SENTENCING ABORIGINAL OFFENDERS

I: THE PRINCIPLES DISTILLED IN R v FERNANDO

The main decision in relation to the specific considerations when sentencing Aboriginal offenders is R v Stanley Edward Fernando.\(^1\) Fernando was a sentencing decision by Wood J sitting in the Supreme Court.

Fernando was sentenced for Malicious Wounding. The victim was his de facto partner. The offence had occurred after a period where both the victim and the defendant had consumed large amounts of alcohol.

Fernando was forty-eight years old at the time of sentencing. He normally lived on an Aboriginal Reserve at Walgett. He had an extensive criminal record.

There were numerous decisions prior to Fernando dealing with sentencing principles relating to Aboriginal offenders.\(^2\) In Fernando, when addressing the difficult problem of sentencing the defendant, Wood J distilled the following principles from these cases and other cases in relation to the sentencing of Aboriginal offenders:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders’ membership of such a group.

(B) The relevance of the aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw

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\(^1\) (1992) 76 A Crim R 58.
\(^2\) See, for example, R v Iginiwunci Unreported, Supreme Court, Northern Territory, 12 March 1975; R v Peter Unreported, Supreme Court of Queensland, 18 September 1981 per Dunn J; Neal v R (1982) 149 CLR 305 especially at 326 per Brennan J; R v Rogers & Murray (1989) 44 A Crim R 301.
light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
(F) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.3

_Fernando_ was approved by the Court of Criminal Appeal in _R v Hickey_4 and has been applied in a number of subsequent cases.

The purpose of this paper is to explore exactly what it means to apply these principles in the sentencing of Aboriginal offenders.

**II. THE FERNANDO PRINCIPLES AS A RECOGNITION OF THE DISADVANTAGES ASSOCIATED WITH ABORIGINALITY**

The _Fernando_ principles do not automatically apply in every case.5 The _Fernando_ principles do not state that Aboriginality of itself is a mitigating factor. An offender submitting that the _Fernando_ principles apply in a particular case must establish the disadvantage that he or she has suffered as a result of his or her aboriginality.

4 Unreported, Court of Criminal Appeal, 27 September 1994.
5 For examples of cases where the _Fernando_ principles were found not to apply, see _R v Grant_ [2001] NSWSC 552; _R v RLS_ [2000] NSWCCA 175; _R v Elemes_ [2000] NSWCCA 235; _R v Pitt_ [2001] NSWCCA 156; _R v Kirkwood_ [2001] NSWCCA 184; _R v MLW_ [2001] NSWCCA 133.
What is stated above is evident from the following passages from Wood CJ at CL in *R v Pitt*, which sets out the role that the *Fernando* principles play:

As I pointed out in *Ceissman* (2001) NSWCCA 73, there is a danger of misinterpreting *Fernando* (1992) 76 A Crim R 58 as a decision justifying special leniency on account of an offender's aboriginality. The error in that approach was recognised in *Hickey* NSWCCA 27 September 1994, where Simpson J noted that the first of the eight propositions stated by me in *Fernando*, was "that sentencing principles are not discriminatory in that they apply to all accused without differentiating by reason of the offender's membership of a particular racial or ethnic group.

In *Powell*, Simpson J similarly noted that it is a mistake to rely on *Fernando* as authority for a proposition that aboriginal heritage of itself is a mitigating circumstance, and warned that care must be taken to ensure that recognition of the social and economic problems that frequently attend aboriginal communities, and the principles stated in *Fernando*, do not have the unintended consequence of devaluing the effect of offences on victims.

What *Fernando* sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.

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III: APPLICATION OF THE FERNANDO PRINCIPLES

In the twelve years since the decision in *Fernando*, the *Fernando* principles have been applied variably and inconsistently.

