IN THE COURT OF APPEAL [1997] QCA 139

SUPREME COURT OF QUEENSLAND

C.A. No. 455 of 1996

Brisbane

[R. v. Daniel]

THE QUEEN

v.

MAYNARD DANIEL

(Applicant)

Fitzgerald P.
McPherson J.A.
Moynihan J.

Judgment delivered 30 May 1997

Separate reasons for judgment of each member of the Court; McPherson J.A. and Moynihan J. concurring as to the order made; Fitzgerald P. dissenting.

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE REFUSED.

CATCHWORDS: **CRIMINAL LAW - sexual offences - sentence - Aboriginal offenders - appeal against sentence of eight years' imprisonment for three counts of rape - applicant and complainant lived in Aboriginal community - complainant was a member of applicant's extended family - offences committed within short period of time when applicant and complainant affected by alcohol - applicant came from disadvantaged background and poor quality of life - whether applicant should receive lower sentence because of his membership of deprived and dysfunctional community.**

Charlie, Uhl and Nagamarra (Supreme Court, W.A., No. 96 of

1987, unreported, 14 August 1987)
Clinch (1994) 72 A.Crim.R. 301
Fernando (1992) 76 A.Crim.R. 58
Minor (1992) 59 A.Crim.R. 227
Neal v. R. (1982) 149 C.L.R. 305
Rogers and Murray (1989) 44 A.Crim.R. 301
Russel (1995) 84 A.Crim.R. 386
Woodley, Boogna and Charles (and others) (1994) 76 A.Crim.R. 302

Counsel: Mr S. Hamlyn-Harris for the applicant.
Mr T. Henry for the respondent.

Solicitors: Legal Aid Office for the applicant.
Queensland Director of Public Prosecutions for the respondent.

Hearing Date: 3 December 1996

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 30 May 1997

This is an application for leave to appeal against sentences imposed in the District Court at Cairns on 2 October 1996. On 30 September, the applicant pleaded guilty to three offences of rape committed on 8 March that year, and on 2 October he was sentenced to imprisonment for eight years for each offence, the sentences to be served concurrently. It was submitted for the applicant that the sentences are manifestly excessive and that the appropriate sentence for each offence was imprisonment for six years.

Both the applicant and the complainant are members of the Aboriginal community at Kowanyama, where the complainant, who was aged 20 years when the offences were committed, resides with her mother. The applicant was born on 16 April 1970, and was aged 25 years when the offences were committed.

On the date of the offences, both the complainant and the applicant were drinking in the canteen at Kowanyama, and were observed by others to be on friendly but not affectionate terms. The applicant left the canteen first, and went to the home of another member of the community where he and others played cards and consumed alcohol. The complainant was at the canteen from 10.00 a.m. to about 10 p.m. when it closed, and was intoxicated when she departed. She went to the house where the applicant and others were playing cards but, after a period, left the house and commenced to walk home.

The applicant caught up with her near his aunt's house, took her into tall grass, tore her clothes off, threatened her and had sexual intercourse with her against her will. He then dragged her naked body across the back garden and up the stairs and on to the verandah of his aunt's house, where he again commenced to have sexual intercourse with her without her consent. He then took her to a bedroom in his aunt's house, and again commenced to have sexual intercourse with her without her consent. When the applicant's aunt was heard coming up the steps of the house on her arrival home, the applicant desisted and the complainant fled to the house of another woman.

The applicant initially denied having sexual intercourse with the complainant but later admitted doing so, although only at his aunt's house, and claimed that the complainant had consented.

The District Court Judge who sentenced the applicant referred to the seriousness of the offences and stated that, in terms of the culture of the parties, sexual intercourse between them was prohibited because of their relationship, which his Honour said was that of uncle and niece "[i]n Aboriginal terms". Reference was made to the fact that the applicant "chose to have [his] way with her, not once, but on three occasions", and to the applicant's abuse and the degrading nature of his behaviour towards the complainant, for whom, it was said, her experience was obviously frightening and humiliating. His Honour said that the applicant's conduct was

"much more serious than one offence of rape only", and that he proposed a sentence reflecting the gravity of the offences and the totality of the applicant's conduct. Reference was also made to community expectations and the applicant's prior criminal history, commencing in March 1993, which it was stated reflected poorly on his character. The applicant's criminal history includes instances of violent behaviour, including three counts of assault occasioning bodily harm, two counts of serious assault on a police officer, aggravated assault on a female, three counts of common assault and three counts of going armed in public. The applicant has, in addition, committed a number of other offences, including property offences. His Honour also referred to a number of matters more favourable to the applicant, including the extent to which prison would remove him from his community at Kowanyama and the impact which that would have on him. Although it was said that alcohol might have played a part in the applicant's conduct, his Honour remarked that it could not excuse what had occurred, but that, fortunately, little or no physical harm was caused to the complainant.

The respondent submitted that the sentences were unremarkable and could have been more severe. It was pointed out that this was an ongoing, persistent attack involving three acts of rape in separate locations, that the complainant was assaulted while walking alone in public at night, that there is a relationship between the parties and that the applicant has a bad criminal history of offences of a violent nature.

The applicant emphasised that, although three offences were committed, there was a continuing course of conduct over a short period of time. Further, it was said that there was no suggestion that the applicant had terrified the complainant or that she would be mentally scarred as a result of the offences, and, although force was used to overcome her resistance, the violence was not great and the complainant did not suffer injury. Reference was made to the fact that both parties were drunk and, although the applicant has a bad criminal history, he also has a history as a good worker who drinks too much; he has worked as a carpenter's assistant and at other times as a labourer. Mention was made of the Kowanyama community's attitude and response. The applicant had been "kicked fairly solidly" by some male members of the complainant's family on the following morning, with the result that his ribs were cracked causing him pain for a couple of weeks. This "quick justice" was consistent with the approach of the community where families are inter-related and "if something bad happens in a family ... you punish that member but you don't throw him out for ever". It was said that the applicant will receive no visits in prison but will be totally cut off from his community. Reference was also made to the applicant's disadvantaged background and poor quality of life, which are material considerations when sentencing, whatever the race or ethnicity of an offender.

Taking all these matters into account, I have no doubt that the sentences imposed

were consistent with recent decisions of this Court.[1]However, the applicant raised an additional point which, stated bluntly, was effectively that he should receive a lower sentence because he and his victim were Aborigines living in a deprived and dysfunctional community where alcohol abuse and violent crime are more prevalent and tolerated more than in the general community.[2] By way of example, the Court's attention was drawn to sentences imposed in the District Court at Cairns on 16 September 1996 which related to offences of rape allegedly committed by two men at Kowanyama one week before the applicant's offences;[3] for those alleged offences, sentences of imprisonment for three years and four years respectively were imposed.

A stark example of the decisions relied on by the applicant is to be found in Rogers and Murray (1989) 44 A.Crim.R. 301.[4] Rogers, who was described as an 18 year old full blooded Aborigine, led his seven year old niece into bushes where he had sexual intercourse with her. He pleaded guilty to aggravated sexual assault by sexually penetrating a girl under the age of 16 years without her consent. The maximum penalty was imprisonment for 20 years. He was sentenced to imprisonment for six years, with an order that he be eligible for parole. On appeal, his sentence was reduced by majority, Malcolm C.J. and Brinsden J., Wallace J. dissenting, to three

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1 See R. v. McIlvaney (C.A. 427 of 1996, unreported, 4/3/1997) and cases referred to.

2 These contentions were not established by evidence.

3 Lawrence and Major (CA Nos. 438 and 439 of 1996, unreported, 2 May 1997).

4 In addition to the later decisions referred to below, Rogers and Murray seems to have been implicitly accepted by the Victorian Court of Criminal Appeal in Harrison (CCA Nos. 133 and 134 of 1994, unreported, 3 November 1994).

years. It was held that the sentence imposed upon him was manifestly excessive having regard to the fact that it was a first offence, his contrition manifested by his timely plea of guilty, and his inexperience with alcohol. Reliance was also placed upon the circumstance that Rogers was an Aborigine.

At pp. 305 ff., the Chief Justice referred to a number of decisions in which statements had been made in the course of sentencing Aborigines,[5] and either approved or himself made statements to the following effect:

(i) in sentencing Aborigines, it is permissible to make allowance for ethnic, environmental and cultural matters;

(ii) the general circumstances which have led to the grave social problems associated with the consumption of alcohol in Aboriginal communities may provide circumstances of mitigation;

(iii) crimes of violence by Aborigines, when they occur on Aboriginal reserves and after the consumption of alcohol, have been dealt with more leniently or sympathetically than has been the case with offences of a similar nature committed by European and other people of non-Aboriginal extraction;

(iv) the relevant mitigating factor is not the mere fact that the offenders concerned are Aboriginal but their personal circumstances, which are related to their membership of the Aboriginal race and the particular circumstances under

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[5] Iginiwuni (unreported, Supreme Court, NT, No 6 of 1975, 12 March 1975) at pp. 23-25; Jamieson (unreported, Supreme Court, WA, Library No 96, 7 April 1965); Lee (unreported, Supreme Court, NT, Forster J, No 221 of 1974, 19 November 1974), pp. 13-14; Friday (1984) 14 ACrimR 471 at 472; Peter (unreported, Supreme Court, WA, Kennedy J, No 108 of 1989, 19 June 1989).

which they live;

(v) race itself is not a permissible ground of discrimination in the sentencing process, and a different approach to the sentencing of Aborigines based only upon their Aboriginal background would be contrary to s. 9 of the Racial Discrimination Act 1975 (Cth.);

(vi) the sentencing principles to be applied in relation to a sexual offence committed by an Aboriginal must be the same as those in any other case;

(vii) however, there may well be particular matters which the Court must take into account, in applying those principles, which are mitigating factors applicable to the particular offender, which include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race;

(viii) it is possible to maintain parity in the sentencing process, notwithstanding that it is necessary to look at each case in the light of its particular facts and factors personal to the offender;

(ix) the material legislative provisions must be interpreted and applied so as to confer protection on all persons from sexual assault irrespective of their race;

(x) the search for parity in sentencing has not resulted in the establishment of one range of sentences for offences committed by non-Aboriginals and another for offences committed by Aboriginals or by Aboriginals in any particular area; and

(xi) regard should be had to the impact which imprisonment in a different part of the State would have on the individual offender.

I will deal below with two decisions to which Malcolm C.J. referred at pp. 305 and 307 respectively, namely Charlie, Uhl and Nagamarra (unreported, Supreme Court, WA, No 96 of 1987, 14 August 1987 per Burt C.J.) and Neal v. R. (1982) 149 C.L.R. 305.[6]

Brinsden J., the other member of the majority in Rogers, also referred to a number of cases, including Charlie, Uhl and Nagamarra, and Peter, for the purpose of ascertaining what was an appropriate sentence for Rogers.

