

## ***Sentencing: taking Aboriginal customary law sanctions and community attitudes into account*** **a Northern Territory perspective**

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would suffer a form of payback when he became available. He stressed that while that fact would be taken into account in sentencing, the Court did not condone the use of violence and, in particular, it did not condone payback. It treated payback as a fact of life. His Honour then recapitulated the evidence of Mr Granites to the effect that the accused would be called on to face tribal punishment, probably by spearing, by Kevin Fry. He noted Mr Granties' assurance that this would resolve the deep ill-feeling between the groups, and considered that this was in the interests of the Yuendumu community. Later, his Honour returned again to the question of payback, and said at transcript pp8-9:

"[The prisoner] is to be subject to the supervision of the Director of Correctional Services, or his nominee, and obey all the reasonable directions of the person. I note what I have been told about the payback proposal and I have said I have taken it into account in setting this sentence. I should give credence and credit to the evidence that has been given by Mr Ganites and assume that he is not intending to mislead the court and that what he says will happen, will in all likelihood happen in the way that he has described it.

I ask the Director of Correctional Services to report to the court as to whether that event occurs. If so, when and as to what happened. It may take a little time for arrangements to be made, but will allow, say, 6 months from this date where if nothing has happened as was envisaged within that period, I would ask the Director to inform the court accordingly and to provide any information which he can obtain from the community or others concerning that issue of payback.

I bear in mind the Director may come before the court and seek a variation of conditions attaching to a bond such as I have just order."

The sentence was one of 3 years imprisonment, backdated 9 months to take account of the time spent in custody, and suspended forthwith on a 2 year good behaviour bond. The "conditions attaching to a bond" were that the prisoner be of good behaviour for 2 years, return to Yuendumu forthwith, and subject himself to the Director's supervision and obey his reasonable directions. His Honour continued:-

"As to payback, I take it into account as something which I'm told by Mr Granites will happen. The problem is, as far as

the court is concerned in determining its sentence: how should it approach the prospect that it won't happen?

Well, I think the first thing the court has to do in this case, and maybe others, is to try and work out a regime whereby it can be informed as to whether what is expected has happened or not and to bear in mind the powers of the Director of Correctional Services who might be asked to supervise people and report to the court his power to bring matters back before the court with a view to changing the terms and conditions of a good behaviour bond."

I interpose here to observe, with respect, that his Honour here clearly had in mind the *Munungurr*-type bond conditions, and not the particular bond before him. His Honour continued:-

"Now, it may or may not be the circumstances of every case to simply have a person brought back to have some additional or other conditions imposed. But it will at least enable the court to keep a tab on what is happening. If ultimately there is sufficient indication that although people with the best of intentions propose that these tribal ways be adopted with a view to settling community fights, [they] do not happen, then the court may very reluctantly to take them into account in the future."

Again, it is clear his Honour was speaking generally of "tribal ways" and did not have in mind the present type of payback.

As I say, this decision has attracted considerable public attention. It has been construed as a request by the Court to the Department of Correctional Services to supervise the spearing and to report back on it to the Court, thus directly involving government officers in the process of payback, which may well be criminal activity. It has also been construed as accepting payback as a substitute for custodial sentence. Both constructions assume that the "fundamental" distinction referred to at p7 has ceased to exist in Northern Territory law. That is not so. A fair reading of his Honour's words does not warrant either construction. Government officers were not asked to be present at or to observe any payback. The likelihood of payback was treated as a factor mitigating the length of the period required to be spent in custody; that is a completely orthodox approach to that factor. The fact of a likely payback was treated as a mitigating factor, but the sentence, once given, stood, and was intended to stand. It was clearly not intended to be varied thereafter.

The Court was also clearly concerned to ascertain in due course whether what it had been told would happen, had in fact happened. The request to the Director to report back as to what in fact happened followed the same approach as was delineated in *Munungurr* (supra) at p10, was not intended or directed to be a condition of the bond, and was obviously made for the purpose of increasing the Court's reservoir of knowledge of customary affairs, and increasing its capacity to assess the validity of submissions of the type which had been put before it.

### **Conclusions**

The recognition of Aboriginal customary law by way of taking into account on sentencing Aboriginal community attitudes and customary law sanctions has a long history in Northern Territory jurisprudence. There is nothing novel about it. It is well-established wholly judge-made law, soundly based on practical social realities.

The introduction of comprehensive sentencing legislation by way of a code now provides an opportunity to legislate on this topic, bearing mind the "fundamental" distinction referred to at p7. The relevant legislation might well take the form of principles to guide the exercise of the sentencing discretion in this area; see, for example, the principles set out in ALRC Report No 31, vol 1, pars 504-22.

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## ***Circuit Commitments for 1995***

*The Administrative Appeals Tribunal calendar of Circuit commitments for 1995 for the Northern Territory:*

### **DARWIN**

*Fortnight commencing Monday 27 February 1995 with the possibility of a third week if need - Deputy President Forgie.*

*Fortnight commencing Monday 19 June 1995 - Senior Member W Purcell.*

*Fortnight commencing Monday 20 November 1995 with the possibility of a third week - if needed - Senior Member Beddoe*