*Christopher Charles**

SENTENCING ABORIGINAL PEOPLE IN SOUTH AUSTRALIA

The colonial perception of the Aboriginal as either "noble savage" or "fallen from grace on the way to cultural extinction" still underlies some of the judgments of the South Australian Supreme Court in their sentencing of Aboriginal people. Not only is this patronising vision of Aboriginal people incorrect, but it also tends to diminish the sentencing judge's view of the defendant Aboriginal as an individual.

The first major reported case on sentencing Aborigines in South Australia is *Wanganeen v Smith*,[1] which involved the reconsideration of a sentence for disorderly behaviour from the Point Pearce community. In His judgment, Wells J attempted to come to grips with the diversity of Aboriginal life and the intellectual problems posed in setting standards for Magistrates to take into account when sentencing Aboriginal people, subject in varying degrees to assimilationist policies. His Honour did not address the effect of those policies but assumed for the purposes of His judgment that assimilation was not controversial,[2]

> [B]ut where an aboriginal native has established himself in the more general community and intends to remain there and to work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow citizens.

Apart from the outmoded use of language ("Aboriginal native") His Honour attempted to draw a distinction between the relative position of "Tribal Aboriginal Natives" and "Urban Aborigines". According to Wells J the former category might require some special treatment, but the latter "cannot expect special treatment":[3]

> If he inhabits and uses the cities and towns of our country, then he must expect to abide by the ordinary rules by which law and order are there maintained. He cannot expect that special exceptions will be made for him.[4]

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* Barrister and Solicitor, Aboriginal Legal Rights Movement.

1 (1977) 73 LSJS 139.

2 At 139.

3 As above.

4 As above.

His Honour stated that an Aboriginal defendant could expect to have their background and antecedents treated in the ordinary way "but he cannot expect special treatment just because he is an Aboriginal native".[5]

Wanganeen v Smith may be criticised on three bases; its outmoded use of language; its creation of categories, "Tribal and established Urban Aboriginal"; and its silent acceptance of assimilationist policies.

Despite the High Court judgment of *Neal v R*[6] where it was held that any Aboriginal, tribal or otherwise, was entitled to compassion in sentencing, unfortunately the influence of *Wanganeen v Smith* is still being felt. The Supreme Court, in a number of sentencing appeals, has perpetuated the categories of "Tribal and Semi-Tribal and Urban Aboriginals".

Roberts v Young[7] concerned a police sentencing appeal from the decision of a Magistrate sitting at the Yalata Court. The defendant came from the Yalata community, where anthropologists have established correlations between the distress of Aboriginal people who live at Yalata, their dispossession from Maralinga lands, 30 years of oppressive administration and the resultant alcohol abuse and general patterns of deviance. They have also referred to the historical background of the problems of the Yalata Community.[8]

During the course of His judgment in *Roberts v Young*, White J considered the background to offending behaviour and commented upon such matters as the homelands movement, the application of *Lands Trust Act* amendments and the *Public Intoxication Act*, limited employment opportunities, as well as other characteristics of the community. There was also discussion of the alcohol problem at Yalata and of policing policies in relation to alcohol. Unfortunately, there also appears to have been some confusion between the so-called "Yalata factor" and the background and antecedents of the particular offender. His Honour commented,[9]

> The defendant is not quite in the category of a semitribal Aborigine. He is a married man aged 40 years with a wife and several children, the youngest being 4 years old. He is able to drive a car and a truck and he knows how to join in Breaking and Entering premises to get liquor. The defendant has been a troublesome member of the Yalata Community.

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5 As above.
6 (1982) 149 CLR 305.
7 Unreported, SA Supreme Court (no 9408/86 30 Sept 1986).
8 Brady and Palmer, *Alcohol in the Outback* (ANU Press, Darwin 1984).
9 *Roberts* at 3.

However, His Honour went on to say,[10]

> This offender was relatively sophisticated and mature and he had considerable previous experience with the Criminal Law and the consequences of offending. It was not suggested in this case, as it is sometimes in other cases, that he had been punished by spearing in the leg or in some other manner by the elders.

The latter point, concerning spearing, had not been raised at all in any of the litigation.