In the sentencing of Aboriginal offenders, the *Fernando* principles:

- Have been mentioned, but no discussion of the principles has been undertaken.\(^7\)

- Have not been referred to at all.\(^8\)

- Have not been applied, where the defendant or appellant's Aboriginality was not referred to at all.\(^9\)

- Have been restricted to applying only to Aboriginals from country and remote areas.\(^10\)

- Have been limited in terms of whether the crimes committed were "aboriginal crimes" or "non-aboriginal crimes".\(^11\)

- Have been found to have an 'expiry date',\(^12\) although this has also been rejected in other cases.\(^13\)

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\(^13\) See *R v David Cook* [1999] NSWCCA 234; *R v Petersen* [2000] NSWCCA 47.
• Have been referred to in a consideration of whether it would be appropriate to set a guideline judgment when the *Fernando* principles would apply to a number of defendants who would be affected by that guideline judgment.\(^\text{14}\)

**IV. WAYS IN WHICH THE *FERNANDO* PRINCIPLES CAN BE APPLIED TO THE SENTENCING OF ABORIGINAL OFFENDERS**

These are ways that the *Fernando* principles can be applied in the sentencing of Aboriginal offenders.

**A. Fixing the length of sentences**

The *Fernando* principles can be taken into account in fixing the length of sentences.

An example is *R v Hickey*,\(^\text{15}\) which was a Crown inadequacy appeal. The sentencing Judge took into account the defendant's disadvantaged background in setting the sentences that were imposed. Although the Court of Criminal Appeal found that the sentencing Judge had attached undue weight to these factors, it is clear that the *Fernando* principles, where applicable, are still to be taken into account in fixing the length of sentences.

In the severity appeal of *R v Weldon*\(^\text{16}\) the *Fernando* principles were found to require a consideration of the actual period of incarceration to be served. The Court of Criminal Appeal left the head sentence unchanged but reduced the non parole period.


\(^{15}\) Unreported, Court of Criminal Appeal, 27 September 1994.

\(^{16}\) [2002] NSWCCA 308 at paragraph 13.
In *R v Ridgeway*\(^{17}\) the appellant's subjective considerations were expressly taken into account when the Court of Criminal Appeal found that the sentencing Judge had imposed excessive sentences.

A final example is *R v Alan Leonard*.\(^{18}\) This was a severity appeal following sentencing in the District Court for Armed Robbery. The applicant's subjective background was taken into account in fixing the sentence imposed.

*Leonard* is a case where the Court of Criminal Appeal did not refer to the *Fernando* principles in the judgment. However, the *Fernando* principles must have been considered, having regard to the fact that Adams J stated that:

> There is no doubt that in this State, indeed, throughout Australia, people of aboriginal descent are represented at a proportion which is tragic and having regard to the undoubted difficulties which they have in prison, it is desirable in those cases especially to attempt to devise the lowest possible sentence that is appropriate having regard to the circumstances of each case.\(^{19}\)

**B. Finding special circumstances**

Although Aboriginality alone does not automatically mean that special circumstances are found, *Fernando* principles (C), (F) and (G), if applicable, should usually lead to a finding of special circumstances.

There have been a number of cases where the *Fernando* principles have been applied in finding special circumstances.\(^{20}\)

Section 44 *Crimes (Sentencing Procedure) Act* as it existed between 1999 and February 2003 stated that for sentences of imprisonment of longer than

\(^{17}\) Unreported, Court of Criminal Appeal, 16 July 1998.
\(^{18}\) Unreported, Court of Criminal Appeal, 22 November 1996.
\(^{19}\) Id at 2.
\(^{20}\) See *R v Lana Ryan* [2002] NSWCCA 171; *R v Toomey* Unreported, Court of Criminal Appeal, 22 July 1998; *R v Ah See* [1999] NSWCCA 175 especially at paragraph 16; *R v Cook* [1999] NSWCCA 234 especially at paragraph 35.
six months, a head sentence was set and then a non parole period was set, which was to be three quarters of the head sentence. If special circumstances were found to exist, a sentencing judge could reduce the non parole period to reflect this finding.\textsuperscript{21}

For offences that occurred after 1 February 2003 the procedure for finding special circumstances is in different terms.\textsuperscript{22} The procedure that is to be followed is that when a sentence of imprisonment is imposed, that firstly a non-parole period will be set, and after this then the balance of the term of the sentence will be set. The balance of the term of the sentence must not exceed one third of the non-parole period for the sentence unless the court decides that there are special circumstances for it being more.