The dissentient, Wallace J., said at pp. 314-315:

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[6] Reference was made to a statement by Brennan J. at p. 326.

> "Each of those sentences are now said to have been excessive because of the age of each applicant, his background, antecedents, and the fact that each pleaded guilty. By background, counsel has argued the 'Aboriginality' of each applicant. The submission made is that
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> > 'it is very important that Aboriginal persons, particularly those in less urbanised areas, have a confidence in the law if they are to be regarded as part of the whole community. Consistency in sentencing therefore, is most important. Courts must temper the disposal of cases in the way that shows an understanding of the Aboriginals and their cultural problems and the requirements of our legal system. Courts, it is submitted, must look for an integration of ideas.'
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> All of that, of course, goes without saying for I would not have thought that in practice the courts have adopted any different approach to that for which counsel pleads. ...
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> ... Notwithstanding the fact that it is clear that greater forebearance has been exercised in sentencing Aboriginals in the north west of the State, examination of the authorities ... does not establish that condign

> punishment has not been imposed for the commission of serious crime. ...
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> Each case must, of course, be looked upon having regard to its own particular facts and the personal position of the prisoner. Furthermore, Parliament's advice to the court, as evidenced in the new legislation: Ginder (1987) 23 A Crim R 1, provides for the protection of Aboriginal women ... I accept what fell from Forster J in Lee (unreported, Supreme Court, NT, No 221 of 1974, 19 November 1974) that the overuse of alcohol is a much more mitigating circumstance in the case of Aboriginal people than in the case of white people. Equally important to the communities in which each of the applicants reside, is the deterrent effect of a meaningful sentence to be served within the Kimberley area."

Charlie, Uhl and Nagamarra involved a pack rape committed by three Aboriginal men at Derby in the north-west of Western Australia. In the course of his judgment, Burt C.J. said:

> "It is apparent to me, indeed it is obvious that I am dealing with three comparatively young Aboriginal men, each of whom has an identifiable tribal community. Over the last 10 years or so, each of you has become addicted to alcohol which is in the process of destroying you, both your culture and you personally, and I do not hold you altogether responsible for that. But it is clear to me that your present condition cannot be constructively dealt with by the criminal law in its normal operation; by that I mean your being locked up in a conventional prison.
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> Imprisonment in that character for each of you, I think, is essentially negative, and that has been demonstrated by your record to date ... A more constructive approach is called for, and the best that the criminal can do is to structure a sentence which will have within it an element of punishment but will at the same time provide the best chances for your rehabilitation. The only way that can be achieved, I think, is through supervised and strictly controlled parole so enabling you, each of you, under strict supervision and away from alcohol, to serve a significant period of your sentence in your own community and under the supervision of your elders with the help of a parole officer."

After fixing terms of imprisonment and minimum terms to be spent in custody, his

Honour continued:

> "I recognise that this is an unusually short minimum term, and I recognise too that it will have an important consequence, namely that it will produce a long period of parole, but I do that upon the basis that during your parole period you will still be serving your sentence and during that period under the general supervision of a parole officer you will each be under the control of your own people and will be kept away from alcohol."

In Juli (1990) 50 A.Crim.R. 31, an appeal was allowed against sentences imposed upon a 25 year old Kimberley Aboriginal, who had committed offences of sexual assault and aggravated sexual assault on two separate days, 14 days apart, upon the same victim. At p. 36, Malcolm C.J. said that, in the absence of any particular mitigating factors, the gravity of the two offences would have warranted sentences of six years for the first offence and eight years or more for the second. However, his Honour considered that there were significant mitigating factors, three of which had not been properly taken into account. His Honour held, and the other members of the Court[7] agreed, that an appropriate total sentence was imprisonment for six years.

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[7] Wallace and Pidgeon JJ.

One of the three factors was that the applicant had a mental illness which was exacerbated by his abuse of alcohol. That need not be further referred to. The other matters not properly taken into account were the applicant's history of alcohol abuse and the fact that he was drunk at the time the offences were committed, and the likely impact upon him, as a Kimberley Aboriginal, of a sentence of imprisonment.

His Honour expressed the opinion that, while drunkenness is not normally an excuse or a mitigating factor, it may be relevant as a mitigating factor in particular circumstances. He continued:

> "... In the particular circumstances of this case the applicant's abuse of alcohol reflects the socio-economic circumstances and the environment in which he has grown up and should be taken into account as a mitigating factor in the way which I suggested in Rogers and Murray (1989) 44 A.Crim.R. 301 at 305-308. I do not wish to repeat what I said in Rogers save to say that the substantive point which I sought to make in my judgment at 305 was:
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> > 'It is a notorious fact that the increased use of alcohol by Aboriginal persons in relatively recent times has caused grave social problems, including problems of violence, in the communities in which they live. The general circumstances which have led to problems associated with the consumption of alcohol may themselves provide circumstances of mitigation .. .' "

His Honour then went on to refer to a number of authorities, some of which he had referred to in his judgment in Rogers, and said at p. 37:

> "In addition, account should be taken of the impact of a sentence of imprisonment on an Aboriginal person in the light of his social and cultural background. As Muirhead J. said in Iginiwuni (unreported, Supreme Court, NT, SCC No 6 of 1975, 12 March 1975):
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> > 'Both Aboriginal and white people are generally speaking subject to the same laws. For years, however, the Judges of this Court in dealing with aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters ...'
>
> That is equally true of the judges of the courts in Western Australia ..."

Wallace J. considered that the sentences imposed of four years and six years respectively were not excessive but in breach of the totality principle; his Honour

said, at p. 39:

> "... a sentence of 10 years upon the 25-year-old mentally deficient applicant, which will result in his complete removal from his Kimberley environment, is crushing in nature[8] ..."

Pidgeon J. stated that the total aggregate sentence of ten years did not give full weight to the factors of diminished responsibility, a plea of guilty and the applicant's ethnic, environmental and cultural background and, after citing the same passage as Malcolm C.J. from the judgment of Muirhead J. in Iginiwuni, continued at p. 40:

> "This is a factor that must be taken into account in the present case and a sentence of ten years does contravene the totality principle. I consider on the facts of the present case it was open to the sentencing judge to say to the applicant that alcohol provided an explanation for what he did but it fell far short of an excuse. It was said in Rogers's case that although drunkenness would not normally be accepted as a mitigating factor it was relevant to the particular circumstances of that case. In the present case I would see the factors to reduce sentence as being those factors to which I have specifically referred."

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[8] See also, for example, Everett (1994) 73 A.Crim.R. 550.

In Clinch (1994) 72 A.Crim.R. 301, the applicant was a 25 year old Aboriginal man who had been sentenced on three different occasions leading to a total period of imprisonment of 26 years without any order for parole eligibility, but accompanied by a declaration that he was an habitual criminal and a direction that he be detained in prison during the Governor's pleasure. Concurrent sentences of 12 years' imprisonment had been imposed on two counts of doing grievous bodily harm (stabbing two people with a knife) to which he had pleaded not guilty. Another 18 "appalling" offences were committed on the same day, to which he had previously

pleaded guilty and been sentenced to 14 years' imprisonment by another judge. The sentence of 12 years was ordered to run cumulatively upon the sentence of 14 years. Later, a third judge sentenced the applicant to nine years' imprisonment for two very serious aggravated sexual assaults on a 15 year old girl, and ordered that those sentences be served concurrently with each other and with the earlier sentences. The Western Australian Court of Criminal Appeal held that the applicant should not have been declared an habitual criminal and ordered to be detained at the Governor's pleasure, and further that the totality principle had been offended by the cumulative sentences imposed. The sentences of 12 years' imprisonment in respect of the offences of grievous bodily harm were reduced by concession to a cumulative sentence of five years, making the total period of imprisonment 19 years.

For present purposes, the relevance of Clinch lies in remarks made by Malcolm C.J. at pp. 308-309 and statements by Seaman J., with whom Malcolm C.J. expressed his substantial agreement, at pp. 327-329.

In the passage referred to in the judgment of the Chief Justice, his Honour said:

> "The applicant's background as detailed in the report prepared by the Aboriginal Medical Service shows that the applicant's life has been marked by repeated trauma and tragedy with the result that, in the absence of any preventative strategy his life has disintegrated into alienation and violence, following a pattern of discrimination, exclusion and disadvantage which he and his family have suffered for many years. Both the applicant's parents died when they were still very young. They had met while in juvenile detention. The applicant was born when his mother was only 16. During their short lives both his parents spent long periods in prison, as have most of their seven children. The applicant had no proper parenting from his natural

> parents. His grandmother was removed from her own mother and placed in a mission. The family members who were not in custody spent most of their lives in a tent on the Gnowangerup Reserve because Aborigines were not permitted to live in the town. The family eventually moved to Perth because the applicant's health required treatment in the Children's Hospital. The applicant's mother died a violent and terrible death at the hands of her de facto spouse. One of the applicant's sisters was raped when she was 12 years old. Neither the applicant nor his siblings received any counselling or other assistance as a consequence of any of the many traumatic events in their lives. It is apparent that the applicant is in need of intensive treatment and healing as a result of his traumatic past.
>
> Unfortunately, this tragic background is all too common among our Aboriginal people. While it explains some of the reasons why these terrible offences were committed and it provides some degree of mitigation for them, it does not excuse them. What it clearly demonstrates is that the failure to address the social and economic problems of our Aboriginal communities by culturally sensitive programmes aimed at developing self-reliance and self-esteem on the part of such communities, so as to remove the causes of violence and crime, will continue to produce bitter, angry and alienated individuals who pose a serious threat to the safety, lives and property of others. Domestic violence, sexual assault, child abuse, burglary, car theft, other offences and juvenile crime are all symptoms as well as consequences of the continuing failure to address these problems, which are all too often associated with alcohol and drug abuse. There is a compelling need to reduce the potential for crime by investment in appropriate social and economic programmes from which the dividends will be not only a reduction in the incidence of crime and in particular violent crime, but a reduction in the very high costs to the community of the direct and indirect costs of crime. Experience with the implementation of a number of community-based programmes recommended by the former State Government Committee on Young Offenders directed at the reduction of juvenile crime in particular areas has provided convincing evidence of the potential of such programmes. In the meantime offenders such as the applicant must receive sentences proportionate to the offences they have committed and the community needs to be protected from them."