His Honour appeared to correlate the "semi-tribal" state with criminal deviance. Implicit in the category "semi-tribal" is the suggestion that "detribalisation" is a kind of fall from grace into criminality. It creates a European perspective of benign pessimism concerning Aboriginal communities. This is misleading for sentencing purposes if one considers the matters referred to - family responsibility and the ability to drive a car. The discussion of family indicates a continuation and adoption of traditional kinship systems to changed circumstances of life at Yalata. The ability to drive a truck presumably assists the participation in traditional ceremonial life by providing the ability to use cars for transport. This would also apply to care of kin and country. Is an Aboriginal person to be regarded as "semi-tribal" because they drive a car to traditional ceremonies?

The other aspects of the respondent's life mentioned by White J, in particular His statement describing the respondent as "a trouble maker, with considerable experience of the Criminal Law and the consequences of offending", are matters which are logically and practically distinct for the purposes of sentencing from the respondent's "semi-tribal" status. This is made clear by Murphy J in *Neal v R*, when his Honour clearly stipulated the differences between matters of aggravation and matters of mitigation in sentencing.[11]

In *Roberts v Young* White J considered that penalties lower than the tariff penalties should apply to Yalata Aborigines, but he also compared and contrasted Yalata Aborigines with Europeans and urban Aborigines. The categories "tribal", "semi-tribal" and "urban Aborigines" are Colonial relics that, in the attempt to categorise, serve only to further mystify and confuse European conceptions of Aboriginal life.

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10 At 3-4.

11 *Neal* at 319.

Gillian Cowlishaw has written two articles on this topic; "Colour Culture and the Aboriginalist"[12] and "Aborigines and Anthropologists".[13] In these articles Cowlishaw deprecates the creation of such categories. She lays blame upon earlier generations of anthropologists, suggesting that they reflect racist notions regarding the creation of categories based upon physical characteristics such as "full blood" and "half caste":[14]

> This identification of Aborigines with certain practices leads to further problems. Aborigines behave in certain ways; are they still Aborigines if they behave in other ways? Or do they behave in other ways because they are no longer Aborigines? The terminology indicates the confusion. Reference to racial categories, half castes and mixed bloods, were made without an explanation of the relevance of "caste" and "blood" to what were supposesdly studies of culture. There was thus an implied causal connection between the "dilution" of the blood and the loss of Aboriginal, that is traditional cultural practices.

Furthermore,[15]

> The common view that after what was called "culture contact" Aborigines began to "lose" their culture can be directly related to the predominant view of what culture was. As mentioned above, culture was seen as unchanging and exotic. While the remote Aborigines were still speaking their languages and performing ceremonies they could reside on Government reserves receiving welfare payments and using four wheel drive vehicles without compromising their status as anthropological informants on authentic Aboriginality.

Concerning the creation of racial categories Cowlishaw further comments,[16]

> To say that race is a culturally constructed category is different from saying that racial categories are really based on cultural differences... The process of categorisation whereby people of a society are allocated to one or another group which is called a race, or to any other category, is part of the wider process of construction of ideology. The categories created are not a direct consequence of a certain genetic or cultural heritage, but are part of a cultural process of evaluation and bestowing

12 (1987) 22 *Man* 221.
13 (1986) 1 *Australian Aboriginal Studies* 2.
14 At 5.
15 Cowlishaw, "Colour Culture and the Aboriginalist" (1987) 22.
16 At 227-8.

> meaning on certain phenomena such as biological or cultural characteristics.

The question I raise is whether in the European judicial process of evaluation and bestowing meaning, the creation of these categories is either useful or instructive.

A similar line of reasoning to that employed by White J in *Roberts v Young* was applied by Bollen J in the cases of *Gibson v Leech*[17] and *Houghagen v Charra*.[18] Similarly, in the cases of *Leech v Minning*[19] and *Leech v Peters*,[20] O'Loughlin and Perry JJ respectively made reference to various categories of Aboriginal people when considering police appeals from the Yalata Court of Summary Jurisdiction.