There are differing opinions as to how this amendment to the legislation changes the structure of sentences when special circumstances are found. However, the nature of the non parole period is as stated in the High Court’s decision in \textit{Power v The Queen} (1974) 131 CLR 623 at 628: that confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the non parole period and the parole period is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter, prisoner can.

This view of the purpose of a non-parole period has been routinely cited with approval and applied by the Court of Criminal Appeal ever since \textit{Power v The Queen}, regardless of what legislative scheme was in place for governing the parole of prisoners. Unless over-turned by a clear legislative intent, it will continue to apply to future regimes.\textsuperscript{23}

\textsuperscript{22} The section was amended by the \textit{Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002}.
\textsuperscript{23} See \textit{R v Royal} [2003] NSWCCA 275 at paragraph 4 per Wood CJ at CL and Howie J.
C. The disadvantages of aboriginality as an explanation of offending behaviour

Principle (B) in *Fernando* draws attention to Aboriginality as providing some explanation of the commission of criminal offences.

The disadvantages of Aboriginality as an explanation of the causes of offending behaviour has been accepted in Canada, where the Supreme Court has recognised that:

The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.24

In New South Wales, in *Regina v Stanley John Fernando*25 the Spigelman CJ (with whom Wood CJ at CL and Kirby J agreed), stated that:

As is well established, it is a primary objective of sentencing for criminal offences that the community must be protected from the commission of crimes, by deterring both the particular offender and other possible offenders - referred to as personal and general deterrence respectively. In a case of the character now before the Court, by an offender with this record, the protection of the community requires a substantial period of imprisonment. It is, however, often the case that such considerations of deterrence are properly tempered by considerations of compassion which arise when the Court is presented with information about the personal circumstances which have led an individual into a life of crime.

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25 [2002] NSWCCA 28 at paragraph 64.
In appropriate cases, subjective matters can be put forward as explaining the very cause of a defendant’s offending behaviour. *R v Stanley John Fernando* is an example of such a case. There, Spigelman CJ stated that:

> The circumstances of the present case are, regrettably, repeated across the entire community. This Court frequently hears appeals from young people who have suffered deprivation in their personal life, have succumbed to addiction - usually first to marijuana and then to heroin - and committed crimes of burglary and armed robbery in order to acquire funds to feed the habit.\(^{26}\)

### D. Recognising the legacy of dislocation and dispossession of Aboriginal people as causes of offending behaviour

There have been a small number of criminal cases where courts have been asked or have come close to recognising the relevance of dispossession and dislocation on Aboriginal offenders.

Fitzgerald P said in *R v Daniel*\(^ {27}\) that:

> Irrespective of race, the criminal justice system increasingly merely punishes those who are the product of deficient or failed social policies. It is at least implicitly accepted in many of the passages quoted above that there are often two victims involved in offences committed by Aborigines, especially drunken Aborigines, one the victim of the offence and the other the offender, whose race has been tragically affected by the colonisation of this country, harsh treatment, dispossession, the separation of children from families, the introduction of European diseases, and the misuse of alcohol and, more recently, other drugs. A refusal to reduce the sentence which would otherwise be appropriate in all the circumstances, including considerations personal to the

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\(^ {26}\) Id at paragraph 69.
\(^ {27}\) [1998] 1 Qd R 499 at 531.
offender, can appear to be an obdurate denial of the harm experienced by the Aboriginal race since British settlement.

In *R v Welsh*\(^2\) Hidden J recognised that:

... [m]uch of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture.

In *R v Burke*,\(^2\) which was a sentencing decision in the Supreme Court for Murder, Greg James J said in his remarks on sentence:

It is not necessary to go so far as to exemplify her life as a direct result of the problems faced by members of the Aboriginal community in the remoter locations of Australia, nor does the evidence on this plea deal with the more general phenomenon of deprivation and dispossession suffered by the Aboriginal community, but it is enough, and the evidence persuades me, that the conditions personal to her of alcoholism, emotional disturbance and intellectual impairment and the deprived lifestyle in which she has been involved are such as to set a context for conditioning her to react in the way in which she did under whatever the emotional stimulus she suffered that night.\(^3\) (Emphasis added).