Commencing at p. 327, Seaman J. said:

> "There is material before us which was not before the learned Supreme Court judge, namely a report from the Aboriginal Medical Service Inc

as to the appellant's family background. The court ordered that it should be kept confidential but it shows that the appellant's life has been marked by repeated trauma and tragedy and has disintegrated into alienation and violence following a path of discrimination, exclusion and disadvantage which his family had experienced over a number of years. It points to the need for the appellant to have intense treatment and healing of his traumatic past. I will say no more about it than that it shows that the treatment of the Aboriginal community by the wider community in the past haunts the present and has a connection with the appellant's ruthless and violent behaviour.

This Court considered the mitigatory effects of such matters in *E (A Child)* (1993) 66 A Crim R 14, a case in which an Aboriginal boy was convicted of attempts to murder police officers.

The Chief Justice said (at 17):

> 'The respondent's youth is a major mitigating factor. His background as an Aboriginal brought up in an environment of perceived conflict between the urban Aboriginal community to which he belonged and police, and the deprived oppressive socio-economic conditions in which his family and other members of his ethnic group have suffered, assist in explaining to some degree how his attitudes to the police and the rest of the community have developed. The extent to which allowance should be made by way of mitigation on account of these circumstances, must depend on any particular case to a very significant degree on the nature of the offence and the circumstances under which it is committed.'

Ipp J said (at 31-32):

> 'Similarly, I do not regard the conditions under which the respondent grew up as being, in law, of significant mitigatory effect in regard to the crimes of attempted murder committed by him. A violent and antisocial upbringing, ethnic oppression and socio-economic deprivation may make more explicable that which would otherwise appear to be psychopathic, but they do not, in my opinion, constitute mitigation in this case. The law does not excuse mindless attacks on police officers merely because the latter happen to be representatives of a group of persons charged with the maintenance of the existing social order, which the offender wishes to damage or destroy; or because the offender has a grievance against the police generally. The law also does

not excuse indiscriminate attempts to murder persons simply because the offender has violent and antisocial attitudes inculcated by his upbringing, no matter how difficult that upbringing might have been.'

Franklyn J (at 19-20) was in entire agreement with the reasons of Ipp J:

'Whilst the factors of Aboriginality, ethnic oppression, socio-economic deprivation, family environment and similar matters or any of them may have relevance in a particular case to the appropriate sentence to be imposed on an offender, none of them is self-executing in the sense that its mere existence necessarily requires a reduction of the penalty otherwise appropriate to the offence. Such matters may explain, at least to some extent, motive or a lack of it, identify influences which have contributed to the commission of the offence which may or may not be mitigatory and reveal circumstances which might be relevant to the appropriateness or otherwise of a custodial term and of probation and/or parole eligibility in a particular case. In the present case, for whatever reason, the applicant committed the six offences of attempted murder as a result of an alliance entered into by him with others to prosecute what was referred to as a 'war' upon the police. It may or may not be a correct inference that his Aboriginality, socio-economic status and/or perception of police/Aboriginal relationships led him to that course but significantly, he deliberately entered into that alliance and personally set out to wage the war by killing policemen, engaging in premeditated attacks to achieve that end. It is not suggested that mental impairment contributed in any way to his decision to so act and indeed psychological testing reveals him to be a "relatively bright boy" despite his alcohol and drug abuse. In such circumstances the factors to which I have referred have little if any relevance to the appropriate sentence.

That a custodial sentence will do little to address his offending pattern of behaviour, which itself might be seen as a product of his up-bringing and personal antecedents, also cannot weigh to any extent in favour of a penalty other than imprisonment or to a reduction of what is the appropriate term. To permit it to do so would be to increase the exposure of the public and the police to his self-declared antisocial and homicidal attitudes without firstly taking positive steps towards his

> rehabilitation and monitoring the results of such steps. General deterrence and the protection of the public in such a case must be given priority. All of this must of course be considered in the light of the requirement that he should be sentenced to no greater term than the nature and gravity of the offences, considered with all the relevant circumstances, require.'

> Although the offences with which we are concerned are not quite so extreme as attempted murder of public officials, the District Court offences were committed in circumstances which were callous, chilling and extremely dangerous to life and the Director rightly said that it was only a matter of chance that the victims were not killed.
>
> I see little mitigation from a tragic background for either the stabbings or the sexual assaults on a 15-year-old Aboriginal girl.
>
> What does emerge from the Aboriginal Medical Service report is the pressing necessity of affording the appellant the opportunity to participate in the prison environment in programmes which may modify what in my opinion are his current ruthless and highly dangerous tendencies."

Woodley, Boogna and Charles (and others) (1994) 76 A.Crim.R. 302 involved a number of Aboriginal offenders who had each pleaded guilty to one or more counts of burglary and unrelated serious violent offences generally (but not in all cases) directed against women when the offenders were affected by alcohol. While it is unnecessary to discuss the individual sentences, the Court, Kennedy, Rowland and Franklyn JJ., delivered a joint judgment containing statements of present relevance.

The Court, which was of opinion that the sentencing judge had erred in principle by failing to consider what sentences were appropriate to each offender as an individual, said at pp. 305-308:

> "It is true that there were common features that each respondent

shared. Each was an Aboriginal person and each had in varying degrees a drink problem. Each had a prior criminal record. But each was an individual and the family backgrounds differed. Some were from extremely disadvantaged backgrounds, others not so. We do not quarrel with the sentiment that there are many Aborigines who require special consideration when they appear before the courts. Each, however, needs to be dealt with individually and on the merits applicable to each. On his Honour's approach, those who were least blameworthy were treated exactly the same as those who were most blameworthy. That might be seen as desirable by the most blameworthy, but could create a sense of grievance in the others. It is certainly contrary to sentencing principle.

The principles applicable in connection with the sentencing of Aborigines are the same as those applicable to all members of the community, although the application of those principles to a particular Aboriginal offender will frequently lead to a disposition which is different from that which it would have been in the case of a non-Aboriginal offender. In *Neal* (1982) 149 CLR 305 at 326; 7 A Crim R 129 at 145, Brennan J said:

> '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.'

A similar point had previously been made by Muirhead J in *Iginiwuni* (unreported, Supreme Court, NT, No 6 of 1975, 12 March 1975), at pp 23-25:

> 'Both Aboriginal and white people are generally speaking subject to the same laws. For years, however, the judges of this Court in dealing with Aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters.'

And see also *Rogers and Murray* (1989) 44 A Crim R 301, *Juli* (1990) 50 A Crim R 31, *Leering* (unreported, Court of Criminal Appeal, WA, Library No 8667.4, 21 December 1990) and *Wiggan* (unreported, Court of Criminal Appeal, WA, Library No 8687, 24 January 1991).

...

With respect, his Honour's approach in dealing with the whole group as a class, without attempting to distinguish between any of them, their

> respective roles and backgrounds, discloses error, unless it can be seen that they all fall into the same category - which they do not. ...
>
> There is another matter about which we should make some general remarks before dealing with each respondent. The fact that each is an Aborigine will have a bearing on the ultimate disposition of these appeals. But, as with all other members of the community, the laws of this State will apply. And that includes the application of s l9A of the *Criminal Code* (WA) which gives effect to the common law rule which has developed that imprisonment is a disposition of last resort. In making the relevant assessment in the sentencing exercise, the antecedents of each respondent will be an important consideration. It should, however, be emphasised that the offences of which the present respondents have been convicted are serious offences. They are not merely offences of drunkenness or disorderly behaviour, in respect of which it is now well recognised that courts should avoid imposing sentences of imprisonment.
>
> It is also necessary to consider the goals of the criminal justice system. They include punishing an offender, rehabilitating him or her, deterring him or her from offending again and, hopefully, deterring others from similarly offending and, as well, protecting the public. Within the system, the courts should endeavour, whenever possible, to utilise such facilities as are available within the community to rehabilitate offenders. Within some Aboriginal communities, the community itself has facilities where this rehabilitation can take place. In the present cases, we have seen that community development employment schemes have been established. One or more of these options should be availed of whenever appropriate. In the end, in the context of s 19A, we would again refer, as Rowland J did in *Farmer* (unreported, Court of Criminal Appeal, WA, Library No 940075, 16 February 1994), to the question posed by Owen J in *Skipper* (1992) 64 A Crim R 260 at 267: 'Is it necessary to imprison the offender to achieve the goals for which punishment is prescribed within the criminal justice system?' "

In dealing with the offender Charles, whose offences included unlawfully wounding his de facto wife, two offences of sexually penetrating her without her consent and one offence of doing her grievous bodily harm, the Court said at p. 315 that the four sentences each of imprisonment for three months to be served cumulatively, making

a total of 12 months, did no more than give lip service to the need to demonstrate that conduct of such a nature will not be tolerated and that more than that was required. At p. 316, the Court continued:

> "Even accepting counsel for the respondent's submission that there was no element of sexual gratification or deliberate harm involved in the two instances of sexual penetration and the mitigating circumstances that may apply in the case of some Aboriginal offenders, and accepting that the respondent's wife is prepared to continue cohabiting with the respondent, why should Aboriginal women have to put up with this vicious type of assault which is not tolerated in the wider community? Such an assertion, in our view, does not need authority. The courts should deal with this vicious, arrogant and drunken violence to women in the same way as they would treat it in the rest of the community. All that is said by way of excuse in the pre-sentence report is that the complainant confirmed that her relationship with the respondent will continue.
>
> In an article by John Upton, 'Thc Marginalization of Aboriginal Women under White and "Black" Law' (1992) 18 MULR 867, the author discusses the problem which this case presents. It is not apparent from this article or from the other materials before us what the effect of conduct such as that of the respondent is likely to be on Aboriginal women. The suggestion that the relationship will continue simply serves to conceal the underlying problem.
>
> We agree with the appellant's submission that 'the term of the sentences is error made manifest'. ..."

Later, in dealing with another offender, Samson, who had unlawfully done grievous bodily harm to his de facto spouse, the Court said at p. 318 that an order placing him on probation for 18 months and ordering him to do 240 hours community service demonstrated manifest error and continued:

> "... As counsel for the Crown submitted, the facts disclosed domestic violence of a high degree. His Honour's approach is not in accord with authority and completely overlooks the need to protect Aboriginal women from violence.

> With great respect to the learned sentencing judge, the message that is being sent to Aboriginal women is profoundly wrong. The courts will do their utmost to treat Aboriginal offenders with patience and tolerance; but, in respect of offences of this nature, their primary concern must be to protect the community and, in particular, the women in the community, who should not have to put up with vicious, drunken and abusive behaviour of this nature. The fact that the women in this case made a good recovery cannot be regarded, as it appears to have been in this case, as a circumstance of mitigation."

