

IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

IN THE MATTER OF
An Application for Leave to Appeal Against Sentence by Damian Honeysett

Between:

DAMIAN HONEYSETT

Applicant

and

THE QUEEN

Respondent

FURTHER SUBMISSIONS ON BEHALF OF THE APPLICANT

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Introduction

1. In his judgment granting leave to appeal to the sentence imposed below, Weinberg JA notes the paucity of case law dealing with, 'the weight separately to be accorded to the appellant's active participation in a sentencing conversation in the Koori Court.'
2. Further, His Honour noted that there was no 'discussion as to how that factor might be balanced against considerations of general and specific deterrence and the need to protection the community.'
3. Finally, he said, 'it would be useful to have this Court provide guidance as to how, precisely, the procedures adopted in the Koori Court should impact upon the overall synthesis when trial judges sentence in such cases.'
4. The purpose of these supplementary submissions is to propose an additional procedure that would assist a sentencing judge in the Koori Court. The additional procedure we suggest takes advantage opportunities of the current

legislative structure whilst also allowing for some precision in the impact that an accused's participation has upon the sentencing task.

Summary of the Applicant's Proposal

5. The Applicant submits that section 4G(f) *County Court Amendment (Koori Court) Act 2008* allows for a pre-sentence report, specific to the Koori Court, in order to assist sentences judges undertake the overall synthesis required of them. It is submitted that the 'anyone else' provision on reporting must envisage the ATSI community and in particular those Elders appointed and/or engaged in the Koori Conversation providing input to assist the sentencing process.
6. The Applicant submits that the very purpose of the Koori Court procedure is to address high rates of Indigenous incarceration and to find therapeutic and culturally relevant sentences having regard to the particular criminal justice issues that arise in relation to Aboriginal and Torres Straight Island ('**ATSI**') peoples affected by generational trauma and disadvantage.
7. The Applicant's overall submission is that an accused's participation in the Koori sentencing process is relevant to issues of general and specific deterrence, protection of the community and prospects of rehabilitation.
8. Axiomatically, the way those principles are impacted will depend upon the nature of an accused's participation in the Koori Court process.
9. Further, it is submitted that it should be rare for the Koori Court to sentence without such a report and that both the report and the sentence should address the factors we suggest below and any other factors relevant to both sentencing principles and the purpose of the Koori Court.

Proposed Koori Pre-Sentence Report

10. The proposed Koori pre-sentence report could, for example, be modelled on the *Gladue* Reports that exist in Canada. In particular, it is submitted that the Koori pre-sentence report should address the following three key aspects would assist the sentencing part of the Koori Court process;

- a. Evidence of material facts that exist by reason of the offender's Aboriginality with the aim of providing an explanation for the offending within the context of the particular offender's experience as an Aboriginal person;
- b. An assessment of the participation of the Accused in the sentencing conversation. It proposed that this assessment is completed by the elders and has regard to insight, remorse, contrition, maturity and honesty. A list of example criteria is expanded upon below;
- c. Consideration of available services to assist the offender. This could include courses in and out of custody, ongoing engagement with Koori Elders and Koori education and engagement programs, and even potential deferral of sentences for rehabilitative steps to take place prior to sentencing.

Evidence of Material Facts

11. In Canada, the 1999 decision of *Jamie Tanis Gladue v The Queen*¹ created a watershed moment in the sentencing of Aboriginal Canadians. Canada experienced comparable inequality in standards of living and over-representation of Aboriginal people in custody as Australia.
12. Whilst there is a specific provision mandating certain considerations in relation to sentencing Aboriginal Canadians, *Gladue* was the first case to deal with the scope of the provision.
13. One of the lasting legacies from *Gladue* is the *Gladue* Report. This is a pre-sentence report that provides the sentencing court with an accurate representation of the offender's personal experience as an Aboriginal person. The reports address the life circumstances of the offender as well as the availability of culturally focused programs that might be available.
14. The details in relation to the material facts of the offender's life are taken from interviews with the offender, his family and/or his friends or members of his community.
15. It should be noted that Ms Gladue herself was an Aboriginal Canadian woman, living in an urban setting, off reserve and 'not within an Aboriginal community' as such. Nevertheless, the Court notes that, for an Aboriginal offender, the

¹ *Gladue v The Queen* [1999] 1 SCR at 688

systemic or background factors which may have influenced the accused to engage in criminal conduct exist whether they reside in an urban setting or on reserve.

