ABORIGINAL HOMICIDE: CUSTOMARY LAW DEFENCES OR CUSTOMARY LAWYERS' DEFENCES?

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THE ABORIGINAL COMMUNITY HAS A UNIQUE INTEREST AND PERSPECTIVE with respect to the conduct of the prosecution and defence to charges of homicide. It is overwhelmingly the case that, when an Aboriginal person is charged with homicide (murder or manslaughter), the deceased person was also Aboriginal. At all stages of the criminal process for such charges (the decision to lay the charge, the determination of guilt or innocence, and sentencing) there are likely to be issues and considerations upon which Aboriginal and non-Aboriginal perceptions will differ profoundly, reflecting the differences in the culture, history and lifestyles of the two groups as well as the conceptions of the role of the Australian legal system in guaranteeing law and order in society.

While a study of the legislation and the decisions of the courts demonstrates an awareness that such differences exist, it is equally apparent that the Australian legal system has been unable to provide a consistent and well-informed response to the fact that the differences in perceptions may well be one of the explanations for the increasing incidence of homicide in Aboriginal society and of the inability of the legal system to satisfy Aboriginal demands that the system meet their needs.

The difference in perceptions and, at times, outright conflict between Aboriginal and non-Aboriginal responses to the conduct of homicide cases operates at one level of the process but, of course, there may also be profound

differences as between Aboriginal people themselves on particular issues. There may well be different views on certain issues between particular communities of Aboriginal people and also within such communities. The attitude of those closest to the victim of homicide may well differ from those of people closest to the person accused. In this regard the Aboriginal perspective may be as diverse as that in the broader community.

The Aboriginal Legal Service (ALS) has, for the two decades prior to 1992, played an important role in the endeavour to inform the legal system as to these unique Aboriginal perspectives, but the ALS has, at times, its own unique dilemma since, as both a representative of an accused person and of the community from which that person comes, conflict of interest considerations are very real and very common. Yet the courts will first look to the ALS for advice regarding both cultural and social factors relevant to the accused and the circumstances of the offence, and also as to the attitude of the Aboriginal community towards the offender. The Pitjantjatjara Legal Service has endeavoured to overcome the conflict of interest problems by arranging for separate lawyers to represent the accused and the community, but most ALS offices are unable to afford the resources for such a commitment.

If the prosecution, conviction and sentencing of killers is a task undertaken by the legal authorities on behalf of the community as a means of both protecting the community and satisfying its sense of justice, then the question arises as to how those responsible for the system can understand and respond to the Aboriginal members of that community. This paper will examine some aspects of the system as it applies to homicide cases to illustrate the apparent confusion in approach which has been adopted to date.

Before examining the issues it is useful to place them into context by considering, by way of illustration, two cases which highlight the difficulties which can arise both for the courts and for those who, in representing the Aboriginal community and the offenders, find themselves called upon to provide advice to the courts.

Case 1[1]: Darwin, December 1991

The appellant was a twenty-nine-year-old Tiwi man from Bathurst Island with limited European education. The deceased was his wife and they lived together at Milikapiti with their two children, the eldest of whom was four.

Shortly prior to the killing the appellant had begun to suspect that his wife was being unfaithful to him. The day before her death the wife had been confronted by another woman with that accusation (involving the other woman's husband) and had denied the allegation. The following day the appellant challenged his wife again about the other man and she once again denied the allegation of impropriety. Later in the day the appellant confronted the 'other

[1] *Mungtatopi v. DPP*, Unreported decision of the Court of Criminal Appeal, Darwin 23 December 1991.

man' at the canteen but he also denied the accusation. At that time the appellant observed that the children were not with his wife at the canteen. The appellant left the canteen and went to his sister's house where he found his youngest child but not the other child.

The appellant went looking for his wife and found her at another person's home, playing cards. Before finding his wife, he located the eldest child at another house. It was apparent to the occupants that the appellant was angry. Having located his wife, he asked her to come home. She refused and the appellant punched his wife and kicked her. The wife was drunk and the appellant had been drinking, but was not drunk. When the assault began, others intervened and the appellant was knocked down and punched.

The appellant and his wife then left the scene and the appellant drove the wife to an out-of-the-way place. The appeal court accepted that there may have been a legitimate reason for the fact that the appellant drove where he did. Within a few minutes the wife jumped from the car and ran away. The appellant told police that he chased his wife and hit her a number of times to the head with a rock. At trial he denied any recollection of chasing his wife or of striking her. The police claimed that he had also told them that he had placed his wife in the back of his vehicle and had there continued to hit her.