Another offender, Watson, pleaded guilty to unlawfully assaulting his de facto spouse thereby doing her bodily harm and, on the same date and at the same place, unlawfully wounding her. His sentence of probation for 18 months with 240 hours community service was also increased. At p. 320, the Court said:

> "... The respondent's conduct disclosed domestic violence of a high degree. The judge's approach to this matter was contrary to authority and completely overlooked the need to show the community that it is the role of the courts to protect Aboriginal women from violence of this type. ..."

Another offender, Brown, pleaded guilty to threatening to unlawfully kill his de facto spouse, and at the same date and place, unlawfully wounding her. He had spent the equivalent of 18 weeks in prison for those two offences before he was sentenced and had also been given probation for 18 months and ordered to perform 240 hours of community service. Again, the Court increased the sentence, stating at p. 321:

> "... We would repeat, and incorporate in these reasons, the remarks made in relation to Samson and Watson concerning assaults on Aboriginal women. In all of these cases it seems that alcohol has played a part in the conduct of the complainants, as well as each respondent. It is probable that the offences occurred because each respondent was unable to resist the use of physical violence when angered or frustrated by what each believed was improper conduct by

> his partner. The courts cannot deal with this root problem. If treatment of a realistic nature is available, or if social facilities are available, the courts will use their best endeavours to accommodate these ideals. There is nothing before us, nor was there anything before the learned sentencing judge in this case, to suggest that the 'last chance' is likely to be any more successful than the last series of 'last chances' which one can readily assume have been offered to this respondent. It appears to us that the judge's discretion has miscarried. The respondent should have been sentenced on a basis which reflects the seriousness of these offences when looked at in the context of his record. ..."

In R. v. Smith (WA CCA 145 of 1995, unreported, judgment delivered 14 February 1996), Kennedy A.C.J., with whom Pidgeon and Rowland JJ. agreed, after stating that it is permissible for a sentencing judge to take into account additional hardship which will be imposed upon a person sentenced to imprisonment, stated:

> "In my view, ... whilst fully acknowledging the social, economic and other disadvantages suffered by Aboriginal people, which are regarded as mitigating considerations in relation to Aboriginal offenders, there is a continuing need to take into account the need for specific and general deterrence in respect of serious violent offences ... within Aboriginal communities in this State - see R. v. Woodley (1994) 76 A.Crim.R. 302 at 306, 316 and Wiggan v. The Queen, unreported; CCA S Ct of WA; Library No 8687; 24 January 1991."

The third of the statements made or adopted by Malcolm C.J. in Rogers was derived from a judgment of Campbell C.J. in this Court's predecessor, the Court of Criminal Appeal, in Friday. However, after the passage referred to by Malcolm C.J. in Friday, Campbell C.J. added:

> "... It appears ... that the sentences being imposed by the courts on Aboriginal people for crimes of violence when they have been affected by alcohol are not having any deterrent effect. It may be that the courts will have to consider this matter in the future with a view to seeing whether perhaps heavier sentences than those which have been imposed in the past for these types of offences should be imposed."

G.N. Williams J. agreed, and Connolly J. expressed his substantial agreement, but said at p. 473:

> "Now, it is quite true, as the Chief Justice has said, that a discernibly lower rate of sentence is being imposed by single judges of this Court - that is, by trial and sentencing judges - than would be imposed on persons of European descent. For reasons which are, I think, too obvious to need stating I agree that this is correct but, as the Chief Justice has I think indicated, compassion for offenders of Aboriginal and Torres Strait Island descent must not be taken to the stage at which the court appears to be overlooking the plight of victims who are of Aboriginal and Torres Strait Island descent."

Bulmer & ors. (1987) 25 A.Crim.R. 155 involved an appeal by the Attorney-General in respect of sentences which had been imposed upon four Aborigines, one of whom, Bulmer, was a woman. All the sentences imposed on the male offenders were increased.

Barlow was a 26 year old man who pleaded guilty to inflicting a wound to the skull of his nine year old nephew with a fishing knife. Mitchell was a 34 year old man who pleaded guilty to inflicting three stab wounds on his de facto wife. Graham pleaded guilty to wounding by using an eight inch knife to inflict shallow stab wounds to his de facto wife's hands and shoulders, accompanied by a threat to "rip her guts open with the knife". Connolly J., with whom McPherson J. agreed, said at p. 156:

> "Two of these offences occurred at Yarrabah Aboriginal Reserve. They are instances of an all too familiar type of offence. The criminal courts have constantly to deal with persons of Aboriginal or Torres Strait Island extraction who, when far gone in alcohol, make violent attacks, commonly with knives, on women and children. It is apparent from the learned sentencing judge's reports to the Court of Criminal Appeal that he regarded the fact that the offenders were Aborigines as having

> a significant bearing on the sentence to be imposed. This indeed, to my mind, affords the only real explanation for the level of sentencing which was adopted. The sentences are completely out of line with the sentences which are ordinarily imposed for this type of offence even on Aborigines."

At p. 157, his Honour referred to an earlier unreported decision of Vasta J. in Barney as follows:

> "In *Barney* (unreported: No 300 of 1985) a female Aborigine was convicted of grievous bodily harm on her own confession. The offence involved two stabbings one of which severed the sciatic nerve causing permanent injury. Barney had a previous criminal history although it was not revealed whether offences of violence were involved. An effective sentence of four months coupled with a bond under s 19(7) was set aside by the Court of Criminal Appeal and a sentence of eighteen months was imposed. Vasta J, in delivering the principal judgment, noted that the learned sentencing judge had observed:
>
> > 'It seems that there is a tendency to treat people of Aboriginal extraction more leniently than others in cases such as this. It may be time for reconsideration of that attitude but that is not for me to determine here.'
>
> Vasta J went on:
>
> > 'His Honour quite rightly observed that courts do sentence people of Aboriginal extraction to sentences much lower in the range than might otherwise be the case. However, it seems to me that to treat offences of violence committed by Aborigines upon other Aborigines with less seriousness than would otherwise be the case may, to some, suggest a form of unfair discrimination against this class of potential victims of violent crime who are no less in need of protection and equal justice under the law.' "

Then, after referring to Friday, his Honour continued at p. 158:

> "The cases of these three men require consideration of a further factor. It is apparent that in each case they considered that they had a right to use a knife as a means of disciplining the child in the one case and the women in the other. It is becoming apparent that some such notion may be quite widespread amongst people of Aboriginal and Torres Strait Island descent. This Court has just delivered judgment in *Watson*

> (unreported: No 171 of 1986) a case in which, on a trial for murder, evidence was tendered and rejected of the recognition by a large section of the Palm Island community of what was described as a custom of inflicting cuts on women as a disciplinary measure. The court held that no such custom could be recognised in the application of the *Criminal Code* (Qld). McPherson J also pointed out that such a practice involved an infringement of s 9 of the *Racial Discrimination Act* 1975 (Cth) which makes it unlawful to do 'any act involving a distinction ... based on race ... which has the purpose or effect of ... impairing the recognition ... on an equal footing of the right to security of a person and protection by the State against violence or bodily harm whether inflicted ... by an individual, group or institution'. If this type of crime of violence does indeed reflect the view that it is legitimate to discipline women and children in this fashion then, far from calling for leniency in sentencing, it represents an attitude which the courts must be vigilant to discourage."

The third judge in Bulmer, Derrington J., said of Barlow (at p. 161) that his was "another case where violence of this nature must be deterred in the name of protection of Aboriginal societies", and of Mitchell (also on p. 161) that his was "the type of domestic violence which must be deterred for the ordinary reasonable protection of all members of the community". In both instances, his Honour referred to remarks which he had made in an unreported judgment concerning Gordon John Graham, in which he had referred to "the need for protection of the Aboriginal community against violence of this nature".

Finally, in dealing with the third male, Graham, his Honour said at p. 162:

> "Although proper recognition must be accorded to the mitigating factors in this case, particularly the youth and reasonable work history of the respondent and the effects of his social disadvantages and his intoxication on this occasion, his steady accumulation of a criminal record is disturbing. However, most importantly of all, there must be seen to be strong deterrence of this domestic and social violence in the Aboriginal community, particularly with weapons. With a proper recognition of this man's claims to mitigation of sentence, one must still

> be heavily influenced by the grave need to protect the weaker members of the community, particularly women and children, from excessive violence, a problem which is becoming endemic. Its incidence is becoming serious, and of course it is leading to more serious violence, including murder, as other cases in this sittings indicate."

Both Friday and Bulmer were among the cases referred to by the Court of Criminal Appeal in Yougie (1986) 33 A.Crim.R. 301, in which an appeal was allowed against a two year prison sentence imposed on a 21 year old Aboriginal woman who pleaded guilty to causing grievous bodily harm to her boyfriend when both were drunk. Thomas J., with whom Matthews J. agreed, said at p. 303:

> "The problem of violence in Aboriginal communities is a very real one, and its cure will require more subtle remedies than the criminal law can administer. But that is no reason to deprive these communities of the benefits of law and order. The courts must continue to do what they can to deter this violence, especially when the strong prey upon the weak."

The third member of the Court, Derrington J., also agreed, but added the following comments at p. 304:

> "...Recognition must be accorded to various factors of considerable importance in cases such as this. Of highest importance is the deterrent effect for the protection of potential victims and the turning of the court's face against violence as a general proposition is justifiable. At the same time it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals in this context where poor self image and other demoralising factors have placed heavy stresses on them leading to alcohol abuse and consequential violence. Its endemic presence in these communities, despite heavy prison sentences, is proof of the serious problem and, to some extent, the limited nature of deterrence in this social context. These various factors must all be given due weight. ..."

This Court has not previously been called upon to give detailed attention to the

question whether special considerations apply to the sentencing of Aborigines for violent offences. However, in Bell (C.A. 116 of 1994, unreported, 20 June 1994), the Court[9] said in increasing a sentence imposed in the District Court for unlawful wounding:

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[9] The President, Davies J.A. and Demack J.

> "There are aspects of what his Honour said with which we must record our disagreement. It was right for him to have regard to the respondent's disadvantages and open to him, as a result, to sentence the respondent as leniently as the circumstances of his offence admitted. However, such disadvantages do not justify or excuse violence against women or, to take another example, abuse of children. Women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. A proposition that such offences should not be adequately penalised because of disadvantages experienced by a group of which an offender is a member is not one which is acceptable to the general community or one which we would expect to be accepted by the particular community of which an offender and complainant are members."

In New South Wales, the leading judgment on the topic is that of Wood J. in Fernando (1992) 76 A.Crim.R. 58, which involved a knife wound inflicted by an Aborigine, while intoxicated, on his former de facto partner. Despite acceptance by the prosecution that a non-custodial sentence was an available option, his Honour imposed a term of imprisonment. At pp. 62-64, he said:

> "(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
> (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
> (C) It is proper for the court to recognise that the problems of

alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and 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.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.[10]

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the

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10 See also Everett at 566; Joshua v. Thomson (1994) 119 F.L.R. 296.

competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

Those then are the principles which I propose to bring to bear in this difficult case. Against the subjective severity of the offence involving as it does the use of a knife to inflict substantial wounds by a man with some record for prior violence and who was on a recognisance at the time are to be weighed the following features:

(a) His deprived background and involuntary removal at an early age to an isolated mission property.