16. This may depend on the individual case in hand but we have supplied some example *Gladue* reports to assist.

Assessment of participation by the Elders

17. It submitted that the Elders are in the perfect position to complete an evaluation of an Accused in the aftermath of his participation in the Sentencing Conversation. We suggest the following areas of evaluation may be suitable factors that might meet the purpose of the Koori conversation and considerations of general and specific deterrence as well as the need to protect the community:

a. Participation:

- Attendance
- Active participation
- Appropriate responses to confrontation and questioning
- Honesty, openness, maturity

b. Engagement

- Level of confrontation aspects for the individual by the Koori conversation
- Response to confrontation
- Whether 'shaming' occurs
- If so, response to confrontation

c. Insight

- Into the impact of offending on those affected directly including victims and their family members, members of the Koori community and the community at large

- Into their own Aboriginality, includes the generational issues, personal experiences, challenges with identity, culture and community
- Into their own personal cognitive and health issues
- Into the causes of the offending
- Into the risk of institutionalisation (if applicable)
- Into the need for support and guidance from Koori community

d. Willingness

- To engage in rehabilitation
- To engage in education
- To engage in employment
- To address substance misuse

Consideration of available services

18. As part of the sentencing conversation, the Koori Court Officer present will usually discuss some of the available services that might be relevant and of interest to an Accused.
19. What we propose is to maintain that aspect of the proceeding but formalise the response and the resolution reached as to services as part of the pre-sentence report.
20. This would add some transparency and certainty to the process whilst also allowing a sentencing judge to take into account the programs and resources available and the offender's demonstrated willingness to participate in the suggested programs.

The Koori Court - legislative framework

21. The statutory formation of the Koori Court process provides the distinct statutory context for a report allowing for an application of factors relevant to the sentencing process.

22. The Koori Court was created by *County Court Amendment (Koori Court) Act 2008* (the **Amendment**) which amends the *County Court Act 1958* (the **Act**). There is nothing in the Act that limits the operation of the *Sentencing Act 1991* (the **Sentencing Act**).
23. It is the ultimate submission of the applicant that the pre-sentence report proposal can be accommodated within the existing legislative scheme.

Specific provisions relating to the Koori Court:

24. The stated purpose of the Amendment in section 1 is:

Section 1 - Purpose

The purpose of this Act is to amend the County Court Act 1958 –

- (a) to establish a Koori Court Division of the County Court; and
- (b) to provide for the jurisdiction and procedure of that Division –

with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the County Court through the role to be played in that process by the Aboriginal elder or respected person and others.

25. The sentencing procedure is dealt with in in section 6 of the Amendment, inserting a new section 4G which states:

4G Sentencing procedure in Koori Court Division

- (1) This section applies to the Koori Court Division when it is considering which sentencing order to make in respect of a defendant.
- (2) The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.
- (3) The Koori Court Division may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by –
 - (a) a Koori Court officer; or
 - (b) a community corrections officer appointed under Part 4 of the Corrections Act 1986; or
 - (c) a health service provider; or
 - (d) a victim of the offence; or

- (e) a family member of the defendant; or
- (f) anyone else whom the Koori Court Division considers appropriate.
- (4) Nothing in this section affects the requirement to observe the rules of natural justice.
- (5) This section does not limit –
 - (a) any other power conferred on the court by or under this or any other Act or the rules; or
 - (b) any other specific provision made by or under this or any other Act or the rules for the making of any report, statement or submission, or the giving of any evidence, to the court for the purpose of assisting it in determining sentence."

