HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

ERNEST MUNDA APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Munda v Western Australia
[2013] HCA 38
2 October 2013
P34/2013

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

A Boe with D D Brunello for the appellant (instructed by Aboriginal Legal Service of Western Australia (Inc))

J McGrath SC with L M Fox for the respondent (instructed by Director of Public Prosecutions)

CATCHWORDS

Munda v Western Australia

Criminal law – Appeal – Prosecution appeal against sentence – Where appellant pleaded guilty to manslaughter of de facto spouse – Where appellate court resentenced appellant on ground that original sentence manifestly inadequate – Whether appellate court failed to correctly apply principles attending disposition of prosecution appeal against sentence on ground of manifest inadequacy – Whether finding of manifest inadequacy open if similar sentences imposed for comparable offences – Whether appellate court erred in failing to exercise residual discretion.

Criminal law – Sentence – Principles – Relevance of deprived background of Aboriginal offender – Whether appellate court gave appropriate regard to appellant's antecedents and personal circumstances.

Words and phrases – "aggravating factors", "antecedents and personal circumstances", "manifestly inadequate", "mitigating factors", "residual discretion", "social disadvantage".

Criminal Appeals Act 2004 (WA), ss 24(1), 31, 41(4).
Sentencing Act 1995 (WA), ss 6, 8(1).

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, GAGELER AND KEANE JJ. The appellant was convicted on his plea of guilty to the manslaughter of his de facto spouse, contrary to s 280 of the *Criminal Code* (WA). The appellant was sentenced by Commissioner Sleight in the Supreme Court of Western Australia to a term of imprisonment of five years and three months, with a non-parole period of three years and three months[1].

2 The respondent appealed against this sentence on the ground that it was manifestly inadequate. The Court of Appeal of the Supreme Court of Western Australia allowed the appeal, and resentenced the appellant to seven years and nine months imprisonment. He remained eligible for parole in accordance with the order of Commissioner Sleight[2].

3 In this Court, the appellant submitted that the Court of Appeal erred in failing to appreciate that there was no sufficient ground for interference by it in the sentence imposed by Commissioner Sleight, and in failing to have proper regard to the appellant's personal circumstances as an Aboriginal man. In particular, it is said that systemic deprivation and disadvantage, including an environment in which the abuse of alcohol is endemic in indigenous communities, should have been, but was not, taken into account by the Court of Appeal.

4 For the reasons that follow, the appellant's submissions should be rejected and his appeal dismissed.

Factual background

5 At the time the deceased was killed, the appellant and the deceased were staying at the Mindi Rardi community near Fitzroy Crossing. They had been in a relationship for approximately 16 years and had four children together.

6 They attended a local tavern on the afternoon of 12 July 2010. Both became intoxicated and the appellant used some cannabis. When the pair returned to their house an argument developed. Each accused the other of being unfaithful. The appellant punched the deceased on numerous occasions, threw

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1 *The State of Western Australia v Munda* [2011] WASCSR 87 at [33], [37].

2 *Western Australia v Munda* (2012) 43 WAR 137 at 153 [68] per McLure P, 185 [260] per Mazza JA.

her about their bedroom and repeatedly rammed her head into the walls. During the attack the deceased repeatedly screamed at the appellant, telling him to leave her alone. At one stage, the appellant caused the deceased to fall onto a bed mattress. He then stood over her and repeatedly punched her in the face. After the appellant had finished assaulting the deceased, they both went to sleep.

7 The next morning, the appellant had sexual intercourse with the deceased. He then left the house to get some tea. When the appellant returned, he noticed that the deceased had stopped breathing. He called for medical assistance and attempted first aid. The deceased was transported to Fitzroy Crossing Hospital and was pronounced dead on arrival.

8 A post-mortem examination confirmed that she had died from traumatic brain injury. She also had a fracture to her left jaw and a number of broken ribs. It is not disputed that all of her injuries were caused by the appellant.