(b) His early introduction to alcohol and longstanding abuse of it within communities where regrettably such conduct is not only the norm but positively encouraged by peer group pressure.

(c) The fact that he was exposed to a very significant gaol sentence when a young man for an offence which today in the case of an offender in his position would not have justified such an outcome which was then followed by numerous brushes with the criminal law for conduct which today again would not have attracted such attention.

(d) His favourable record for gainful work and his desire to advance that record by seeking full-time station work.

(e) The fact that he was substantially disinhibited by alcohol at the time of the offence.

(f) The steps that he has already taken towards breaking his alcohol problem and his greater awareness of the need for it.

(g) His obvious remorse and contrition.

(h) The fact that the victim has substantially forgiven him and would prefer that he not go to gaol.

(i) His early plea of guilty which the Crown accepted to a lesser charge but in full satisfaction of the indictment.

(j) The fact that his earlier record almost exclusively, if not entirely, is alcohol-related and displays some significant periods of freedom from criminality.

(k) The fact that he has in the past observed the conditions of recognisances and also has satisfactorily fulfilled the requirements of community service orders.

(l) The indications that he may possibly have some organic brain damage due either to the effects of alcohol or fighting or possibly both which are likely to have affected his behavioural controls particularly when affected by alcohol."

The principles stated in Fernando have since been endorsed by the New South Wales Court of Criminal Appeal; see, for example, Stone (1995) 84 A.Crim.R. 218.

In Russel (1995) 84 A.Crim.R. 386, Kirby A.C.J.,[11] after stating that the "circumstances for considering aboriginality as a legitimate concern in sentencing" had been explained in Fernando, later said at p. 392:

> "I do not propose to dwell to any significant extent, on this aspect. Little attention was given to issues of aboriginality by Counsel for the applicant. It is important not to romanticise or generalise the issues and problems faced by someone of that ethnicity. Aboriginal Australians, like any other group within the Australian community, are not homogenous. Every person is a product of different circumstances. Although there are certain matters of more pressing concern to one group over another, it is dangerous to suggest that these problems extend to all members of that community. See eg C Charles, 'Sentencing Aboriginal People in South Australia' (1991) 13 Adel LR 90. As no evidence was led to suggest that the aboriginality of the applicant had any significant impact on his actions, Shillington DCJ was right not to be more specific other than to mention this consideration briefly and to take it into account in a general way.

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[11] The other members of the Court were Allen and Dowd JJ.

> There are two further matters however, which I do believe should be mentioned. The first is the general concern of the community, shared by the judiciary, that there are extremely high proportions of Aboriginals in prison. Present sentencing law does little to alleviate this problem or indeed to lessen the rate of offending. Available statistics illustrate the significant disparities between custodial sentences involving Aboriginal and non-Aboriginal offenders in Australia. For example, in New South Wales the number of Aboriginal offenders in full time custody rose from 369 to 664 between 1987 and 1991. That is, there was an eighty per cent increase in the number of Aboriginal prisoners. This compares with a fifty four per cent increase in the number of non-Aboriginal prisoners. See C. Cunneen 'Aboriginal Imprisonment During and Since the Royal Commission into Aboriginal Deaths in Custody' (1992) 2 Aboriginal Law Bulletin No 55 13,14. I mention these statistics and reports to draw attention to the fact that courts must be aware of the fact that growing numbers of Aboriginals are being charged with offences leading to custodial sentences. Statistics suggest that the increase in incarceration is not necessarily a result of an increase in the number of offences. As a

> consequence, Aboriginals are disproportionately represented in prisons in direct contradiction to recommendations of the Royal Commission into Aboriginal Deaths in Custody. In its Final Report, Vol 3 (1991), at 95, that Commission detailed what it suggested was the under utilisation of non-custodial sentences in New South Wales as an alternative punishment for convicted Aboriginal offenders. See Cunneen (above), at 14. Although, quite clearly, a custodial sentence was appropriate and necessary in the present case, the usefulness of long custodial sentences for Aboriginal offenders must increasingly be called into question in light of the Royal Commission and the other reports, produced in recent years. Judges with the responsibility of sentencing must be generally familiar with these considerations. ..."

His Honour then mentioned research which "suggests that hearing loss amongst Australian Aboriginals is endemic", and noted that the "conclusion is open that this disability, with its attendant frustrations and handicaps, could increase the likelihood of contact between an Australian Aboriginal and ... the criminal justice system", and that "[i]f a custodial sentence is passed, the hearing deficiency with its associated problems will also tend to make the offender's period in prison more difficult and harsh".

Later, the judgment went on to state:

(1) "... the element of punishment must not be overlooked ...";

(2) "Nor must it be forgotten that the applicant inflicted hardship and indignities on the people he assaulted";

(3) Those considerations "must not overshadow the need for ultimate rehabilitation";

(4) The protection of the community is of importance and perhaps the paramount consideration, at least in cases of sexual assault. While "the interests of the

community cannot result in a harsher sentence than would have been determined without considering the special circumstances of the offender", the importance of protecting the community might outweigh "any concern for leniency and humanity which might be shown the offender";

(5) A "sentence must reflect the appropriate punishment with regard to the objective criminality involved in accordance with the general moral sense of the community ... balanced by reference to the personal circumstances of the offender ...;" and

(6) (a) "Sexual assault is unacceptable behaviour in any society. The courts have a role to play in deterring future offences by sentencing such offenders appropriately. ... Furthermore, the courts have a function to protect the community from such offenders by imposing custodial sentences long enough to ensure that the seriousness of the offence is made apparent to the offender".

(b) In dealing with the same type of offence earlier in the context of the use of sentencing as a deterrent, his Honour had said:

> "... It is important not to fall into the trap of excusing inexcusable behaviour. Sexual assault is a very grave and serious affront to human dignity and personal space. It is unacceptable behaviour. It is essential that the courts reflect community sentiment, in a general way, by the sentences which are imposed for offences of this kind. Mental incapacity might diminish responsibility in certain situations, ... But a court must be wary of elevating an accused person's diminished mental capacity into an excuse or exculpation in the case of sexual assault. The interdiction of sexual assault in any society is not an intellectual notion. It touches the fundamental issue of respect for individual human dignity and integrity. ..."

Consideration has also been given to issues surrounding the sentencing of Aborigines in South Australia and the Northern Territory.

In Houghagen v Charra (1988) 50 S.A.S.R. 419, Bollen J. said at p. 422:

> "In one sense, penalties should be imposed on people for what they have done, and for what is relevant to their personal circumstances, irrespective of race, colour or creed. But that would not be practical nor just. One cannot, in my opinion, as a general rule, impose the same penalties, at least for some offences, on tribal Aborigines living at Yalata with no advantages in their life or background as one would impose on a person living a comfortable life in the suburbs."

In Leech v Sansbury (unreported, Supreme Court of S.A., 748 of 1990, 29 May 1990), Mullighan J. said:

> "Obviously the courts cannot have different sentencing principles or different tariffs for each racial group in the community, but that is not to say that the special problems encountered by an offender due to his racial background must be disregarded. The racial background of one person may be of relevance in the sentencing process but not with respect to another, or others although in the same group."

Again, in R v Goldsmith (1995) 65 S.A.S.R. 373, a decision of the Full Court of the South Australian Supreme Court, Mullighan J said at p. 375:

> "... Clearly, a sentence of imprisonment was justified, but in fixing the sentence the learned sentencing judge not only had to have regard to the seriousness of the crime, but also to all of the matters of background and the personal circumstances of the appellant and, in my view, how it might be expected that prison would affect him should he be obliged to serve the sentence. That is a view which is expressed in *Hanson v The Queen* (unreported, Court of Criminal Appeal, 22 February 1995).
>
> General deterrence must play a significant part in a sentence for the crime of arson, as well as personal deterrence. However, other circumstances may also play a significant role in the determination of a

just sentence."

In Davey (1980) 2 A.Crim.R. 254, Muirhead J. was the only member of the Full Court of the Federal Court who delivered a detailed judgment. At pp. 258-259, he said:

> "... The devastating effects of liquor, especially upon Aboriginal society, are daily demonstrated in our courts. I am afraid in this area sentencing policies are unlikely to prove an effective deterrent. A man crazed with alcohol seldom takes stock. The concept that imprisonment must be regarded as an effective deterrent is now enshrined in our law despite the fact that modern research throws some doubts upon its validity. It is perhaps accurate to say that it is because of awareness of the difficulties of the Aboriginal and with knowledge that the source of practically all Aboriginal crime is alcohol, that lenient penalties are frequently imposed. The courts in pursuing such policies must be careful to ensure that they do not thereby deprive Aboriginals of the protection which it is assumed punishment provides. It would be serious if the belief grew up in Aboriginal society that killings by drunken persons were treated by the law as occurrences of little consequence. ..."

Minor[12] (1992) 59 A.Crim.R. 227, a decision of the Northern Territory Court of Criminal Appeal, involved the sentencing of a man described as a 24 year old full blood tribal Aborigine who had pleaded guilty to two counts of manslaughter, one count of unlawfully causing grievous bodily harm, and one of aggravated assault. All of the offences were committed in the course of a brawl between two family groups at an Aboriginal camp. The sentencing judge, who imposed a term of imprisonment but ordered that the offender be released on a good behaviour bond, took into account that the offender would receive, and had consented to, "payback" in the form of spearing in the thigh.

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[12] See also Robertson v. Flood (1992) 111 F.L.R. 177; R. v. Miyatatawuy (N.T. 19 of 1995, unreported, 24/10/1996).