Relevant provisions of the Sentencing Act:

26. For the purpose of these submissions, sections 5 and 83A have particular application and relevance:

s5 Sentencing guidelines

- (1) The only purposes for which sentences may be imposed are –
 - (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
 - (b) to deter the offender or other persons from committing offences of the same or a similar character; or
 - (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
 - (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
 - (e) to protect the community from the offender; or
 - (f) a combination of two or more of those purposes.
 - (2) In sentencing an offender a court must have regard to –
 - (a) the maximum penalty prescribed for the offence; and
 - (ab) the standard sentence, if any, for the offence; and
 - (b) current sentencing practices; and
 - (c) the nature and gravity of the offence; and
 - (d) the offender's culpability and degree of responsibility for the offence;
- and

- (daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated; and
- (daa) the impact of the offence on any victim of the offence; and
- (da) the personal circumstances of any victim of the offence; and
- (db) any injury, loss or damage resulting directly from the offence; and
- (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
- (f) the offender's previous character; and
- (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

27. It is proposed that the section 83A - for a deferral of up to twelve months - in the *Sentencing Act 1991* could have a wider application in the Koori Court.

The relevant provision states:

Section 83A - Deferral of sentencing

- (1) If the Magistrates' Court or County Court finds a person guilty of an offence and –
 - (b) the court is of the opinion that sentencing should, in the interests of the offender, be deferred; and
 - (c) the offender agrees to a deferral of sentencing –
 the court may defer sentencing the offender for a period not exceeding 12 months.
- (1A) The court may defer sentencing the offender under subsection (1) for any one or more of the following purposes –
 - (a) to allow the offender's capacity for and prospects of rehabilitation to be assessed;
 - (b) to allow the offender to demonstrate that rehabilitation has taken place;
 - (c) to allow the offender to participate in a program or programs aimed at addressing the underlying causes of the offending;
 - (d) to allow the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim;

- (e) for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.
- (1B) In making an order deferring a sentence under subsection (1), the court may determine the date at which the offender must re-appear before the court for a review of the order.
- (1C) Dates fixed under subsection (1B) must be between the date on which the order deferring the sentence is made and the date to which the proceeding has been adjourned.
- (1D) On the review of an order deferring a sentence under this section, the court may –
 - (a) take no further action; or
 - (b) cancel the order deferring the sentence and proceed to sentence the offender, as if the matter were an adjourned hearing to which subsection (3) applies.
- (1E) In making an order deferring a sentence under subsection (1), the court may order that any review of the order under subsection (1B) be dealt with by the court constituted by the person who made the order deferring the sentence.
- (2) If the Magistrates' Court or County Court defers sentencing an offender, it –
 - (a) must adjourn the proceeding for a period of up to 12 months; and
 - (b) may release the offender on his or her undertaking to attend before the court on the date fixed for sentence or release the offender on bail or extend his or her bail to that date; and
 - (c) may order a pre-sentence report in respect of the offender.
- (3) On the adjourned hearing, the court must, in determining the appropriate sentence for an offender, have regard to –
 - (a) the offender's behaviour during the period of deferral; and
 - (b) subject to section 8D, any pre-sentence report ordered under subsection (2)(c); and
 - (c) any other relevant matter.
- (4) If an offender is found guilty of an offence during a period of deferral under this section, the court may –
 - (a) re-list the adjourned proceeding on a day earlier than the day to which it was adjourned under subsection (2)(a); and
 - (b) on the adjourned hearing make any order that the court could have made if it had not deferred sentencing.

- (5) The court may order that a warrant to arrest be issued against the offender if he or she does not attend before the court on the adjourned hearing.
- (6) Nothing in this section removes any requirement imposed on the Magistrates' Court or County Court by or under this or any other Act to impose any disqualification on, or make any other order in respect of, a person found guilty or convicted of an offence, including an order cancelling or suspending a driver licence or permit or disqualifying the offender from obtaining one for any period.

Submissions

28. We note the following aspects of section 4G of the Act in the context of the Applicant's proposal:

- e. Subsection 3 allows for Court to 'inform itself in any way it think fit, *including by considering a report prepared by...*' various people and organisations listed. This provision would enable a pre-sentence report of the nature proposed.
- f. Subsection 5 purports not to limit 'any other power conferred on the court by or under this *or any other Act...*' The relevant and applicable provisions of the *Sentencing Act 1991* are therefore unrestrained by the specific provisions relating to the operation of the Koori Court. In particular, the deferral provisions outlined in section 83A could be utilised.

29. The legislative framework currently exists and could be better utilised to ensure a meaningful engagement in the Koori Court process, from arraignment through to sentence.

30. Specific guidance from this Court as to how the available provisions could be used would clarify how participation in the Koori Court process applies to the sentencing synthesis.

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