The evidence from the pathologist (which was not disputed) disclosed that the wife (who weighed only thirty-nine kilograms) had multiple injuries to the head, neck, trunk, back, elbows and arms. There were also injuries to the legs. These injuries were all consistent with her having been assaulted with a weapon—a blunt instrument. Additionally, the wife had suffered the most dreadful series of injuries to the vagina, rectum and to internal organs. Some of these injuries had occurred after death, which was caused by shock and haemorrhaging resulting from these lower body injuries, which had also been caused by the blunt instrument.

The defence was that the appellant acted under provocation within the terms of the Criminal Code of the Northern Territory. If he succeeded in that defence, the accused would have been convicted of manslaughter and not murder. To succeed in that defence the accused had to show that he had been subjected to a 'wrongful act or insult' of such a nature as to be likely to deprive an 'ordinary person' of the power of self-control. Additionally, the accused had to show that 'an ordinary person, similarly circumstanced, would have acted in the same or a similar way' (Criminal Code, Northern Territory Section 34(2)(d)).

Before the question could be left to the jury, the accused had to first satisfy the trial judge that there was evidence which might be acted upon by the jury to support the defence of provocation. The trial judge ruled, however, that there was not such evidence because, whether or not there had been any actions by the victim which could be described as 'wrongful' or 'insulting', there was no basis on which it could be said that such acts could have been likely to cause an ordinary person to lose self-control in the way the accused had. The Court of Criminal Appeal upheld the trial Judge's ruling.

In considering these issues the trial judge had to consider submissions made and evidence led on behalf of the accused man. Counsel for the accused cross-examined three female Aboriginal witnesses in order to advance the argument that an ordinary member of the community might be provoked to do what the accused did in this case.

The appeal court set out the submissions made on behalf of the accused as follows:

> It was submitted by (counsel), that the deceased's behaviour, in refusing to come home and look after the children when called upon by her husband to do so, was an insult in the circumstances of the case. The refusal took place in front of three other female Aboriginals. There was evidence that under Aboriginal customary law an Aboriginal wife who fails to look after her children, by getting drunk and neglecting them, is liable to be punished by her husband, although the level of punishment admitted to by the Crown witnesses did not go beyond merely hitting such a wife (*Mungatopi* supra, at 7).

Case 2[2]: Brisbane, 28 August 1986

The appellant was convicted of murder of 'his woman' by stabbing her with a knife which penetrated 15 cm, passing through the liver, bladder and aorta. The defence was that the accused had not formed an intention to kill or to cause grievous bodily harm but intended to 'cut' the victim on the arm or on her side so as to make her go home with him, which she was refusing to do. The appeal was concerned with the refusal of the trial judge to allow an expert witness to be called to give evidence of what were said to be the cultural practices of Aboriginal people at Palm Island. It was said that an understanding of these practices would demonstrate that it was consistent with conduct on the Island for a person to use a knife in the way the accused did and yet not to be intending any serious harm.

In a statement supplied to the appeal court, it was noted that the evidence which the expert, a sociologist, would have given was to this effect:

> In general terms, the distinctions in our culture between discipline, punishment, violence and assault—including the use of weapons—have little impact on a very large section of the Palm Island community—male or female.

The witness said that, whereas a non-Aboriginal person brandishing a knife in Brisbane would be presumed by onlookers to have the intention of doing harm to someone, that would not be the perception of Palm Islanders if they saw such a scene on the Island. The witness said:

> Assuredly, some offences on the Island are motivated the same as the above example. However, a very large proportion of such uses have, as their motivation, a desire to discipline and punish a person for violation of a code

[2] *R v. Watson* 69 ALR 145, Court of Criminal Appeal, Queensland, 28 August 1986.

> of behaviour or conduct. And this code, as it applies to heterosexual relationships, is based upon a traditional sense of male superiority and feminine subservience. While not ritualistic, the men very often feel it is their 'right' to discipline 'their women' . . . Even the severity of the injuries is seen differently on the Island. 'I intended to cut her' is a phrase often heard and we may be mortified at the prospect of being 'cut' . However, this is very readily accepted by Palm Island people as attested to by the very large number of scars on these people.

In unanimously rejecting the appeal, the judges agreed that the proposed evidence was not such as to be admissible in evidence. The question of the acceptance by courts and qualification of expert witnesses will be returned to later in this paper. What is of present interest is that, in advancing a defence on behalf of the accused in this case, a proposition was put forward which, if accepted, could be said to have amounted to an attempt to legitimise male violence towards women on the basis that that was in accordance with Aboriginal tradition. Inferentially, it was being suggested that the use of violence by 'cutting' was regarded as acceptable by Palm Island women (and, presumably, by all of the men). Justice McPherson noted that if there was such a practice and custom then it was in contravention of the Racial Discrimination Act which incorporated the right to security of individuals from violence provided by Article V of the Covenant on Civil and Political Rights.