The appellant's previous history of domestic violence

9 Previously, on 4 May 2009, the appellant had been sentenced to 12 months imprisonment, conditionally suspended for 12 months, for the offence of unlawfully doing grievous bodily harm to the deceased on 23 October 2008. On that occasion the injuries inflicted on the deceased included a fractured femur, tibia and right radius as well as deep lacerations to her forehead inflicted by the use of a metal shovel. The injuries to the deceased's leg were sufficiently serious to require her to be transferred from Broome Hospital to Royal Perth Hospital for treatment[3].

10 On 4 May 2009, the appellant was also sentenced to six months imprisonment, conditionally suspended for 12 months, for two offences of common assault upon his 13 year old niece and the ex-partner of the appellant's sister[4].

11 The appellant killed the deceased a little more than two months after the expiration of the conditionally suspended imprisonment order[5].

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3 (2012) 43 WAR 137 at 154 [78], [80]-[81].

4 (2012) 43 WAR 137 at 154 [78].

5 (2012) 43 WAR 137 at 154 [79].

12 At the time of the deceased's death, the appellant was subject to a lifetime violence restraining order in relation to the deceased. This order prohibited the appellant from having any contact with the deceased. It had evidently been ignored by both the appellant and the deceased in that they had continued their domestic relationship[6].

The sentence at first instance

13 The respondent submitted before Commissioner Sleight that "for this particular offence … a sentence in the range of seven to nine years' imprisonment would not be inappropriate".

14 Section 6 of the *Sentencing Act* 1995 (WA) ("the Sentencing Act") provides relevantly that:

> "(1) A sentence imposed on an offender must be commensurate with the seriousness of the offence.
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> (2) The seriousness of an offence must be determined by taking into account –
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> (a) the statutory penalty for the offence; and
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> (b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and
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> (c) any aggravating factors; and
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> (d) any mitigating factors."

15 By s 8(1) of the Sentencing Act "mitigating factors" are "factors which, in the court's opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished."

16 As to the seriousness of the offence, the maximum penalty was 20 years imprisonment. Commissioner Sleight referred to three features of the offence committed by the appellant which he regarded as aggravating factors[7]. First, his

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6 (2012) 43 WAR 137 at 154 [79].

7 [2011] WASCSR 87 at [9]-[11].

Honour referred to the earlier offence against the deceased and the violence restraining order in relation to her. Secondly, his Honour noted that the appellant was in a domestic relationship with the deceased, which should have provided her with protection. Thirdly, the attack was sustained and involved considerable violence. The Commissioner concluded that, within the broad range of offending punishable as manslaughter, the offending in this case did not fall within the "worst category of offences of this type" but was nonetheless "towards the upper end of the range of seriousness."[8]

17 The Commissioner then turned to the appellant's personal circumstances, noting that he was a traditional Aboriginal man and that as a child he was exposed to the "negative influences of alcohol and family violence."[9] His Honour noted that the appellant had a long history of alcohol and cannabis abuse[10].

18 The appellant had attended school until year 10 and went on to hold various jobs. However, he had been unemployed for about four years when he committed the offence[11]. The appellant also had a long history of offending dating back to 1997[12]. Some of the offences involved violence, such that the Commissioner concluded that the offence for which he was to be sentenced could not be considered uncharacteristic[13].

19 Commissioner Sleight accepted that he was obliged to take the appellant's circumstances of disadvantage into account as mitigatory factors[14]:

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8 [2011] WASCSR 87 at [12].

9 [2011] WASCSR 87 at [13].

10 [2011] WASCSR 87 at [15].

11 [2011] WASCSR 87 at [14].

12 [2011] WASCSR 87 at [16].

13 [2011] WASCSR 87 at [18].

14 [2011] WASCSR 87 at [22]-[23].