On appeal, Asche C.J. said at p. 228-229:

> "The facts which resulted in the imposition of these sentences from which the Crown now appeals, and the circumstances in which the learned trial judge took into account the fact that payback would be inflicted, are set out in the judgment of Mildren J and I adopt them. I also adopt his Honour's comprehensive and, if I may say so with respect, illuminating analysis, of the way in which Australian courts have dealt with these situations.
>
> In this case the learned trial judge (himself a judge of great experience in these matters) recognised that he was taking what he himself described as an 'unusual' course. He was influenced by the consideration that, in this case, the infliction of payback would be of benefit to a community which possessed a philosophy that, once inflicted, payback wiped out all feuds arising from the respondent's actions. Hence his Honour's remark that the community 'may put the whole episode behind them and get on with the more positive aspects of their lives'. His Honour was careful to say that the circumstances were such that the court did not condone payback but recognised it as inevitable.
>
> It is important a1so to note that his Honour had here the advantage of hearing expert and convincing evidence from a person fully conversant with the language and customs of the community concerned. Statements sometimes emanate from the bar table to the effect that 'there will be payback'. Such statements are of little assistance if they are not accompanied by the sort of evidence which was before the learned trial judge. Payback is not vendetta. There must be clear evidence of the difference. As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process; vendetta never. It would be a serious and impermissible abrogation of the court's duty to reduce a sentence on any person of whatever race or creed because of assurances that friends or relatives of the victim were preparing their own vengeance for the assailant. If payback is no more than this it is nothing to the sentencing process. If, however, it transcends vengeance and can be shown to be of positive benefit to the peace and welfare of a particular community it may be taken into account; though even then I do not believe the court could countenance any really serious bodily harm. But, as Mildren J has pointed out, the action contemplated may not in fact come within the prohibitions of the criminal law. In some cases the payback is purely symbolic. In one such case before me, payback

> consisted of merely touching the assailant on the thigh with a blunt nosed spear, the families concerned having previously come to certain financial arrangements. The formal ceremony, however, was an important and necessary part in the reconciliation of the families; because only through that ceremony could certain relatives be relieved of what, to them, was otherwise a solemn and sacred obligation to avenge the wrong inflicted on the victim.
>
> The concept of payback however must not be seen as something to be automatically or even generally considered to apply to all Aboriginal people. This Court particularly must recognise, and I believe does recognise, that, as with many other groups in the Australian community, there are, amongst Aboriginals, sophisticated and unsophisticated members, there are some who follow certain customs and some who do not. The tendency to make sweeping statements encompassing the behaviour of all Aboriginal citizens is unreal, patronising and insulting to these citizens. The court is not helped by this sort of approach. But it can be assisted by positive evidence that a particular group of Aboriginals follow particular customs in particular circumstances. The learned sentencing judge had the advantage of that sort of evidence which enabled him to draw up a sentencing regime having regard to that evidence.
>
> I cannot, therefore, find any error in principle in the way in which the learned trial judge dealt with the question of payback. ..."

Martin J. said at p. 230:

> "The facts surrounding the conviction and sentencing of the respondent, the sentence themselves and the grounds of appeal brought by the Director of Public Prosecutions sufficiently appear from the reasons for decision of his Honour Mildren J.
>
> I agree with all his Honour has had to say as to the reasons why punishment by way of payback is a relevant sentencing consideration, but I would reserve for further consideration, in the light of the facts of a particular case, whether such an activity is unlawful."

Mildren J. said at pp. 236-241:

> "It is clear from these remarks that his Honour attempted to give special recognition to the payback punishment but, at the same time, the purpose of the fixed release date was to ensure the respondent's

release at a time which was not inappropriate having regard to all the circumstances and as soon as possible so that the payback which his Honour regarded as inevitable might be given effect to at the earliest possible time.

His Honour had the benefit of hearing evidence from a Mr Gerhardt Stoll, a field officer with the Finke River Mission of the Lutheran Church, and a resident of Hermannsburg for 26 years, who was familiar with the Western Arunta language, the culture and tribal customs of the people, and who personally knew the key players involved. He explained that when a person dies, the people believe that death is always the fault of some person; not only the person who may have directly caused the death, but also that person's relatives; and that payback punishment is a form of freeing the family concerned from their guilt. The fact that the respondent was imprisoned and therefore could not undergo payback would not be counted against him, and indeed a period of imprisonment was both expected and desirable because it gave the parties time to negotiate the terms of payback and calm down the 'hotheads'. In this case, payback punishment had already been inflicted on members of the respondent's family. The important thing about payback was that it constituted an admission of responsibility for the death. Although his Honour did not refer to Mr Stoll's evidence in detail, it is clear that he took it into account.

The Director of Public Prosecutions did not suggest that his Honour erred in taking the possibility of future payback punishment into account. There is ample authority for that proposition. Indeed the Northern Territory has had a long history of taking into account tribal law when sentencing a tribal Aboriginal. ... in *Anderson* [1954] NTJ 240 at 248, Kriewaldt J said, after referring to s 6A [Criminal Law Consolidation Act, NT]:

> 'In every case where I have been under a duty to pass sentence on a native, *irrespective of the charge*, I have heard such evidence as has been available throwing light on the background and upbringing of the native. Where tribal law or custom might possibly be relevant I have in every case endeavoured to inform my mind on these topics either by hearing evidence in court or perusing any material available to me which seemed to bear on the point.' [Emphasis added.]

As to payback punishment specifically, in *Jadurin* (1982) 7 A Crim R 182, the Full Court of the Federal Court of Australia, on appeal from this Court, dealt with a situation where a full blood tribal Aboriginal

had undergone, and was still to undergo, tribal punishment. The appellant sought to have his sentence reduced to avoid being punished twice for what he did. Although the appellant failed, the court nevertheless recognised that the sentencing court was obliged to take into account the implications for a convicted Aboriginal with his own society. As the court (St John, Toohey and Fisher JJ) observed (at 187):

> 'In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account.'

See also *Atkinson v. Walkely* (1984) 27 NTR 34 at 37; *The Recognition of Aboriginal Customary Laws* (1986) 31 ALRC Vol 1, par 507.

The reason why payback punishment, either past or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to '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' (per Brennan J in *Neal* (1982) 149 CLR 305 at 326; 7 A Crim R 129 at 145). The Australian Law Reform Commission pointed out that another reason for this attitude 'derives from an important principle of the common law, that a person should not be punished twice for the same offence', noting that 'in practice it appears that some balancing of punishments is done within both systems': ALRC Report, par 508. ...

See also *Juli* (1990) 50 A Crim R 31 at 37, where Malcolm CJ quoted with approval a passage from a decision of Muirhead J in *Iginiwuni* (unreported, Court of Criminal Appeal, NT, No 6 of 1975 12 March 1975):

> 'Both Aboriginal and white people are generally speaking subject to the same laws. For years, however, the judges

> of this Court in dealing with Aborigines have endeavoured to make allowance for ethnic, environmental and cultural matters ...'

See also Kriewaldt J in *Namatjira v Raabe* [1958] NTJ 608at 629-631. Indeed, for these reasons and as Aboriginals do not have the same concept of time as do white people, Kriewaldt J adopted the practice of imposing on Aboriginals substantially more lenient sentences than he would have imposed on white persons: see *Anderson* at 248; *Aboriginal Roy Pannaka* [1959] NTJ 453 at 454; although the nearer an Aboriginal's 'mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime' (*Anderson* at 249). There appears to be a similar practice in Queensland: *Friday* (1984) 14 A Crim R 471.

I have considered it necessary to refer to these authorities in some detail because in my opinion they demonstrate that the sentencing judge did not in this case sanction unlawful violence by the way he structured his sentence. In the first place, all his Honour was doing and all his Honour intended to do was to give effect to the principles which I have outlined above. In the second place, there was no evidence upon which his Honour could have concluded that the form of punishment proposed was unlawful. An assault is not unlawful if authorised by the 'victim' unless the person committing the assault intends to kill or to cause grievous harm: *Criminal Code* (NT), s 26(3). 'Grievous harm' is defined to mean 'any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health': Code, s 1. There was simply no evidence that the person administering payback punishment on behalf of the Aboriginal community would intend to inflict such an injury; on the contrary, the understanding I have had as a Territorian of some 20 years is that no permanent injury to health is intended when tribal spearings occur. I note that this was in accordance with the evidence given by the Superintendent at Hermannsburg in *Gorey* (unreported, Gallop J, 20 June 1978), quoted by the ALRC Report, par 508: 'He might be speared, but never seriously and once that has been accomplished, then no-one can bring the matter up again.' ... In my opinion, no matter which of these views is preferred, there was no evidence that the injury caused by the proposed spearing must or even was likely to cause grievous bodily harm. There was no evidence as to the type of spear likely to be used (the spear might have been a single sharpened steel point, easily retrieved) and there was no medical evidence to show what permanent effect an injury likely to be caused by such an instrument might have. Thirdly, even if the spearing was

unlawful, in my opinion the principles to which I have referred nevertheless required the court to take it into account: see, for example, *Mamarika* (1982) 5 A Crim R 354, where the Federal Court of Australia took into account punishment to an Aboriginal accused which was the result of anger rather than customary law. It is apparent from the facts of that case that the accused did not consent to his punishment and the injuries inflicted upon him were quite serious although he recovered without any residual disability. However that may be, I wish to make it clear that it is one thing for a court to take into account the likelihood of future retribution to be visited upon the accused, whether lawful or unlawful,; it is yet another for a court to actually facilitate the imposition of an unlawful punishment. The reason why courts usually say that they do not condone 'payback' is because it is a form of corporal punishment carried out by persons not employed by the State to impose punishment; not because the imposition of the punishment is necessarily unlawful. But I have no doubt that it would be quite wrong for a sentencing judge to so structure his sentence as to actually facilitate an unlawful act. Indeed it is interesting to observe that Wells J in *Williams* (1976) 14 SASR 1 (referred to by the ALRC Report, par 492) imposed as a condition of a bond that the accused shall be, for a period of a year, 'ruled and governed by the Tribal Elders and shall in all things obey their *lawful* orders and directions (emphasis added). To the extent that the contrary may be implied by the remarks of Forster CJ in *Jungarai* (1982) 5 A Crim R 319, I would respectfully disagree. However, for the reasons given above, I am not satisfied that this was the case here.

I turn now to consider the submission that the sentencing court fixed the release date by reference to an irrelevant and extraneous circumstance. In my opinion, a sentencing judge is entitled to have regard not only to the interests of the wider community but also to the special interests of the community of which the respondent is a member. Indeed, this frequently occurs. It is often said that one of the main purposes of the sentencing process is the protection of the community. In *Channon* (1978) 33 FLR 433 at 437-438, Brennan J spoke of the necessary and ultimate justification for criminal sanctions as 'the protection of society from conduct which the law proscribes'. This means not only the wider community, but those members of it most likely to be affected. There are numerous occasions when the court has had regard to the wishes of the particular Aboriginal community of which a prisoner is a member in order to consider the need to protect that community: see, for example, *Mamarika* and the cases referred to by the ALRC Report, par 570. And so long as the wishes of the community do not prevail over what might otherwise be a proper sentence, it is my opinion that no criticism can be directed to a sentence

> which gives appropriate weight to those needs. In the present case, the finding of the sentencing judge was that the community needed, as much as the respondent, to finalise this matter in the tribal way, and the evidence before him suggested that without this there was a very real fear of excessive, possibly drunken, violence with the real prospect of someone else being severely injured or perhaps killed. In those circumstances the sentencing judge was called upon to exercise a degree of ingenuity to give proper effect to all of the competing interests and factors which were necessary for him to take into account. This was no occasion for blindly following an unthinking conservative path; it required, as this Court often has in the past been called upon to do when dealing with the approach to Aboriginals and the criminal law, to find a solution by means which ensured that justice was done, even if the means adopted were unusual or novel. I reject, therefore, the submission that the release date was fixed by reference to an extraneous circumstance, or for that matter, that undue emphasis was given to the interests of the Hermannsburg community."