Greg James J went on in *Burke* to state that:

To what the Crown had said in this regard should be added the considerations referred to in *Fernando* (supra) which require regard to be had to the particular aspect of alcohol abuse and violence within aboriginal communities so that the sentence is so crafted as to afford an opportunity for the future to avoid any further involvement on her part in the circumstances which would give rise to violence. The

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\(^3\) Id at paragraph 44.
realistic recognition by the court not only of the endemic presence of alcohol within such communities as she might come in contact with but of the effect of alcohol in inducing violence within these communities requires that the court have regard to that matter in the form of sentence which it passes in the hope of avoiding the offender's further resort to violence.\textsuperscript{31}

These considerations were all relevant in Greg James J fixing a sentence of imprisonment of nine years with a non parole period of five years.

In \textit{R v Raymond Reid}\textsuperscript{32} Bell J, in sentencing the defendant for Maliciously Inflicting Grievous Bodily Harm, stated that:

\begin{quote}
Certain of the principles which his Honour enunciated in \textit{Fernando} do not seem to me to have a place in the exercise of my sentencing discretion in this case. The prisoner is not a person with little experience of European ways for whom a lengthy period of imprisonment may be unduly harsh. However, his deprived background, steeped as it was in alcohol abuse, violence, and neglect, is reflective of the dislocation and demoralisation of many Aboriginal persons living in rural areas of New South Wales. I consider that notwithstanding his history of criminal offending, he remains entitled to a measure of mitigation of sentence on account of this consideration. It remains necessary to give due weight to the objective seriousness of this offence.\textsuperscript{33} (Emphasis added).
\end{quote}

The reference to the dislocation of the offender in each case was slight. However, each reference was an important one.

\textsuperscript{31} Id at paragraph 57.  
\textsuperscript{32} [2001] NSWSC 1084.  
\textsuperscript{33} Id at paragraph 31.
Recognising these issues, and the systemic discrimination of Aboriginal people (which can occur even in the sentencing process\textsuperscript{34}) is important in explaining the causes of criminal behaviour.

In Canada it is accepted that these considerations will affect the nature and length of the sentence to be imposed in each case.\textsuperscript{35}

**E. Explaining the difficulties in prison experienced by Aboriginal offenders**

In *Fernando*, principle (G) refers to the difficulties when Aboriginals are sentenced to lengthy terms of imprisonment. There has been an extension of this principle, which is illustrated in the following cases.

In *R v Elemes*\textsuperscript{36} Adams J stated that:

\begin{quote}
One of the material factors - although I use my own language and not that of Wood CJ at CL - is that in the gaol environment especially, aboriginal people find themselves quite often in the position of being foreigners in their own country. This is not mere sentimental consideration. It is an important part of the process of considering the impact of punishment by way of imprisonment on persons from a particular background, and the proper function of the criminal law in that respect.
\end{quote}


\textsuperscript{35} *R v Gladue* [1999] 1 SCR 688 at paragraphs 68 - 69.

\textsuperscript{36} [2000] NSWCCA 235 at paragraph 37.
In *R v Russell* Kirby ACJ referred to a:

...[G]eneral concern of the community, shared by the judiciary, that there are extremely high proportions of Aboriginals in prison. Present sentencing law does little to alleviate this problem or indeed to lessen the rate of offending.

Although, quite clearly, a custodial sentence was appropriate and necessary in the present case, the usefulness of long custodial sentences for Aboriginal offenders must increasingly be called into question in light of the Royal Commission and the other reports, produced in recent years.\(^{37}\)

These cases extend the *Fernando* principles because they go beyond mere consideration of the difficulties that Aboriginals face when they are sentenced to lengthy terms of imprisonment. The approaches taken in these cases consider the actual difficulties faced in custody irrespective of the length of the sentences of imprisonment, as well as whether there is any benefit to the imposition of lengthy sentences of imprisonment on Aboriginal offenders.\(^{38}\)

**F. Explaining the use of drugs in Aboriginal communities**

In *R v Stanley John Fernando*\(^ {39}\) the Court of Criminal Appeal dealt with an appeal against inadequacy by the Crown for the respondent who was sentenced for six charges of Armed Robbery and one charge of Use Offensive Weapon to Prevent Apprehension. The Crown inadequacy appeal was allowed and the respondent was re-sentenced.