> "The sentencing of Aboriginal people can present unique problems which must be addressed. Firstly, it should be stated that the same sentencing principles apply in every case, irrespective of the [identity] of an offender within a particular ethnic group.
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> Secondly, it is proper for a court to recognise the problems of alcohol abuse and violence which exist in many Aboriginal communities and the social disadvantages that they create. These social disadvantages often create a conditioning within the community to accept as normal alcohol abuse and violence, as if it were a way of life. In such circumstances, there needs to be a recognition that, although punishment plays a role in personal and general deterrence, to change such behaviour requires a change in the social circumstances. However, notwithstanding these considerations, the seriousness of an offence must always be given proper weight. Like in all communities, the sentences imposed play a role in trying to protect the vulnerable. This includes, in Aboriginal communities, Aboriginal women, who are frequently subject to violence."

20 His Honour also took account of the prospect of the appellant suffering traditional payback in the form of severe corporal punishment, but gave "limited [weight] to it."[15]

The appeal to the Court of Appeal

21 Section 24 of the *Criminal Appeals Act* 2004 (WA) ("the Criminal Appeals Act") authorises an appeal by a prosecutor to the Court of Appeal against the sentence imposed on a convicted person.

22 Sub-sections (1) and (4) of s 31 of the Criminal Appeals Act provide relevantly that, in the case of an appeal by a prosecutor under s 24(1) against sentence, the Court of Appeal may allow the appeal if, in its opinion, a different sentence should have been imposed. In such a case, by virtue of s 31(5), where the Court of Appeal allows an appeal, the Court must set aside the sentence and may instead impose a sentence that is more or less severe, or send the matter back to the court that imposed the sentence to be further dealt with.

23 The respondent appealed against the sentence imposed by Commissioner Sleight on the ground that it was manifestly inadequate.

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15 [2011] WASCSR 87 at [24]-[27].

24 McLure P, with whom Mazza JA agreed, concluded that the offending was high on the scale of seriousness for that offence, and held that the sentence imposed by Commissioner Sleight was manifestly inadequate[16]. Buss JA, in a separate judgment, reached the same conclusion, observing that "the sentence of five years three months' imprisonment … failed properly to recognise the very serious offence committed by the [appellant]"[17].

The appeal to this Court

25 The appellant argued that the Court of Appeal erred in three separate ways.

26 First, it was said that it failed to apply "the principles that attend the disposition of a State appeal brought on the basis of alleged manifest inadequacy." Secondly, the appellant argued that the Court of Appeal did not appropriately determine "the scope and regard that should be given to the appellant's antecedents and personal circumstances." Finally, it was argued that the Court erred in the "identification and exercise of its discretion not to set aside the original sentence, even if sufficient error was found."

27 In the interests of coherence, each of the grounds of appeal will be discussed separately.

Ground 1 – Manifest inadequacy

28 In order to appreciate the first ground of the appellant's challenge to the decision of the Court of Appeal, it is necessary to note the following observations of McLure P[18]:

> "It is clear from the State's written submissions that the gravamen of its complaint concerns weighting errors; in particular, that the sentencing judge gave too little weight to deterrence, personal and general."

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16 (2012) 43 WAR 137 at 150 [50].

17 (2012) 43 WAR 137 at 165 [142].

18 (2012) 43 WAR 137 at 152 [63].

29 McLure P also said that[19]:

> "It is the experience of judicial officers in this jurisdiction that the gross over-representation of Aboriginal people in this State's criminal justice system … is directly related to alcohol abuse and, more recently, often in combination with illicit drug abuse. As those working in the criminal law in this State would know, a grossly disproportionate number of offenders convicted and sentenced for manslaughter in the Supreme Court in recent years are Aboriginal, as are most of their victims."

30 The appellant argued that the Court of Appeal did not proceed by reference to standards of sentencing customarily observed, and did not assess the seriousness of the appellant's offending by a comparison with similar cases. That being so, the Court of Appeal could not have been, as it was required to be, "convinced that the sentence [was] definitely outside the appropriate range"[20] so as to be satisfied that it was manifestly inadequate.

31 In addition, the appellant argued that the Court of Appeal approached the appeal before it as raising specific "weighting errors"[21]. This approach was said to undermine the competency of the appeal itself because the only ground of appeal was manifest inadequacy of the sentence.