Issues Arising from the Cases

In both of the above cases the arguments advanced on behalf of the Aboriginal accused did not succeed in allowing a defence, or evidence relevant to a defence, which was said to reflect Aboriginal customary law. More often than not, this has been the case when such defences have been advanced. But similar arguments have been frequently successful when advanced during the sentencing process. Far from it being the case that Aboriginal people have been sentenced more harshly than non-Aboriginals, studies conducted on behalf of the Royal Commission into Aboriginal Deaths in Custody (Australia 1991, p. 216) confirmed, as a general principle, the accuracy of the observations of Chief Justice Campbell in one Queensland case in 1985:

> Crimes of violence by Aboriginals, when they occur on Aboriginal reserves and after the consumption of alcohol, have been dealt with by the courts in this State more leniently or sympathetically than has been the case of offences of a similar nature committed by Europeans and people of non-Aboriginal extraction (*Friday v. R*, [1985] 14A Crim R 471 at 472).

As a result of submissions made on behalf of accused people, similar comments to the following observations of Gallop J. have been repeated many times by sentencing tribunals:

> I cannot ignore the fact that whether the European society likes it or not, rape is not as seriously regarded in the Aboriginal community as it is in the European Community (*R v. Gus Forbes*, Northern Territory Supreme Court, Unreported, 29 August 1980. *See also R v. Burt Lane and others*, Northern Territory Supreme Court, Gallop J., Unreported 29 May 1980; and *R v. Mingkilli and others*, South Australian Supreme Court, Unreported, Millhouse J., 20 March 1991).

The first thing which can be said about the two cases which have been highlighted is that they have a very familiar ring to them for any lawyer who has handled Aboriginal cases in the two decades prior to 1992. It is tragic and commonplace for there to be so many homicide cases involving Aboriginal people as victims and for the person accused to also be Aboriginal and to be the male spouse of the deceased.

In commenting upon the two highlighted cases, and others, there is no intended criticism of the lawyers representing the accused in any instance nor of the expert whose evidence was proffered in the second case. A lawyer not only has a legitimate right to advance his or her client's interests—he/she has an obligation to do so. It is not at all uncommon to be instructed that a wound was inflicted as a punishment which was in accordance with Aboriginal custom and tradition. Notwithstanding that, the lawyer might have doubts about whether such an argument will gain much sympathy with the court—especially where the accused was drunk at the time of the offence. However, the lawyer may be obliged to put the matter to the court in accordance with his/her instructions, even if other members of the Aboriginal community would dispute the assertion.

Provocation of the 'Ordinary (Aboriginal) Person'

Reference to Aboriginal custom and tradition most frequently arises in homicide cases as a result of the accused seeking to rely on the defence of provocation. As noted earlier, this defence, if successful, reduces the charge from murder to manslaughter with consequential reductions in the sentence usually resulting. The defence of provocation can only arise where the jury is first satisfied that the accused intended to kill or to cause grievous bodily harm to his/her victim.

Before the defence of provocation may be considered by the jury, the trial judge must first be satisfied that there is evidence upon which a reasonable jury could find the defence established. Although there are important differences in the terms in which the defence is defined by the Criminal Codes of different states, it remains generally true that the defence applies where the accused has lost self-control as a result of the provocative actions or words of the deceased. The jury will be instructed by the trial judge that there are both objective and subjective factors which they must consider.

The jury must first consider whether the wrongful provocative acts were such as to cause an 'ordinary person' to lose self-control so as to do what the accused did. If the jury is not satisfied of that, then the defence has failed at this threshold point.

Having got beyond the threshold point, however, the jury then must consider whether this accused did in fact lose his self-control as a result of the provocation.

In making its objective evaluation as to whether the 'ordinary person' would be so provoked as to kill, the jury are entitled to take into account the age, sex, race, physical features, personal attributes, relationships and past history of the accused person. Thus the question really becomes: 'How seriously would the ordinary Aboriginal person, of the same attributes as this accused, view these provocative acts?'

Thus, to that point, the jury, while applying an objective assessment, is assessing the ordinary person from an Aboriginal perspective. Having thus tried to determine the gravity of the provocative acts from that perspective, the jury must then consider whether those acts could cause the ordinary person to lose self-control to such an extent as to kill as the accused did. But the power of self-control—the capacity to exercise control in response to that provocation—is judged not from the perspective of an Aboriginal person at all, let alone an Aboriginal person with all the history and characteristics of the particular accused. In deciding whether this ordinary person might lose self-control, the only characteristic with which he might be invested is the actual age of the accused. The High Court has recently explained the rationale for this as follows:

> No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test (*Stringel v. R* [1990] 97 ALR 1 at 12).

