> It [the decision of the Court] is a conclusion which offers some protection to the citizen against the legislative practice of conferring statutory discretions on a Governor in Council instead of the Minister or a statutory officer in the hope of thereby avoiding judicial review, particularly for want of compliance with the rules of natural justice, in circumstances where the legislature does not directly dispense with the duty to accord natural justice.[40]

It is the opinion of the writer that the Court will now move towards the view of Stephen J. that the duty to accord natural justice and judicial review thereof will attach to the Governor in Council or not depending on the nature of the decision to be taken. A broad distinction has been made between decisions taken on the basis of an automatic application of policy irrespective of considerations personal to the individual and decisions in which such personal considerations may influence the outcome.[41] The duty attaches to the latter but not the former class. If the Court moves in this direction the distinction may need to be refined.

Whether this decision is likely to lead to the Governor in Council becoming subject to review on other grounds is an open question. However, given the attitude of the Court that review of a decision of the Executive Council does not reflect personally on the Governor, the width of Mason J.'s *dictum* quoted above, and the judicial trend shown by *Ex parte Northern Land Council* and this case, such a possibility is well within reasonable contemplation.

MARK SNEDDON*

R. v. PETER[1]

Criminal Law — Murder — Manslaughter — Abnormality of mind under Queensland Criminal Code — Diminished responsibility of Aboriginal defendant as a factor in sentencing.

> Our case is shortly this: in Queensland, there have been created communities in which the incidence of homicide and very serious assaults is amongst the highest that has been recorded and published anywhere in the world. It is, for example, thought to be at least equivalent to that which is found in the poorest and the most violent ghettoes of New York. Now, Deidre Gilbert, the deceased girl, and Alwyn Peter, the prisoner, were the members of one such community, and they were shaped by it and each has been destroyed by it. Now, I should tell Your Honour that to be a member of such a community one does not have to be bad or mad, but one has to be an Aborigine. . . .[2]

The plight of the Aboriginal living on government-created reserves is a matter of particular concern to Australia's legal profession. As counsel for the accused remarked in the recent case of *R. v. Peter* 'the problems . . . that bring him before this court are the problems of his situation; . . . It is impossible to discuss the moral responsibility of Alwyn Peter unless one talks about the situation in which he lived.'[3] And yet if the law is to be instrumental in breaking the cycle it must not only grapple with questions of guilt or innocence, it must also consider ways of preventing crime so as to protect the individual in society. With violence endemic in the local Aboriginal settlements, Queensland's Public Defender decided that Alwyn Peter be a test case to explore the

[40] Judgment 23.
[41] *Ibid.* 49 *per* Wilson J.

* A student of Law at the University of Melbourne.

[1] Unreported decision, Queensland Supreme Court, 18th September 1981.
[2] Opening submission of Mr D. G. Sturgess for the Defence in *The Queen v. Alwyn William Peter*, Brisbane 8 September 1981, Transcript 8-9.
[3] Transcript 30.

reasons for the statistics. The resultant trial — reported by the press as a milestone in Criminal Justice[4] — sheds sympathetic light on the obstacles facing the accused, but it leaves open some important legal and moral questions. In advocating an extension to the defence of diminished responsibility the case says nothing about the victims of crime and their right to protection under the law.

THE PROBLEM

Peter was a 24 year-old full-blood Aborigine charged with the murder of his *de facto* wife at Weipa South Aboriginal Community on 7 December 1979. As in so many similar cases the Defendant appears to have been under the influence of alcohol when he stabbed his victim and could give only a confused explanation of his conduct.[5] Although their aim was to put a human face to the accused, it is perhaps ironic that his counsel chose to do this by denying Peter's most uniquely human attribute: his freedom of choice. In the 21 months leading up to his trial, the defence assembled evidence from eminent psychiatrists, psychologists, anthropologists and other experts in Aboriginal affairs with a view to showing the court that Peter's actions were an 'amoral reaction' or the consequence of his upbringing.

The immediate practical effect of this approach was that the Crown withdrew the indictment for murder and accepted from the defendant a plea of guilty to manslaughter. When the case finally came to be heard before Mr Justice Dunn in Brisbane,[6] the defence of diminished responsibility was no longer strictly relevant. In spite of this, counsel chose to argue the defence as they posited their plea for leniency in sentencing.

Under section 304A of the Queensland Criminal Code, murder is reduced to manslaughter if, at the material time, the accused was 'in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes . . .) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission . . .'. Under the Code, intoxication alone cannot constitute an abnormality of mind. Accordingly, the defence argued that Peter suffered from an 'arrested development of mind' in the sense of being '[u]ntrained by any process of socialization to fit within a society into which . . . [he] was born; . . .'[7]

Unable to identify fully with either his aboriginal ancestry or the lifestyle of Europeans, Peter was presented as living in a state of 'anomie' or normlessness which was aggravated by poverty, a lack of educational and job opportunities and by alcoholism. It was argued that because of the paternalistic nature of the administration of aboriginal reserves, this sensation of being stranded between two cultures produced psychological disturbances quite different from those observed among other estranged or poverty-stricken minority groups. Not only was the accused unfamiliar with the normal principles or rules governing white society, he was also part of a 'sub-culture' based on subservience and dependence akin to that seen in an institution or orphanage.[8] According to defence witnesses,[9] this was reflected in the extraordinarily high incidence

[4] See reports in Brisbane's *Courier Mail* 19 September 1981; *Sydney Morning Herald* 19 September 1981; *The Age* 19 September 1981.

[5] The accused claimed to have been angered by an earlier act of infidelity. See Transcript 2.

[6] The case first came before his honour at the Cairns Circuit Court on 29 July 1981, when it was adjourned to enable it to proceed in Brisbane.