32 The appellant also seized upon the comment by McLure P[22] concerning the "grossly disproportionate number of offenders convicted and sentenced for manslaughter … in recent years [who] are Aboriginal, as are most of their victims", to mount an argument that McLure P and Mazza JA had proceeded upon a consideration of the prevalence of the kind of offending with which this case is concerned. That was said to be an error, given that no ground of error in this regard had been raised by the respondent's appeal.

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19 (2012) 43 WAR 137 at 152 [64].

20 *Everett v The Queen* (1994) 181 CLR 295 at 306; [1994] HCA 49.

21 (2012) 43 WAR 137 at 152 [63].

22 (2012) 43 WAR 137 at 152 [64].

"Weighting errors"

33 There was nothing unorthodox in the Court of Appeal's approach to the question of manifest inadequacy. Its view in that respect was properly informed and explained by having regard to the maximum sentence for the offence, the gravity of the offending conduct on the scale of seriousness, and the personal circumstances of the offender[23].

34 *House v The King* established that appealable error in the exercise of a discretionary judgment may be established by demonstration of specific error of fact or principle apparent from the primary judge's reasons or because[24]:

> "the result embodied in [the primary judge's] order … is unreasonable or plainly unjust, [such that] the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

35 That is the approach which McLure P expressly adopted[25]. Her Honour's reference to "weighting errors" does not suggest that her Honour proceeded to decide the appeal on a ground different from that urged by the respondent. Although McLure P used the phrase "weighting errors", it is clear from the context of her remarks that her Honour was not using the phrase to introduce a discussion of specific error but to expose the reasoning by which she reached a conclusion of manifest inadequacy. The considerations to which her Honour referred serve to explain why the sentence imposed at first instance was so unreasonable and plainly unjust as to manifest the error of inadequacy.

Prevalence

36 As to prevalence, there was some discussion in this regard in the Court of Appeal during oral argument, but ultimately no reliance was placed on it by the

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23 (2012) 43 WAR 137 at 151 [57].

24 (1936) 55 CLR 499 at 505; [1936] HCA 40.

25 (2012) 43 WAR 137 at 151 [56].

Court of Appeal. McLure P did not mention it as a factor material to her conclusion, and Buss JA expressly disavowed any reliance upon prevalence[26].

37 McLure P did not alter the ground on which the appeal was fought by referring to the gravity of the offence of alcohol-fuelled domestic violence by indigenous men against indigenous women. The point of her Honour's reference to the nature and scale of the problem was not to justify a review of sentence range to prescribe future guidelines[27]. Rather, as is apparent on a fair reading of her Honour's reasons, her Honour was proceeding to make the point that, even in the context of the circumstances of social disadvantage in which domestic violence commonly occurs, the seriousness of the offence is such as to make a compelling claim on the sentencing discretion. And that is so notwithstanding that the number of Aboriginal offenders (and victims) is "grossly disproportionate".

Comparable sentences

38 The appellant argued that the sentence imposed by Commissioner Sleight was not markedly different from that imposed in cases which were "most closely comparable" with the present case[28]. As part of that argument, the appellant contended that, absent a yardstick by reference to which the sentence imposed at first instance could be seen to be inadequate, there was no basis for the Court of Appeal to allow the appeal. Further, the appellant noted that the sentence imposed by the Court of Appeal was higher than the most comparable case placed before Commissioner Sleight, *R v Gordon*[29], where an appeal by the prosecution against a sentence of seven years imprisonment for manslaughter was dismissed.

39 This aspect of the appellant's argument should be rejected for three reasons. First, the appellant's argument assumes that only "closely comparable" cases can provide a yardstick with which to judge the adequacy of a sentence. In this regard, the appellant invoked this Court's decision in *Hili v The Queen* in

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26 (2012) 43 WAR 137 at 184 [256].

27 cf *Sentencing Act* 1995 (WA), s 143.

28 *Hili v The Queen* (2010) 242 CLR 520 at 539-540 [62]; [2010] HCA 45.