Very rarely is it the case, anywhere in Australia, that Aboriginal people are members of the jury before whom an Aboriginal person is tried and it would be almost unheard of for there to be a tribal Aboriginal person to be on a jury. So the jury (and the judge too, in considering the objective test in order to decide whether there is evidence fit for the jury to consider the defence of provocation) has to consider how provocative a particular act might be to an Aboriginal person, but must then require that the ordinary person react to that insult with a degree of self-control common to all people.

Clearly, one might be forgiven for thinking the non-Aboriginal jury might benefit from hearing some expert evidence so as to know what things would provoke an Aboriginal person and to know how he/she might react to the provocation, but at this point an anomaly arises. No evidence may be led to the

jury to inform them as to how Aboriginal people are, in fact, affected. The jury must work that out for themselves. This is not something which applies only to Aboriginal people. In a Victorian case where a Turkish Muslim was pleading provocation in defence to the charge of murdering his daughter who had disgraced him by losing her virginity, Lush J., after telling the jury that they could determine the severity of the provocation to a Turkish Muslim of the same attributes as the accused, then added:

> You may be asking yourselves, 'how are we to know what an ordinary conservative Turkish Moslem might have done in these circumstances?' There is no answer to that question . . . the law does not allow the calling of evidence to assist the judgement of the jury on a question like that. It is your problem (*R v. Dincer* [1983] VR 460 at 468).

While juries may be quick to recognise their ignorance about the customs and experience of a Turkish Moslem, they may well consider that they are experts when it comes to Aboriginal people—non-Aboriginals have held that opinion for a couple of hundred years! The blind refusal to acknowledge the fact that Aboriginal people rarely sit as jurors is one of the curiosities of Australian law. In considering the question of how a West African villager might react to provocation, the Privy Council was probably on safer ground when it said that expert evidence could not be called on the issue but that the issue would be resolved by 'the knowledge and common sense of a local jury' (*Kwaku Mensah v. R* [1946] AC 83).

The decision in Stingel's case, if applicable in those jurisdictions where the cross-cultural realities of Aboriginal cases most frequently intruded, would have made it even more difficult to relate European law to the aspirations and understanding of Aboriginal people when homicide occurred on Aboriginal communities. In the Northern Territory, where for many years the courts had adopted rules of practice which attempted to accommodate those cross-cultural realities within the common law, Stingel's case was regarded as having little or no application.

The Court of Criminal Appeal in the Northern Territory considered Stingel's case when deciding *Mungatopi* and noted that the High Court had said that its decision was confined only to an assessment of the Code in Tasmania and that that Code differed significantly from the Codes of Queensland and Western Australia. The Northern Territory Court noted that the Code of the Territory also differed from the Tasmanian Code, especially in its reference to the fact that the ordinary person was to be one 'similarly circumstanced' to the accused.

Therefore, in the Northern Territory, the approach which will continue to be applied to provocation cases will be that expounded by Kearney J. in *Jabarula v. Poore* (68 ALR 26), who said that the ordinary person was of the same race as the accused and in the same location and invested with the same characteristics. Kearney J. said that the ordinary person was one on the remote community where the killing occurred and was a person 'who possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have'.

While confining Stingel's case to the Tasmanian Code will lessen the difficulties experienced by those courts where provocation defences are most frequently relevant to Aboriginal people, the rule against calling evidence on the issues remains a nationally recognised prohibition. There are, however, ways around this restriction which many courts have adopted and which Kearney J. acknowledged when considering the Queensland case of Rankin, ([1966] QWN 10). Kearney J. observed of that case:

> It may be noted that in Rankin a cross-section of such Aboriginals appeared before the jury and gave evidence.
>
> Presumably, this afforded the jury a better opportunity to decide the question whether the provocation met this objective standard as to the loss of self-control. Direct evidence directed to establishing the standard is not, in my view, admissible (*Jabarula v. Poore*, 68 ALR 26 at 34).

Thus, while it is likely that Stingel's case will be of less significance in the Northern Territory, and probably also in Queensland and Western Australia, the decision nonetheless reaffirms the maintenance of objective standards as being critical determinators of the applicability of the defence of provocation. Where the objective standard allows consideration to be given to the situation from the viewpoint of an Aboriginal person then the determination is made, inevitably, by a non-Aboriginal fact-finder and, where the judgement is as to the self-control which could be expected to be exercised, then the question is determined from the perspective of a non-Aboriginal person. In all instances, in theory at least, evidence as to what actually might happen on an Aboriginal community when certain acts and behaviour takes place is not permissible.

