director's first ground of appeal to the Court of Criminal Appeal clearly invoked the second of those categories of appellate intervention[72]. To establish that "the sentence pronounced was manifestly inadequate", it was incumbent upon the Director to establish that the sentence was outside the range of available sentences in all the circumstances of the case[73].

53 The Director's three "additional grounds of appeal" to the Court of Criminal Appeal were not clearly framed to invoke either category of appellate intervention. The first and second were framed in terms of a failure "properly" to determine or acknowledge relevant considerations. They would be capable of invoking the first category of appellate intervention only if the asserted impropriety rose to the level of a failure to take those considerations into account. As demonstrated in the joint reasons for judgment, they were not analysed by the Court of Criminal Appeal in those terms. The third was framed only in terms of "weight". It was incapable of establishing an error in the first category of appellate intervention. It pointed at most to a circumstance which, taken with other circumstances, might be indicative of error in the second category.

54 The appellant in this Court submitted that all three of the additional grounds were properly to be understood as no more than particulars of the ground of manifest inadequacy. The Director did not contend otherwise, submitting only that the errors found by the Court of Criminal Appeal in determining those grounds were "tantamount to a finding of manifest inadequacy". The problem with that submission is that the Court of Criminal Appeal either found manifest inadequacy or did not. To the extent it went so far as to assert that such a finding was implicit, the submission is falsified by the express holding of the Court of Criminal Appeal that it was not necessary to deal with the ground of manifest

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71 *Carroll v The Queen* (2009) 83 ALJR 579 at 581 [7]; 254 ALR 379 at 381; [2009] HCA 13, citing *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

72 (2009) 83 ALJR 579 at 581 [8]; 254 ALR 379 at 381.

73 *Hili v The Queen* (2010) 242 CLR 520 at 538-539 [58]-[60]; [2010] HCA 45.

inadequacy because the errors identified in analysing the additional grounds of appeal were "of such a kind that it will be necessary to re-sentence"[74].

55 In the result, I agree with the conclusion reached in the joint reasons for judgment that the Court of Criminal Appeal did not determine the sole ground of appeal to it. The Court of Criminal Appeal did not determine that the sentence under appeal was outside the range of available sentences in all the circumstances of the case. Its discretion to vary the sentence and to impose the sentence it thought proper was not enlivened. The appeal must for that reason be allowed, the sentence imposed by the Court of Criminal Appeal set aside, and the Director's appeal remitted to the Court of Criminal Appeal for its reconsideration.

56 As to whether there is, with the passage of time, a diminution in the extent to which it is appropriate for a sentencing judge to take into account the effects of social deprivation in an offender's youth and background, I am unable to accept either the Court of Criminal Appeal's categorical statement that there must be[75], or the Director's categorical concession in the appeal to this Court that there is not. Consistently with the statement of sentencing principle by Brennan J in *Neal v The Queen*[76], the weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case for individual assessment.

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74 *R v Bugmy* [2012] NSWCCA 223 at [53].

75 [2012] NSWCCA 223 at [50].

76 (1982) 149 CLR 305 at 326; [1982] HCA 55.