29 [2000] WASCA 401.

support of the proposition that, absent a marked departure by Commissioner Sleight from closely comparable cases, the Court of Appeal could not conclude that the original sentence was manifestly inadequate. But in *Hili* it was distinctly not said that a yardstick derived by reference to comparable cases was an essential precondition of a conclusion that a sentence was manifestly inadequate. It was acknowledged that such a disparity is one pointer towards inadequacy; but French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ expressly approved[30] the statement of Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa*[31] that previous sentences may be used to establish a range of sentences that have been imposed but not that the range is correct. In particular, the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence."[32]

40 Secondly, as Gleeson CJ, Gummow, Hayne and Callinan JJ said in *Markarian v The Queen*[33], the maximum penalty fixed by the legislature for the offence provides, "taken and balanced with all of the other relevant factors, a yardstick." The maximum penalty for manslaughter was 20 years imprisonment, and, as the Court of Appeal noted, this case was a serious example of that offence[34].

41 Thirdly, the decision in *Gordon*, delivered in 2000, was, as counsel for the respondent pointed out to Commissioner Sleight, a Crown appeal which was decided by reference to considerations of double jeopardy[35] which are no longer material[36]. As a result, as McLure P noted, the decision in *Gordon* afforded "[l]ittle guidance"[37] in relation to this case. It may also be noted that, in *Gordon*,

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30 (2010) 242 CLR 520 at 537 [54].

31 (2010) 79 NSWLR 1 at 70-71 [303]-[305].

32 (2010) 79 NSWLR 1 at 70 [304].

33 (2005) 228 CLR 357 at 372 [31]; [2005] HCA 25.

34 (2012) 43 WAR 137 at 151 [58], 185 [259].

35 [2000] WASCA 401 at [16].

36 *Criminal Appeals Act* 2004 (WA), s 41(4)(b).

37 (2012) 43 WAR 137 at 151 [61].

Wheeler J delivered a powerful dissenting judgment. Her Honour would have allowed the State's appeal and substituted a sentence of nine years imprisonment without eligibility for parole. Her Honour said[38]:

> "In this case, the offence is one of the most serious known to the law. The maintenance of adequate standards of punishment for a crime involving the taking of human life is an important consideration. While the role of the criminal law in deterring the commission of violent acts is problematic, and particularly so in relation to Aboriginal communities, it is important to indicate very clearly that drunken violence against Aboriginal women is viewed very seriously".

42 The passage of time has not lessened the force of that statement. While the appellant's offence may not have been in the very worst category of offences of manslaughter, it is not easy to think of worse examples. Given that the maximum available sentence was 20 years imprisonment, and given the prolonged and brutal beating administered by the appellant upon his de facto spouse, a conclusion that the sentence imposed at first instance was manifestly inadequate cannot be said to have been wrong.

Ground 2 – Antecedents and personal circumstances

43 It is relevant to the second aspect of the appellant's challenge to the decision of the Court of Appeal to note that McLure P observed that[39]:

> "Even if it is established that a person's addiction to alcohol and/or drugs is mitigatory because of events in their formative childhood years or otherwise, that does not inevitably reduce the weight to be given to personal deterrence. Indeed, addictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending. ... Further, the courts must exercise caution in characterising or treating an offender as a 'victim' because it can lead adult perpetrators to wrongly believe that they are not truly responsible and accountable for their conduct, leading to a failure to properly protect the community. …

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38 [2000] WASCA 401 at [35].

39 (2012) 43 WAR 137 at 152-153 [65]-[66].

Moreover, it is wrong in principle to reduce the weight to be given to general deterrence in circumstances where alcohol-fuelled violence is endemic in the community generally, even if not sufficiently deterred in fact by the prospect of imprisonment".

44 Further, as to the appellant's personal circumstances, McLure P said[40]:

"The evidence in this case did not establish that the [appellant] was raised in circumstances of such deprivation and difficulty as to render his addictions mitigatory. It is the case that the [appellant] will be separated from his family and country for the term of his imprisonment. However, as he is able to communicate in English and has had prior experience in the prison system, it cannot be said that imprisonment would bear particularly harshly upon him.