Courts in the Northern Territory, Western Australia, Queensland and South Australia have the common experience of the need to attempt to relate the common law and their legislation to the expectations and understandings of Aboriginal people who, most often, are living a tribal lifestyle. This is particularly important when the event under examination is a killing, where passions are highest and where resort to pay-back responses are probable. In these circumstances, interpretations of the law which make the legal process even more irrelevant to the experience and understandings of the Aboriginal community are clearly not welcomed.

There is another factor which makes it even more unreasonable to maintain a rule which prohibits a jury from hearing evidence of what the actual life experience and cultural understanding are of Aboriginal people. Kearney J. noted the problems which the rule against direct evidence imposed at the broadest level and then noted how much more difficult it becomes when confronted by events which occurred at a particular community. As to the broader problem, he said:

> . . . The question (of the ordinary man) is particularly difficult when the fact finder is not a member of the 'community' in question, and that community

> consists of persons whose backgrounds and cultural values are different to his and are recognised by the law as being relevant matters. As I understand the law, the calling of evidence to assist the fact finder to determine community standards is not permitted (*Jabarula v. Poore*, supra at 28).

Kearney J. noted the justification for imposing an objective standard which was based on the understanding of the broader community in the following terms:

> . . . the question of the 'ordinary person' . . . now comes increasingly to the fore as presenting a general problem in Australia's pluralistic society: how to balance individualised justice and cultural pluralism with the need to create a broad sense of community common purpose, and commonly shared values. While Aboriginal communities in the Northern Territory remain as distinct communities possessing a separate culture and a degree of physical separation from the wider community, so the standard of the 'ordinary person' will vary in its application in the Territory (ibid. at 33-34).

It is this question of the cultural diversity of Aboriginal society which creates the second dilemma in applying a rule which prohibits the calling of evidence as to the actual cultural understanding of a community from which the offender comes. It is also an argument for the restriction, given that the greater the diversity of opinion the more difficult it may be for the courts to cope with application of any objective standard at all :

> . . . (The) standard is not 'fixed and unchanging'. The lifestyle of many of the Aboriginal inhabitants of the Territory has greatly changed over the last 30 years. However, there are still many Aboriginal communities such as Ali Curung, relatively isolated, oriented in part to traditional ways of life, and still possessing a distinct Aboriginal cultural identity (ibid. at 34).

As has been noted, Kearney J. held that the ordinary person is not only a person at Ali Curung but is one who 'possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have'.

In the end result, what appears to apply in the defence of provocation is an acceptance by the courts that an objective standard must be applied but that by devices which fall short of actually calling evidence—directed specifically to advising the jury of the reality of understanding of the events as Aboriginal people knew them to be—the blind ignorance of the jury can be partially overcome.

This rather unsatisfactory attempt at compromise is, again, not unique to cases involving Aboriginal people.

In the case of Yildiz, the Court of Criminal Appeal in Victoria (*Yildiz v. R* 11 A Crim R 115) considered whether it had been appropriate that evidence had been called from a Turkish interpreter to advise a jury as to the attitude of the Turkish community towards persons who had engaged in homosexual activities and, in particular, as to the attitude of the community towards a person who played the passive role in such acts. In this case it was the Crown which called the evidence

in order to establish a motive for the murder which took place. The court ruled that such evidence as to 'social attitudes' could be given. The court noted that the evidence did not stray into the prohibited category of evidence where the witness was purporting to give evidence as to the very issue which it was the role of the jury to determine (in fact what was the actual belief and intention of the person charged). It was said that it was a relevant issue to know whether there was a particular attitude held within the Turkish community. Whether the accused held that attitude was a matter to be separately determined.

It is interesting to note that the court in this case accepted that the evidence could have been given by an 'expert' who had made a study of Turkish attitudes on this issue but that it was not necessary for a person to be an expert to give such evidence. As Murray J. observed:

> An adult national can be well and expertly acquainted with the attitude of the population in which he lives towards social issues without having first-hand contact with the persons concerned (ibid. at 125).

The court recognised the dangers of such evidence and the limits of it. The Chief Justice said:

> But evidence of social attitudes is notoriously difficult and imprecise. Many members of the community in this country, in this State or in this city might have great difficulty in answering a question as to the attitude of this community to, for example, homosexual activities . . . The fact that a question is difficult to answer or to answer precisely does not however render the answer inadmissible. It may mean that the answer should be received with caution.