In Robertson v. Flood, Mildren J. said at p. 187:

> "... one must have regard to the general policy of leniency towards those Aboriginal offenders who are disadvantaged socially, economically and in other ways because of their membership of a deprived section of the community..."

At pp. 188-189,[13] he added:

> "As I observed in *R v Minor* [supra], (at 193-194), it is appropriate for the court to take into account the special interests of the community of which the offender is a member, and to take into account the wishes of that community so long as they do not prevail over what might otherwise be a proper sentence. By this I meant that a court would not be justified in imposing a sentence more harsh than is otherwise appropriate, merely because that is the wish of the community."

The only modern consideration of the sentencing of Aborigines by the High Court appears to be Neal, in which reference was made by Murphy and Brennan JJ. to the unreported sentencing remarks of Dunn J. in Peter (18 September 1981). Peter, who

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[13] See also Joshua v. Thomson at pp. 306-307; Mununggurr v. R. (1994) 4 N.T.L.R. 63.

had stabbed his de facto wife when he was very drunk, pleaded guilty to manslaughter. Dunn J., after referring to evidence which "showed in detail the correctness of a belief held by myself and other Judges ... that the incidents of violent crime amongst Aboriginal communities in North Queensland is very high" and that "whilst alcohol is usually the trigger which releases violence, there are other factors to take into account", stated that it was "because of those factors that so much uncontrolled drinking takes place", and that the other members of the Court and he "have perceived and made allowance for the fact that special problems exist in Aboriginal communities".

Neal involved a very different type of offence, namely unlawful assault by spitting at the white manager of the local store on the Yarrabah Aboriginal Community Reserve. Mr Neal, who was chairman of the Yarrabah Council, an office to which he was elected by fellow Aboriginal members of the community, spat at Mr Collins in the heat of an angry altercation. A magistrate sentenced him to imprisonment for two months, which the Court of Criminal Appeal increased to six months. The High Court allowed an appeal and set aside the order of the Court of Criminal Appeal. However, Gibbs C.J. and Wilson J. declined to interfere with the magistrate's sentence. Murphy J. would have set it aside and imposed a fine equivalent to Mr Neal's wages for one week. Brennan J. would have remitted the matter to the Court of Criminal Appeal for reconsideration.

At p. 309, Gibbs C.J. noted a submission for Mr Neal that "the Court in imposing

sentence in the present case should have taken into account the special problems experienced by Aboriginals living in reserves", but neither he nor Wilson J. discussed the point further.

Murphy J. said at p. 315:

> "*Reserve Conditions and Race Relations*. In Australian conditions these present a special mitigating factor. (See *Reg. v. Peter [(Supreme Court of Queensland; Unreported; 18 September 1981)]*; also Wilson, *Black Death White Hands* (1982); Daunton-Fear and Freiberg, '"Gum Tree Justice": Aborigines and the Courts' in *The Australian Criminal Justice System*, Chappell and Wilson, ed. (1977), pp. 45-99; Misner, 'Administration of Criminal Justice on Aboriginal Settlements' Sydney Law Review vol. 7 (1974), p. 275.) ..."

Then at pp. 317-319, he stated:

> "These remarks disclosed, if it were not already apparent, that this was a race relations case, intimately related to the politics of Aboriginal communities and the system under which Aboriginals live in the communities. ...
>
> ...
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> Aboriginal sense of grievance has developed over the two hundred years of white settlement in Australia. Early in the nineteenth century Aborigines were 'being treated with arrogant superiority, often accompanied by considerable brutality' (Teasdale and Whitelaw, *The Early Childhood Education of Aboriginal Australians* (1981)). The plight of the Aborigines was compounded by the introduction of European diseases and alcohol which, in addition to white colonisation, 'contributed to the fragmentation of Aboriginal society and helped to promote the apathetic attitudes erroneously attributed by the Europeans to inferior intellectual capacity' (M. King-Boyes, *Patterns of Aboriginal Culture: Then and Now* (1977)). Aborigines have complained bitterly about white paternalism robbing them of their dignity and right to direct their own lives. ...
> That Aborigines have a right to participate in and direct their own policies has been reiterated by Aboriginal representatives speaking for themselves and for their people. (See S. S. Dunn and C. M. Tatz, *Aborigines and Education* (1969).) The United States' experience has

shown that persons frustrated by powerlessness through the exercise of racist policies and practices, and the expression of racist ideals, feel their grievances deeply and sometimes express them in the only way possible - by protest or violence (see *Report of the National Advisory Commission on Civil Disorders*, 1968). The complaints enumerated in that report are well replicated in Australian society in every State of the Commonwealth. (See for example Commissioner for Community Relations, *Annual Reports* 1-6, 1976-1981.)

The Director of the Australian Institute of Criminology has said:

> 'At the cutting edge of the contact between black and white communities in this country is the law and particularly the manner of its enforcement. Its gross injustice to the Aboriginal, in its present form . . . (is an issue) .. . paraded by scholars, agencies and departments again and again . . . Whether the criminal justice system is a discriminating instrument of power or a social scapegoat for problems which society cannot solve, we might regard it as a useful barometer of the state of balance between law and order on the one hand and human rights on the other . . .'. (W. Clifford, 'An Approach to Aboriginal Criminology', *A.N.Z. Journal of Criminology* vol. 15, (1982) 3, at pp. 4-6.)

Although Aborigines comprise only 1 per cent of the total population they make up nearly 30 per cent of the prison population, and at times exceed that level. Comparing the disproportionate numbers of arrests of Indians in Canada, Maoris and Islanders in New Zealand, and Malays in Sri Lanka, Australia's rate according to the 1976 Census of 726.5 Aborigines in prison per 100,000 (there are about 140,000 Aborigines in this country) can reasonably be speculated to be 'the highest rate of imprisonment in the world. (See Clifford, pp. 7-8.) Elizabeth Eggleston in her pioneering work on Aborigines and the criminal justice system concluded that there is 'discrimination against Aborigines in sentencing and this discrimination chiefly occurs in the choice of imprisonment as a suitable sentence in a higher proportion of Aboriginal cases, instead of the imposition of a lighter penalty'. (Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (1976), p. 176.) ...

Spitting is humiliating and degrading. It is a typical response of children and others without power, attempting to humiliate and degrade those who are seen as oppressors. (See Seligman, *Helplessness - On Depression, Development and Death* (1975).) The sentence of imprisonment imposed upon Mr. Neal will not improve race relations

but will tend to embitter them. Taking into account the racial relations aspect of this case, the fact that Mr. Neal was placed in a position of inferiority to the whites managing the Reserve should have been a special mitigating factor in determining sentence."

Brennan J. said at pp. 324-325:

"Consideration of emotional stress is commonplace in the exercise of a sentencing discretion: see, for example, the observations of Jacobs J. in *Veen v. The Queen [(1979) 143 C.L.R., at p 490]*. A particular example of emotional stress arising from problems existing in Aboriginal communities in North Queensland was furnished to us in the transcript of remarks made by Dunn J. in the Supreme Court of Queensland *[(18 September 1981; Unreported)]* in passing sentence upon Alwyn William Peter who had been convicted of manslaughter of a woman on another Aboriginal Reserve in North Queensland. His Honour said:

> 'The inclination of my brother Judges and myself to recommend such offenders as you for consideration for parole results I think from the fact that without the assistance of expert evidence we have perceived and made allowance for the fact that special problems exist in Aboriginal communities.'

The facts of the present case likewise point to some 'special problems' which may explain - though they cannot justify or excuse - Mr. Neal's conduct. The assault was not caused by any ill-feeling between Messrs. Collins and Neal personally. Yet a dramatic and emotional confrontation on Mr. Collins' steps had occurred, apparently produced by a deeply-felt objection to departmental control of the reserve. The fact that the incident was to be accounted for by the problems (whatever they are) of life on the reserve was a material factor for consideration. ..."

At p. 326, his Honour added:

"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."

It is plainly not possible to reconcile all the judicial statements taken from the cases referred to. That is not surprising. Although the public, politicians and the media generally seem unaware of the complexity of sentencing, it involves principles and considerations which are potentially contradictory, as is not only recognised by the courts[14] but established by legislative statements of Parliamentary intention.[15] The public has competing interests, which are visible in the conflicting interests of victim and offender. Shortly put, some factors favour severity and some favour leniency of punishment; thus, for example, deterrence of crime, both general and personal to a particular offender, which is necessary for the protection of the community, punishment for the wrong done to the victim of an offence and society, and vindication of the rights of the victim indicate the need for a sufficient penalty,[16] while leniency can be attracted by favourable considerations which are personal to the offender and the prospect of his or her rehabilitation.[17] Nonetheless, these factors which are inherent in the sentencing process cannot fully explain the divergent views expressed in the authorities concerning the sentencing of members of Aboriginal communities.

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14 See, for example, Hoare v. R. (1989) 167 C.L.R. 348; R. v. Shrestha (1991) 173 C.L.R. 48, 60-61, 68.

15 See, for example, the Penalties and Sentences Act 1992, ss. 3, 9 and 11; the Juvenile Justice Act 1992, ss. 3, 4, 109 and 165; and ss. 7, 13, 14 and 18 of the Criminal Offence Victims Act 1995.

16 A sentence should be no more severe than is necessary: Penalties & Sentences Act, sub-ss. 9(2)(a) and (3)(b).

17 Shrestha at pp. 63, 69, 76.

It is apparent from the decisions referred to that the submission made for the applicant in this case involves issues of considerable complexity and difficulty and of great sensitivity. Any approach adopted could conceivably be criticised as racist. Sympathy for the plight of Aboriginal people can be portrayed as paternalistic and patronising, and the notion that Aboriginal offenders should be sentenced more leniently for violent offences is capable of conveying an implication of moral inferiority. On the other hand, there is compelling evidence of the disproportionately high representation of Aborigines in the criminal justice system, the severity of its impact upon those who are incarcerated and the disastrous consequences which all too frequently ensue. The criminal law is a hopelessly blunt instrument of social policy, and its implementation by the courts is a totally inadequate substitute for improved education, health, housing and employment for Aboriginal communities. Irrespective of race, the criminal justice system increasingly merely punishes those who are the product of deficient or failed social policies. It is at least implicitly accepted in many of the passages quoted above that there are often two victims involved in offences committed by Aborigines, especially drunken Aborigines, one the victim of the offence and the other the offender, whose race has been tragically affected by the colonisation of this country, harsh treatment, dispossession, the separation of children from families, the introduction of European diseases, and the misuse of alcohol and, more recently, other drugs. A refusal to reduce the sentence which would otherwise be appropriate in all the circumstances, including considerations personal to the offender, can appear to be an obdurate denial of the harm experienced by the Aboriginal race since British settlement.