A sentence of five years and three months' imprisonment for the offence committed by the [appellant] is, having regard to all relevant circumstances, manifestly inadequate and should be set aside. It fails to give due recognition to the seriousness of the offence, the seriousness of the circumstances in which it was committed and the need for both personal and general deterrence. I would impose a sentence of seven years and nine months' imprisonment. The [appellant] will remain eligible for parole."

45 Buss JA considered the appellant's personal circumstances and held that they "were of limited relevance and had little weight."[41] As to those considerations, Buss JA said[42]:

"[T]o the extent they were relevant, [they] were decisively outweighed by other sentencing factors (namely, the protection of vulnerable women, personal deterrence and general deterrence) in the context of the very serious nature of the offending and the [appellant's] previous convictions for violent offending against the deceased and other women."

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40 (2012) 43 WAR 137 at 153 [67]-[68].

41 (2012) 43 WAR 137 at 164 [134].

42 (2012) 43 WAR 137 at 164 [134].

46 Buss JA concluded[43]:

> "I am satisfied that upon all relevant facts and circumstances, and all relevant sentencing considerations, being evaluated and weighed, the sentence of five years three months' imprisonment was manifestly inadequate. This is apparent when that sentencing outcome is viewed from the perspective of the maximum available penalty (20 years' imprisonment); the seriousness of the offending; the importance of the protection of vulnerable women, personal deterrence and general deterrence as prominent sentencing considerations; and after taking into account the general standards of sentencing applicable to the offence of manslaughter (bearing in mind that, as I have mentioned, there is no sentencing tariff for manslaughter and each case must be decided on its own facts), the value of human life and the [appellant's] personal circumstances."

47 The appellant contended that the Court of Appeal erred in principle in treating his personal circumstances as having little, if any, mitigatory effect.

48 The appellant disclaimed any contention that Aboriginality per se warrants leniency. Rather, the appellant's submission was that the disadvantage associated with the social and economic problems that commonly attend Aboriginal communities affected the appellant and that his antecedent circumstances should be treated as mitigatory, notwithstanding the weight to be given to considerations such as deterrence.

49 Finally, it was said that both the sentencing judge and the Court of Appeal failed to give appropriate weight to the consideration that the appellant will likely suffer traditional punishment, namely being struck with nulla nullas by the family of the deceased, when released from gaol. It was submitted that the Court of Appeal did not have any regard to this factor. The appellant is said to be willing, and indeed anxious, to subject himself to traditional payback. His anxiety is said to be an aspect of what should have been given greater significance as a mitigating factor.

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43 (2012) 43 WAR 137 at 165 [143].

Circumstances of social disadvantage

50 In the absence of specific legislative direction of the kind discussed in the Canadian decisions of *R v Gladue*[44] and *R v Ipeelee*[45], the starting point for discussion of this ground of appeal is the statement of Brennan J in *Neal v The Queen*[46]:

> "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 in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal."

51 The statement by Brennan J in *Neal* has consistently been applied in this country by intermediate appellate courts[47]. Thus in *Fernando*, Wood J said[48]:

> "[I]n 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

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44 [1999] 1 SCR 688.

45 [2012] 1 SCR 433. For a discussion of *Gladue* and *Ipeelee* see *Bugmy v The Queen* [2013] HCA 37 at [28]-[34].

46 (1982) 149 CLR 305 at 326; [1982] HCA 55.

47 *Rogers* (1989) 44 A Crim R 301 at 306-307; *Fernando* (1992) 76 A Crim R 58 at 62; *R v Fuller-Cust* (2002) 6 VR 496 at 520 [80]-[81]; *Western Australia v Richards* (2008) 37 WAR 229 at 232-233 [6], 241 [44]; *R v KU; Ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at 474-476 [129]-[135].

48 (1992) 76 A Crim R 58 at 63.

and by reference to the particular subjective circumstances of the offender."