While recognising that the rules relating to the defence of provocation are of long standing and have traditionally maintained an objective overview, given that the defence is a merciful recognition of human frailty but nonetheless only applies when a person has otherwise been adjudged to be a murderer, it is difficult to understand why there would remain such a barrier to the reception of relevant evidence in such cases when there is not in other cases of murder. This is particularly anomalous when the issues could be expected to be outside the life experience of the average non-Aboriginal juror.

The Australian Law Reform Commission (1986, pars 416-27.), in its Customary Law reference, reported that the prohibitions against the calling of evidence on these issues should be removed by legislation. The ALRC noted that in many cases evidence had, in fact, been heard but said that on matters relevant both to provocation and also as to matters which might be relevant to the question of whether the accused had formed an intention to kill, the matter should be put beyond doubt. To date, no legislative response has occurred to that proposal.

Sentencing in Aboriginal Homicide Cases

On sentencing issues the courts have shown much less inhibition in seeking Aboriginal opinion as to the appropriate disposition of the cases. The problem here tends to relate more to the quality of the advice which the courts may receive and as to the extent to which the advice obtained reflects the diversity of opinion which might exist within the Aboriginal community on the relevant issues.

The courts have long recognised that the obtaining of Aboriginal opinion is by no means a simple task. As Muirhead J. observed:

> The court has for many years now considered it should, if practicable, inform itself of the attitude of the Aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on a consultation with Aboriginal communities in remote areas (*R v. William Davey*, Federal Court, Full Court, Unreported, 13 November 1980, pp. 5-6).

The courts have frequently relied upon statements from the Bar table as to community attitudes. When those statements come from the defence counsel, usually from an ALS lawyer or counsel instructed by the ALS, then the conflict of interest problems, earlier noted, can reduce the value of the advice received. The courts have been aware of this problem. Assertions that an accused person has or will suffer payback are frequently made and later evidence has sometimes suggested that the evidence given to the court in this regard was wrong. The case of *R v. Sydney Williams* (South Australia Supreme Court, 14 May 1976, Wells J.) was one illustration where it was claimed that the offender (who later committed a series of assaults on Aboriginal women and was twice imprisoned further) had not undergone the pay-back which the judge was told he would.

The courts have often expressed concern as to the reliability of advice which has been proffered to them. The Federal Court, which heard appeals for many years in the Northern Territory, was moved to observe:

> . . . If it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of an Aboriginal community or tribal group, we are of the opinion that there should be evidence before the court to show that this was indeed the case and that what happened was not simply the angry reaction of friends of the deceased, particularly when the killing of the deceased and the injuries of the appellant occurred at a time when some, if not all, of those participating had been drinking (*Mamarika v. R* [1982] 63 FLR 202 at 206).

It has also been a recurring concern that what is asserted to be behaviour which has its foundation in customary law may in fact not have any legitimacy

in Aboriginal traditional life at all. This concern has been expressed often by the courts when dealing with cases in which an assault or killing of an Aboriginal woman has been the occasion of the charge. Such an assertion was put forward on behalf of a man who beat his wife with an iron pipe and the court observed:

> There was a suggestion made on behalf of the appellant, not by way of justification but by way of explanation, that in Aboriginal society it is not unusual for women to be beaten if they do not obey their husbands. In our opinion that answer goes no further than to describe something which may occur from time to time; it goes no distance towards establishing that such conduct is an accepted facet of Aboriginal society. The suggestion overlooks the fact that, at least in the experience of the courts, when such beatings take place it is usually after a great deal of alcohol has been consumed. It also ignores the very complex web of relationships between men and women in Aboriginal society (*Jadurin v. R*, 44 ALR 424 at 426 [Federal Court, Full Court]).

While the courts have continued to express their interest to learn what the Aboriginal community has to say with respect to the appropriate sentence, the judges have warned that the standard of sentences must meet a broader community standard and not just be determined by what the Aboriginal community asserts is appropriate. Sometimes the sentence will be harsher than that which, so it is asserted, the community considers reasonable. The Australian Law Reform Commission agreed that the courts should not disregard the values and views of the broader society (Australian Law Reform Commission 1986, chapter 21). It was invariably the case that when a sentencing judge announced (in a case involving violence against a spouse) that he would impose a sentence different to that which he had been told the community required, the offender received a heavier sentence as a result. In this respect it could be said that the judges have been more mindful of the rights and opinions of the victims than the lawyers representing the accused persons may have been.