In addition, O'Loughlin J emphasized the importance of the circumstances of an individual offender. In all the cases mentioned, the "Yalata factor" was preserved; Bollen J's judgments in particular are informed by useful comments on the nature of the community and its problems and upon the need for Appeal Courts to take into account the experience of the presiding Magistrates.[21]

I make no criticism of this judicial recognition of the problems faced by the community or of the so called "Yalata factor". However, there is a danger in the use of judicially created categories, because they may be applied mechanically. No Aboriginal person fits any category anyway. In the case of *Leech and Lovegrove v Milera*,[22] Prior J attempted to apply the categories and to justify an increase of sentence, upon the basis that the respondent was not a tribal Aborigine:[23]

> That the special factors that were before other judges on cases the likes of *Roberts v Young*, *Leach v Minning* and *Houghagen v Charra*, are lacking here. White J observed in *Roberts v Young* that urban Aborigines cannot call for lower penalties that might prevail for Aboriginals offending in remote areas of the State. The respondent is not an urban Aborigine, although

17 Unreported, SA Supreme Court (no 2011, 11th Oct 1989).

18 Unreported, SA Supreme Court (nos 16, 17 and 21, 11th June 1989).

19 Unreported, SA Supreme Court (no 887, 23rd June 1988) sic "a matter of general application to all Aboriginals, be they described as tribal, reserve or urban" at 2 per O'Loughlin J.

20 Unreported, SA Supreme Court (nos 2754-2755, by Mr Justice Perry 15th Dec 1988), - sic "The Respondent is a full blooded Aborigine aged nineteen years" at 2.

21 *Houghagen* at 8.

22 Unreported, SA Supreme Court (no 725, 9th June 1989).

23 At 11.

> he has lived in Port Augusta and Adelaide. Low or lenient penalties might prevail for offences committed by tribal Aborigines away from the city or even for a first offending in the city but this was not a first offending in the city.

This discussion of categories diverted judicial attention away from the actual circumstances of the respondent. The correct way for judges to consider the social, cultural and economic position of Aboriginal offenders is to apply the formula laid down by Brennan J in the case of *Neal v R*:[24]

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.

What judges need is detailed information concerning the circumstances of particular offenders and their communities. In relation to Yalata, a former Aboriginal Legal Rights Movement solicitor has sworn a detailed affidavit outlining the character of the Yalata community, the remoteness of the community, the paucity and cost of public transport, the difficulty of finding licensed sober drivers, the purchasing of alcohol at Nundroo, the effects of lifestyle changes on Yalata residents and their dependence on motorised transport. That affidavit is frequently referred to by Magistrates who sit at Yalata and has been favourably commented upon by Bollen J in *Houghagen v Charra*.[25]

The most recent decision on sentencing Aboriginal people in South Australia is the case of *Leech v Sansbury*,[26] which concerned a police appeal against a sentence imposed at Ceduna on an Aboriginal person who had originally come from Adelaide. Mullighan J considered that the sentencing magistrate had not erred by imposing a short term of imprisonment for a breaking and entering offence. Reference was not made to the categories of tribal, semi-

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24 (1982) 149 CLR 305 at 326.

25 *Houghagen* at 8.

26 Unreported, SA Supreme Court (no 748, 29th May 1990).

tribal or urban but the background of the respondent was considered as follows:[27]

> No doubt persons, such as the respondent, encounter difficulties due to their racial background which are not experienced by most people. 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.

His Honour went on to apply the dicta quoted above from Brennan J in the High Court case of *Neal*. It is noteworthy that the *Neal* formula has been applied by Northern Territory Judges in considering payback cases and those involving traditional punishment. In this respect I refer to *Jadurin v R*[28] and *Mamarika v R.*[29]

There has been some acceptance by South Australian judges of the importance of taking into account tribal punishment and payback. In the case of *Miller v Hrotek*[30] Bollen J observed:

> Mr Di Fazio says in relation to the unlawful wounding there was the provocation in the circumstances in which it was offered by the drunken wife and the call for an Aboriginal husband to administer suitable disciplinary punishment to a wife who so behaved. Certainly I think the magistrate was called upon to take that into account. In relation to the assault on Kuntjima it appears clear that later the appellant submitted to stabbing wounds administered to him in retaliation or payback by Kuntjima. He has already had some punishment, Mr Di Fazio said, and, again, that was something fit to be taken into account.

The approach of the South Australian Supreme Court to sentencing Aboriginals, begun in *Wanganeen v Smith* and continued in the line of cases beginning with *Roberts v Young*, was misguided. South Australian judges should heed the decision of the High Court in the case of *Neal*. In the most recent South Australian decision, *Leech v Sansbury*, this has occurred. As a matter of principle and policy it should continue.

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27 At 8.

28 (1982) 44 ALR 424.

29 (1982) 42 ALR 94.

30 Unreported, SA Supreme Court (no 4, 13th February 1986) at 4-5.