Article — Indigenous over-incarceration and individualised justice in light of Bugmy v The Queen (2021) 50 Aust Bar Rev 427

Date: 29 October 2021

Sources: Australian Bar Review

Abstract:

This article is about over incarceration of Indigenous offenders, which is a long-standing problem. It considers a criminal law case, *Bugmy v R* (2013) 249 CLR 571; (2013) 302 ALR 192; (2013) 87 ALJR 1022; (2013) 229 A Crim R 337; [2013] HCA 37; BC201313361, where the High Court examined the relevance of aboriginality as a background factor when considering sentencing.

It argues that, inter alia, the failure of the High Court to embrace an approach to indigeneity similar to that taken in a Canadian Supreme Court decision, *R v Gladue* [1991] 1 SCR 688 ("Gladue") is an example of an underlying problem of addressing Aboriginal disadvantage in Australia's legal system.

The Gladue judgment requires sentencing judges to recognise that adverse background factors and the uniqueness of the Aboriginal experience in Canada should be recognised as important considerations in terms of reducing culpability or as mitigating factors for Aboriginal defendants. The article considers the Gladue judgment, as well as the approaches to sentencing the Indigenous community in New Zealand, and the contrasting approach in Australia.

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