The courts have also been subject, at times, to complaints that the broader interests of the community required that the judges ignore the reality of Aboriginal payback. Very recently (*R v. Minor*, Northern Territory Court of Criminal Appeal, Unreported, 13 January 1992) the Crown appealed against a sentence in a manslaughter case on the basis that, in taking into account the fact that payback was to be inflicted on the accused, the judge had sanctioned unlawful violence. The Court of Criminal Appeal rejected that suggestion. It is to be noted that in this case expert evidence was called during sentencing on this and other aspects relating to community attitudes to the offences.

A review of the cases suggests that there is no lack of willingness of the courts to learn Aboriginal attitudes as to sentence but there remains a continuing difficulty in guaranteeing that accurate evidence is provided and, especially, evidence of the attitudes of the victim and his/her family.

The Role of the Expert Witness

If the courts are to have greater regard to the realities of Aboriginal society and to the opinions of Aboriginal people as to the appropriate disposition of homicide cases, then the first requirement will be that the law is made sufficiently flexible so as to be capable of receiving direct evidence on relevant matters. The next issue is the method by which such evidence is provided to the court. Who should provide the evidence and how should it be evaluated?

As has been noted, many times evidence—directly or indirectly—has come from Aboriginal people themselves. This is clearly very valuable, but there are considerations which have to be taken into account even when the witnesses are Aboriginal. Opinions may be as varied in an Aboriginal community as in any other. Bias and vested interest are no less possible motivations for Aboriginal witnesses than for non-Aboriginal witnesses. Thus it is necessary that, if evidence of 'Aboriginal Opinion' is to be given to the court, efforts should be made to ensure that the court is getting the whole picture. This is a task which has usually fallen on the shoulders of the ALS lawyers and field officers. It is a task which is difficult, not only because of the limited resources available to those services (and time is the most limited of all resources), but is also difficult because of the conflicts of interest which can arise.

There is an important place for the expert witness to assist the court in gaining insight into these questions of Aboriginal opinion and custom. There are many continuing restrictions on the admission of expert testimony and they are well described by Freckelton (1985). While evidence from an anthropologist as to the behaviour of Aboriginal people in given situations might be very helpful to a jury in assessing the circumstances surrounding a homicide, the courts have shown considerable caution in allowing such evidence lest it be the case that the expert is really giving evidence on the very issue which it is the task of the jury to decide. It is this objection which is often decisive in causing the rejection of expert evidence which is directed to the question of the intention of the accused person at the time when a homicide occurs. The general rule has been stated by the High Court in these terms:

> But particular descriptions of persons may conceivably form the subject of study and of special knowledge. This may be because they are abnormal in mentality or abnormal in behaviour as a result of circumstances peculiar to their history or situation . . . But before opinion evidence may be given upon the characteristics, responses or behaviour of any special category of persons, it must be shown that they form a subject of special study or knowledge and only the opinions of one qualified by special training or experience may be received. Evidence of his opinion must be confined to matters which are the subject of his special study or knowledge. Beyond that his evidence must not go (*Transport Publishing Co Pty Ltd v. Literature Board of Review*, [1956] 99 CLR 111 at 119).

The restrictions on the reception of expert evidence are by no means precisely determined and, while there may be a continuing reluctance to expand the role of the expert evidence in areas such as the laws of provocation, the courts have shown a willingness to accept that, in more novel situations, the jury should not be denied the assistance of an expert's testimony.

The Court of Criminal Appeal in South Australia recently accepted that expert evidence could be called in a murder case in support of a defence of duress where the issue was the 'battered wife syndrome'. In this case, the Chief Justice noted the court's reluctance to allow evidence which went to the very question which the jury had to decide, and he commented that the mere fact that the jury would not have had any experience of the syndrome was not a justification for the reception of the evidence, since jurors are constantly asked to consider matters on which they have no life experience. His remarks reflected the traditional concerns of the courts about such evidence. He first noted that the defence of duress (like provocation) had both objective and subjective elements and that the evidence which was sought to be led related both to the likely state of mind of the accused as well as to the general response which women might have when placed in the particular situation. The Chief Justice observed:

> . . . the proffered evidence is concerned not so much with the particular responses of these appellants as with what would be expected of women generally . . . who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences (*Runjanjic and Kontinnen v. R* [1991] 53 A Crim R 362 at 368).

He then considered whether the evidence was in a category in which expert evidence was permissible at all:

> Not all knowledge, however, which is relevant to an issue and which forms part of an organised field of knowledge, may be imparted to a court by means of expert testimony. The law jealously guards the role of the jury . . . as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them (ibid. at 368).