The importance of *R v Stanley John Fernando* is that the Court considered more than the circumstances of alcohol abuse, which *Fernando* was limited

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\(^{38}\) *Russell* is also important because the particular difficulties of Aboriginal offenders who have a hearing loss were referred to. Kirby ACJ referred to the particular correlation between hearing loss, Aboriginality and the criminal justice system.

to, but also considered the circumstances of addiction to drugs. The circumstances of the respondent's addiction to drugs was firstly an addiction to marijuana and then an addition to heroin, followed by the commission of crimes to acquire funds to feed this habit.

This case therefore represents an extension of the *Fernando* principles. It shows that the social changes since *Fernando* have been taken into account.

V: THE EFFECT OF RECENT CHANGES IN SENTENCING ON THE SENTENCING OF ABORIGINAL OFFENDERS

A. Restorative justice principles in sentencing

One of the amendments to the *Crimes (Sentencing Procedure) Act* brought about by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* is that a new section, section 3A, has been introduced, which sets out the purposes of sentencing.

Section 3A states:

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

To examine what subsections (d), (e) and (g) mean, a comparison with the Canadian Criminal Code is helpful. The Canadian Criminal Code governs, among other matters, sentencing in Canada.

Canadian Criminal Code, RSC 1985, s 718(2) is in these terms:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

While the Canadian provisions go further than the New South Wales provisions (for example, in referring to promoting "a sense of responsibility in offenders" rather than "to make an offender accountable for his or her actions") the two sets of provisions are sufficiently similar so that an
interpretation of the Canadian provisions assists in interpreting the New South Wales provisions.

The Supreme Court of Canada examined what changes to sentencing had been brought about by section 718 in *R v Gladue*.40

The Court said:

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (d), (e), and (f) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process … In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders.41 (Emphasis added).

In the application for a guideline judgment in New South Wales in relation to offences of Assault Police42 the Chief Justice said that:

Further, this Court did not receive submissions about the impact of s3A of the 1999 Act which also takes effect from 1 January 2003. It is arguable that some of the "purposes of sentencing" which must now
guide sentencing decisions constitute a change of pre-existing sentencing principle.

For example, "prior" case law refers to the role of sentencing to protect the community, but that objective was often said to be achieved by means of rehabilitation, deterrence or retribution. Section 3A(c) now suggests that this should be regarded as a separate "purpose" and one concerned with protection of the community "from the offender".

It may also be arguable that s3A(c) - making the offender "accountable" - introduces a new element into the sentencing task. The same may be true of the reference to "harm" to "the community" in s3A(g).

In the absence of argument, I would not wish to be understood to be expressing a view on these matters.

B. What is restorative justice?

Restorative justice has many different meanings. It is often used in the context of diversion from court, such as the scheme of youth justice conferencing under the Young Offenders Act 1997, and other alternatives to the traditional sentencing process.

In this current discussion, restorative justice is analysed as part of the sentencing process.

The Supreme Court in Gladue defined restorative justice as:

In general terms … an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as
the offender. The focus is on the human beings closely affected by the crime.\textsuperscript{43}

The Court compared the different approaches to sentencing in these terms:

Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.\textsuperscript{44}

C. How are restorative justice principles taken into account in sentencing?

Section 3A does not give any guidance as to which of the purposes set out is to have priority in any given sentencing exercise.

In appropriate cases emphasis can be placed on the restorative justice aspects of sentencing.