[7] Transcript 221.

[8] On this point see, further, Eggleston E., *Fear Favour or Affection* (1976) Chapter 8.

[9] See for example the evidence of P. R. Wilson, criminologist, Transcript 52 ff; *cf.* M. J. Foley, Sub-Dean of Faculty of Social Work, University of Queensland, Transcript 186 ff; *cf.* I. H. Jones, psychiatrist, University of Melbourne, Transcript 251 ff.

of self-mutilation and inter-personal or domestic violence found on the government reserves which contrasts sharply with the pattern of violence found in even the most depressed of the world's ghettoes.

Professor Stanner, through his anthropological assessment of the Weipa Community, drew attention to the most crucial factor attaching to Peter's situation: with the disintegration of his society came a loss of the 'inbuilt mechanisms of personal restraint which in the tradition limited or guided the aggressive impulses of aborigines'.[10] When the frustrations of reserve life are compounded by the tensions of living in an abnormally crowded community of people taken from a variety of mutually hostile tribal groups,[11] the inability to subvert feelings of aggression leaves the individual totally unequipped to cope with his situation. As defence counsel showed it was characteristic that Peter's violent impulses were directed against himself and those nearest to him.

Some trouble was taken to establish the defendant's inate intelligence.[12] This fact, counsel contended, made his psychological reactions to his environment — or his 'arrested development of mind' — more, not less understandable. Indeed it must be accepted that full development of mind requires an environment of tradition and culture marked by stability or only gradual change. Astonishing figures were elicited from the expert witnesses[13] showing the prevalence of violence on government reserves. For example, the homicide rate amongst Aboriginals on Queensland reserves was ten time higher than both the State and national average and anything between seven and forty times higher than the rates recorded in Queensland's other regional centres. 39.6 homicide cases per 100,000 inhabitants is almost double the rates recorded in New York and Chicago.[14] Further, assaults between Aboriginals on reserves was reported by the Police Commissioner to be 226.05 per 100,000 inhabitants, compared with the Queensland State average of 33.85 per 100,000. Although comprising only 2% of the State's population, it was found that 14% of the inmates of Queensland's gaols are Aboriginals. Ninety-five percent of offences committed by these people involved alcohol and over half were cases of intra-familial disputes.[15] Such figures were reflected in Alwyn Peter's family history; his younger brother had been involved in much the same kind of trouble.[16]

The true nature of this line of argument will only emerge in the context of a fully contested murder trial. Nevertheless the invocation of the defence of diminished responsibility on the *Peter's* case represents an interesting development and would seem to point towards some extension of that doctrine. His Honour, Mr Justice Dunn, chose not to comment on the form of the defence's argument other than to say that the evidence of the experts was 'indeed thought-provoking'.[17] Instead, he noted that he and his brother judges were aware of the special problems existing in Aboriginal

[10] Transcript 199. See the descriptions of the 'ritualized' fights of traditional Aboriginal society, Transcript 228 ff.

[11] See comments of Professor Cawte, discussed Transcript 206.

[12] See the evidence of D. W. McElwain. Transcript 188-98.

[13] See the evidence of P. R. Wilson, criminologist, at 36 ff. of the transcript.

[14] Cited as 20.8 and 25.5 per 100,000 respectively see Transcript 38.

[15] For further statistics see *Law Reform Commission Discussion Paper* No. 17 November 1980, 37 ff.

[16] Alwyn's brother Sydney was convicted of stabbing a girl, Geraldine, with whom he was living. Geraldine was the daughter of one Harold Motton who was found guilty of murdering his first and second wife. While Sydney was in gaol, she married a man who had killed his first wife in 1974 and who ended up killing Geraldine. See Transcript 48-9.

[17] See Transcript of Sentence 2. See also 1, where His Honour said: 'The evidence also shows that, whilst alcohol is usually the trigger which releases violence, there are other factors to take into account. It is indeed because of those factors that so much uncontrolled drinking takes place'.

communities and that a practice had been developed to take this into account in sentencing offenders. After waiting 21 months to come to trial Alwyn Peter was therefore recommended for immediate parole on condition that he undergo a programme of rehabilitation to be administered by the Queensland Alcohol and Drug Dependence Service.

COMMENT

Whether or not one agrees with this extension of the defence of diminished responsibility must depend on the function one ascribes to Criminal Law. If the sole purpose of the law is to punish guilty individuals the decision in *Peter's* case is manifestly just. If however, the Law should also afford protection to innocent individuals, what protection does it afford the Aboriginal woman who stands to suffer the consequences of an irresponsible act? Merely exculpating an individual from resposibility for his actions does not help his situation — and it certainly does not increase the security of the people with whom he comes in contact. The case also raises other important questions. Does it enhance the dignity of the aborigine to relieve him of responsibility for his actions purely on the basis of his upbringing or position in society or does it somehow confirm his status as sub-human? If Alwyn Peter's victim had been an Anglo-Saxon woman, and therefore a member of the class 'oppressing' him, would this have been a further ground for excusing his conduct? If so, how would the white community have reacted to a decision such as the one in question?

Although clearly born of sympathy for Peter and his kin, the implications of his defence are ominous. The reasoning of his Counsel, when carried to its logical conclusion, militates not for leniency towards the accused, but rather for his permanent removal from society. While the accused remains within the environment that 'caused' his delinquency, the argument admits of no change in him. If there is to be a real departure from traditional paternalistic attitudes — and if there is to be any hope for the Aborigine in white society — he must not be denied his freedom to change *in spite* of his circumstances.

MARY CROCK*

* B.A. (Hons.), Student of Law, Melbourne University.