Nonetheless, in the context of the current criminal justice system, I cannot accept that, in principle, Aborigines who inflict violent crimes on their communities while intoxicated should be accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to the circumstances of the offence and other relevant factors, including considerations personal to the offender. The Penalties & Sentences Act[18] is inconsistent with the approach for which the applicant argued, as is the Racial Discrimination Act 1975 (Cth) and the fundamental principle that, in accordance with the rule of law, all are equal before the law.[19] There is no basis, on this occasion, for considering whether, in some circumstances, it might be permissible and appropriate to take into account punishment which an offender will receive from his or her own community or even customary law.[20]

Matters of principle aside, in my opinion it would do Aboriginal people a grave disservice to accede to the applicant's submissions. For obvious reasons, no attempt has been made to collect all the potentially material cases. With some important exceptions, the discussion has for the most part been confined to decisions of appellate courts or appellate decisions approving statements at first instance. All except Neal have involved violence against other Aborigines, frequently women and

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18 cf. sub-s. 3(e) of the Juvenile Justice Act.

19 R. v. Binder (1990) V.R. 563, 569-570; Shrestha at p. 71

20 But see Walker v. New South Wales (1994) 182 C.L.R. 45.

sometimes children. It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions and, as was stated in Bell, Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. To revert to the matters discussed in the previous paragraph, they are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.

Some matters arising out of the above discussion merit emphasis.

(i) If as is immanent in the applicant's submissions, and has sometimes been assumed by courts in sentencing Aborigines, some Aboriginal communities have an unusually high incidence of serious crimes of violence, including sexual assaults, courts are powerless to alleviate dysfunction or deprivation in those communities. They can only attempt to protect the communities, especially the potential victims of violence, who are often women or children.

(ii) While courts cannot entirely yield to the pessimistic belief that adequate punishment frequently does not act as a deterrent to violent offences, it is unrealistic to think that imprisonment is a wholly satisfactory response to behaviour based on anger, resentment, powerlessness and frustration related to deprivation and oppression, whatever the race of the offender. In Clinch, Malcolm C.J. referred to the need for "culturally sensitive programmes aimed at developing self-reliance and self-esteem on the part of [Aboriginal] communities", and pointed out that appropriate social and economic programmes will not only reduce the incidence of

crime, and in particular violent crime, but also "the very high costs to the community of the direct and indirect costs of crime". In the same case, Seaman J. referred to how "the treatment of the Aboriginal community by the wider community in the past haunts the present", to which it might be added that the continuing failure to respond generously to the contemporary Aboriginal struggle for justice continues to contribute to the poor quality of life of many Aborigines and the involvement of far too many Aborigines in substance abuse and violent offences.

(iii) Although offences must often lead to imprisonment, incarceration statistics at least raise a significant possibility that Aboriginal offenders are sometimes given custodial sentences when community based orders would provide sufficient punishment and better prospects of rehabilitation. A sentence of imprisonment should only be imposed as a last resort, and a sentence that allows an offender to stay in the community is preferable.[21] Further, it is plainly desirable to extend and properly resource facilities which will provide courts with alternatives to imprisonment. As the judgment of the Court in Woodley, Boogna and Charles stated: "If treatment of a realistic nature is available, or if social facilities are available, the courts will use their best endeavours to accommodate these ideals".

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[21] Penalties & Sentences Act, sub-s. 9(2)(a).

(iv) While attitudes of a victim and an offender's community which support leniency are material, care must be taken, especially when the offence involves violence against a woman or child, that there has been no persuasion exerted on the victim and that the community attitude is more than the view of the influential

members of the community. It should also be recognised that persuasion might be subtle and indirect; concern at ostracism or disapproval by other members of a community, and even a sense of guilt at criminalising or causing the incarceration of a community member.

(v) Finally, it is desirable to confirm the importance of considerations personal to the offender in the sentencing process. While the principle is of general application, it might have special significance in relation to Aborigines, or some Aboriginal or other groups; youthful offenders provide an obvious, racially neutral example of such a group. As was recognised in Fernando, an Aborigine from a community which is isolated from, and has little experience of, the general community, and perhaps different understandings of even fundamental concepts such as time, may be punished much more severely than would otherwise be the case by incarceration away from his or her community in a prison environment which is insensitive to his or her society, culture and thinking. If it is established that imprisonment will be especially harsh on an offender, for example, an Aborigine from such a community, a sentencing judge or magistrate should take that into account.

This consideration was referred to by the trial judge in sentencing the applicant, but was not obviously taken into account in the sentences. Although the level of violence used by the applicant was comparatively low, even a consensual sexual relationship with the complainant would have been a breach of the custom of their community, and a reduction in the head sentence is not justified, especially having regard to his criminal history. However, the course adopted by Burt C.J. in Charlie,

Uhl and Nagamarra has much to commend it. As his Honour said:

> "... the best that the criminal [justice system] can do is to structure a sentence which will have within it an element of punishment but will at the same time provide the best chances for your rehabilitation. The only way that can be achieved, I think, is through supervised and strictly controlled parole so enabling you, each of you, under strict supervision and away from alcohol, to serve a significant period of your sentence in your own community and under the supervision of your elders with the help of a parole officer."

Consistently with this approach, I consider that the sentences imposed on the applicant should have been accompanied by a recommendation that he be eligible for parole after three years' imprisonment. When the applicant is released on parole, the conditions imposed should be aimed at assisting his problems with alcohol and violence and his re-integration into his community.

I would grant the application, allow the appeal and order that there be added to the sentences imposed below a recommendation that the applicant be eligible for parole after three years' imprisonment.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 30 May 1997

For the reasons given by Moynihan J., I agree that this application for leave to appeal against sentence should be refused.

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 30 May 1997

The applicant was convicted by a jury on three counts of rape which took place in the Kowanyama Aboriginal Community. He was sentenced to eight years imprisonment on each count. The sentences were to be served concurrently and there was no recommendation for early eligibility for parole. The applicant sought leave to appeal against sentence on the ground that it was manifestly excessive having regard to the following–

(a)the three offences were committed in the course of one incident only, apparently over a short space of time;

(b)there was no excessive violence although force was used in order to effect the commission of the offences;

(c)there was no evidence of any injury at all to the complainant;

(d)the offences to do not appear to have been associated with any terror as might be the case when a woman is attacked by a stranger.

The outline submitted that the appropriate sentencing range was five to six years, with the applicant's criminal history having the consequence that a sentence on the top end of this range was appropriate.

Some of the contentions in support of the application for leave as set out above might be thought to be of dubious validity. In any event (a), (b) and (c) at least were specifically adverted to in the sentencing remarks. In developing his arguments in support of the application for leave,

counsel for the applicant relied on cases decided in the High Court, and in Queensland, New South Wales, Western Australian, South Australian and Northern Territory Courts to advance a submission to the effect that the sentence does not appropriately reflect what might conveniently be described as cultural considerations. It was submitted that these cultural considerations are consequent upon the applicant and the complainant being aboriginal persons who reside in a remote aboriginal community where it was not uncommon in the commission of such offences that alcohol had been consumed.

The circumstances relating to the commission of the offences and the consideration adverted to by the trial judge in sentencing the applicant are canvassed in the President's reasons and it is unnecessary for me to repeat them here. By the same token, the cases to which the Court was referred during oral argument and in subsequent written submissions, are sufficiently canvassed in the President's reasons to make it unnecessary for me to go into detail here.

In the circumstances of the present appeal, the cases cited (virtually every reported case involving the sentencing of an aboriginal), canvass the application of a number of accepted general principles to particular circumstances. The sentencing of any offender calls for an endeavour to balance competing considerations reflecting, for example, the particular circumstances of the offence, the offender and the victim, and more general public considerations such as deterrence of the offender and others, rehabilitation and community standards. For these reasons the cases cited contain statements not fitting easily with statements in other cases and apply sentencing principles in circumstances bearing no compelling comparison with those of this case. The circumstances of those cases, in some aspects, bear a resemblance to aspects of this case and differ in others. For these reasons I have not found the exercise of extensive citation to be of great assistance in this case.

No doubt the impact of cultural or other considerations may mean, for example, that the impact of a sentence on a person who comes from a remote aboriginal community differs from its impact on a person who comes from a different community in a way that might appropriately be reflected in a sentence. The trial judge was aware of and adverted to the effect of the applicant

being removed from his community by being sentenced to a term of imprisonment, he also dealt with the community's reaction to the offences. By the same token the impact of the commission of the offence on the victim may differ in particular circumstances. Thus in the present case the relationship between the applicant and his victim was such as to prohibit sexual intercourse, but it would not have had the same effect in the european community: the trial judge referred to this.

It may be appropriate to reflect particular considerations relevant to a particular community in sentencing. It may be, for example, that an aboriginal community has a regime for dealing with classes of offences or offenders which it is appropriate for the court to consider and reflect in a sentence. No such issue arises in this case. It was submitted to the effect that the applicant should receive a lower sentence than might otherwise be the case because he and his victim lived in a deprived and dysfunctional community where alcohol abuse and violent crime was more prevalent and more tolerated than in the general community. As is pointed out by the President, the latter contention in particular was not established by evidence. It is not apparent that it is a situation such as might be the subject of judicial notice. It by no means follows that such considerations should lead to a lower sentence.

In any event, as has been indicated, the trial judge adverted to the various considerations canvassed in imposing sentence. Moreover, even assuming them to all operate in the applicant's favour, there were countervailing considerations some of which have already been referred to; these included that the offences were serious offences perpetrated by a person who had a substantial criminal history of offences of violence. He had been dealt with previously by a range of sentencing options including imprisonment. The offences involved an ongoing persistent attack albeit over a relatively short time. The complainant was walking alone in public and was raped on three separate occasions. Put shortly, the circumstances of the offences coupled with the applicant's history justified a substantial sentence. That imposed was within the appropriate range. It has not, to my mind, been demonstrated that the sentencing judge failed to advert to any relevant consideration or that he otherwise erred. I would therefore refuse leave.