The following changes will flow from a consideration of restorative justice principles:

- Restorative sentencing goals do not usually correlate with the use of prison as a sanction.\textsuperscript{45}

\textsuperscript{43} Id at paragraph 71.  
\textsuperscript{44} Id at paragraph 72.  
\textsuperscript{45} Id at paragraph 44.
• Through its reference to the community, restorative justice principles would lead Judges to consider whether imprisonment would actually serve to deter or to denounce crime in a sense that would be meaningful to the community from which an offender comes from. In many instances, more restorative sentencing principles will gain primary relevance because the prevention of crime as well as individual and social healing cannot occur through other means.46

• Sentencing Judges would have to consider the place of the offender within the community, and to enquire as to what understanding of criminal sanctions is held by the community, and what the nature of the relationship is between the offender and his or her community.47

None of these considerations mean that sentences of full time imprisonment will no longer be imposed. In appropriate cases, though, these submissions are open to be made.

VI: THE IMPORTANCE OF A PROPER ASSESSMENT OF THE FERNANDO PRINCIPLES IN EACH SENTENCING DECISION

The Fernando principles are not a set of principles that should be referred to by advocates or by judicial officers in the sentencing of Aboriginal offenders. The principles should be explored in the context of the particular circumstances of the Aboriginal offender who appears before a sentencing court.

Adams J in R v Elemes48 explained why a meaningful analysis of the Fernando principles is required:

The principles set out in R v Fernando (1992) 65 A Crim R 98 are to my mind extremely important. In dealing with them a Court must anxiously

46 Id at paragraph 69.
47 Id at paragraph 80. See also Daniel Kwochka "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Saskatchewan Law Review 153.
consider whether the aboriginality of the offender calls for any
adjustment to be made having regard to the matters set out to my mind
comprehensively and appropriately by Wood CJ at CL, as he is now.
Repeating that *Fernando* principles have been taken into account as
though it was some kind of mantra is not an appropriate way of dealing
with the fundamental issues to which that case draws the attention of
sentencing courts and the law.

In the circumstances of this case I consider that more was required by
his Honour than a mere reference to *Fernando*. It is important that the
principles it states become a clearly understood part of the way in
which sentencing courts deal with aboriginal people. Attempts should
be made to explain why results follow and why a particular analysis
leads to particular conclusions having regard to those matters.

This offender was entitled to know, as was his community and his
friends, as well as the wider Australian community, why it was that what
had been said in *Fernando* relating to his aboriginality applied, only
slightly applied, or did not apply at all.

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APPENDIX I: SELECTED LIST OF CASES DEALING WITH THE SENTENCING OF ABORIGINAL OFFENDERS


Jabaltjari v Hammersley (1977) 15 ALR 94.


R v Ah See [1999] NSWCCA 175.


R v Dennis [2003] NSWCCA 137.


R v Grant [2001] NSWSC 552.


R v Lake [2003] NSWCCA 27.

R v Alan Leonard Unreported, Court of Criminal Appeal, 22 November 1996.

R v Cynthia Leonard Unreported, Court of Criminal Appeal, 22 April 1996.


R v MLW [2001] NSWCCA 133.


R v Peckham [2003] NSWCCA 293.

R v Petersen [2000] NSWCCA 47.

R v Pheeney Unreported, Court of Criminal Appeal, 3 April 1998.
R v Pitt [2001] NSWCCA 156.


R v RLS [2000] NSWCCA 175.


R v Rogers and Murray (1989) 44 A Crim R 301.


R v Timbery Unreported, Court of Criminal Appeal, 1 April 1996.


APPENDIX II: SELECTED LIST OF ARTICLES RELATING TO THE SENTENCING OF ABORIGINAL OFFENDERS


Susan Haslip "Aboriginal Sentencing Reform in Canada - Prospects for Success: Standing Tall With Both Feet Planted Firmly In The Air" (2000) 7(1) Murdoch University Electronic Journal of Law [71]

Margaret A Jackson "Canadian Aboriginal Women and Their 'Criminality': The Cycle of Violence in the Context of Difference" (1999) 32 Australian and New Zealand Journal of Criminology 197.


Carol La Prairie "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" (1990) 32 Canadian Journal of Criminology 429.