The issue was resolved in favour of allowing the evidence even though it sought to advise the jury of human behaviour in circumstances where juries had, in similar situations, been precluded from hearing such expert evidence because they were required to make their decision notwithstanding their personal ignorance of the situation which they were assessing:

> Nevertheless, some human situations or relations, or the attitudes or behaviour of some categories of persons, may be so special and so outside the experience of jurors . . . that evidence of methodical studies of behaviour or attitudes in such situations or relations, or of the attitudes or behaviour of those categories of persons, may be admissible. The fact that the accused

> person cannot be characterised as an abnormal person or that the evidence relates to the behaviour of normal persons in special situations is not necessarily a bar to the admission of such evidence (ibid. at 368).

As has been noted, the courts have accepted that expert evidence as to attitudes within the Turkish community could be accepted in some circumstances and not in others. The rules as to expert evidence are by no means certain, but on many occasions evidence from anthropologists, sociologists and historians, among other disciplines, has been of great value. It is certainly the case (and has been remarked upon, often with less than approval, by Aboriginal people) that in the Northern Territory there is hardly a community of Aboriginal people which has not been the source of the Ph.D study of at least one such person!

It is certainly not the case that such expert evidence, if available, is necessarily the sole answer to the court's needs. It may be very helpful evidence to complement the evidence obtained from members of the community. On the other hand, it is not axiomatic that such evidence is necessarily itself free from bias nor of subjective considerations which reduce its value. Anthropologists would also, no doubt, remark on their experiences of being called upon by 'defence' lawyers to provide evidence helpful to an accused person but then being unable to accommodate the lawyers because their experience would be more helpful to the prosecution. More often than not, such anthropologists are left to observe that their opinions are then not provided to the court at all.

There is little doubt that the Aboriginal communities want their opinions heard by the courts. They want those aspects of Aboriginal society which they believe are relevant to offences to be known by the courts. Such opinions were emphatically stated to the Royal Commission into Aboriginal Deaths in Custody as they had been years before to the Australian Law Reform Commission. The courts have stumbled along trying to find mechanisms which allow that expression of opinion to be heard. It will not adequately be heard until legislative change allows for evidence to be called on issues relevant to the defences in homicide charges and until the resources available to Aboriginal communities permit them the opportunity to present the diversity of Aboriginal opinion which arises after any homicide.

If there is legislative recognition given to the entitlement of the courts to hear evidence directly relevant to Aboriginal customs and behaviour—and to more precisely determine the manner in which Aboriginal opinion (and the diversity of such opinion as to sentence) may be provided to the courts—then it may well be that there will be pressure to incorporate into any such regime a mechanism to ensure that the diversity of non-Aboriginal opinion may also be heard more clearly. Roden J., in considering sentence of an Aboriginal man who had been convicted of the manslaughter of a non-Aboriginal, received much evidence relating to the difficult life of an Aboriginal person in Brewarrina, New South Wales. He found the evidence helpful but expressed concern that he did not then have the same amount of information from a non-Aboriginal perspective. He remarked:

> Of course I do not advocate that sentences be passed 'on behalf of' victims; nor should revenge be the object of sentencing. But so long as we respect community attitudes as a relevant consideration in the assessment of sentence, we should recognise the fact that one factor operating to mould those attitudes, is respect and regard for the violated rights of the victims of crime. They would better understand sentencing decisions, I believe, if they were given an opportunity of being heard before those decisions were made (*R v. Wise*, Supreme Court, New South Wales, Roden J., Unreported 19 October 1988).

Conclusion

While there is continuing evidence of Aboriginal dissatisfaction about the inability of the courts to fully take into account Aboriginal customs and experience in determining the guilt or innocence of offenders charged with homicide, and also as to the considerations which should be taken into account in sentencing such offenders, there is by no means a united Aboriginal opinion on these matters. Increasingly, there have been complaints by and on behalf of Aboriginal women that the legal system—and the Aboriginal Legal Services themselves—while providing a commendable service to Aboriginal men, have failed to represent the opinions of Aboriginal women, who are most often the victims of homicide in Aboriginal communities. There have been many complaints, not always publicly made, that submissions on behalf of Aboriginal men have mis-stated Aboriginal customary laws and traditions.

Before any moves are made to legislate so as to ensure that the courts are freed from restrictions in the reception of evidence as to Aboriginal customs and opinions, it will first be necessary for the Aboriginal Legal Services to seek the opinions of their constituents in reconciling the, at times, competing interests of those Aboriginal people whose civil liberties they must protect when they are accused of crimes and those Aboriginal people whose civil liberties have been violated when they have become the victims of crime.

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