52 In *R v Fuller-Cust*[49], Eames JA observed that, in the application of the principle stated by Brennan J, regard to an offender's Aboriginality serves to ensure that a factor relevant to sentencing which arises from the offender's Aboriginality is not "overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored." Moreover, the personal disadvantages affecting an individual offender may be, because of the circumstances in which they were engendered, so deep and so broad that they serve to shed light on matters such as, for example, an offender's recidivism.

53 Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence."[50] It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour[51]. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

54 It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be

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49 (2002) 6 VR 496 at 520 [80].

50 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477; [1988] HCA 14.

51 *R v KU; Ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at 475-476 [133].

said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

55 A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

56 The second point to be made here is that, as McLure P noted[52]:

> "[A]ddictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending."

57 This observation by McLure P is particularly poignant in this case, given the very lenient sentence imposed on the appellant in May 2009 and its evident insufficiency to deter the appellant from the repetition of alcohol-fuelled violence

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52 (2012) 43 WAR 137 at 152 [65].

against his de facto spouse, or to afford her protection from such violence. The circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.

58 The third point to be made here is related to the first two. As Gleeson CJ said in *Engert*[53]:

> "[T]he interplay of the considerations relevant to sentencing may be complex … In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. …
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> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances."

59 In *Markarian*[54], Gleeson CJ, Gummow, Hayne and Callinan JJ adopted the explanation of the sentencing discretion given by Gaudron, Gummow and Hayne JJ in *Wong v The Queen*[55] that the description of the balance struck by a sentence as an "instinctive synthesis" is not used "to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features."

60 As to the balancing by the Court of Appeal of competing considerations in fixing upon a just sentence, it is important to bear in mind that, as Brennan J

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53 (1995) 84 A Crim R 67 at 68.

54 (2005) 228 CLR 357 at 373-374 [37].

55 (2001) 207 CLR 584 at 611-612 [74]-[76]; [2001] HCA 64.

observed in *Neal*[56], "this Court is not regularly engaged in reviewing the merits of sentences in particular cases", and that the "weighing of relevant factors in the exercise of a sentencing discretion is best left to" the courts of criminal appeal of the States or the Full Court of the Federal Court, who have the benefit of "contemporary knowledge of sentences imposed in comparable cases and of local factors affecting the level of sentences". As to the sentence finally imposed by the Court of Appeal, it is not possible to say that the Court of Appeal's synthesis of competing considerations was affected by error.

Traditional punishment

61 There is something to be said for the view that the circumstance that the appellant is willing to submit to traditional punishment, and is anxious that this should happen, is not a consideration material to the fixing of a proper sentence. Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment.

62 The possibility that the appellant may, at some time in the future, face corporal punishment by way of payback was taken into account in his favour by the sentencing judge[57]. The respondent accepted that that possibility is a factor relevant to sentencing. The Court of Appeal did not take a different view; and the respondent did not argue that this Court should take a different view.

63 In these circumstances, this case does not afford an occasion to express a concluded view on the question whether the prospect of such punishment is a consideration relevant to the imposition of a proper sentence, given that the courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. It is sufficient to say that the appellant did not suffer any injustice by reason of the circumstance that the prospect of payback was given only limited weight in his favour by the courts below.

Ground 3 – Residual discretion

64 It is relevant to the third ground of the appeal to note that, before the Court of Appeal, the appellant conceded that the common law principle of double

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56 (1982) 149 CLR 305 at 323.

57 [2011] WASCSR 87 at [24]-[27].

jeopardy, the application of which moderated sentences imposed by the Court in successful State appeals against sentence, had been abrogated by s 41(4) of the Criminal Appeals Act, which provides:

> "The appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor) –
>
> (a) may take into account any matter, including any material change to the person's circumstances, relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but
>
> (b) despite paragraph (a), must not take into account the fact that the court's decision may mean that the person is again sentenced for the offence."

65 The appellant did, however, raise an issue as to whether s 41(4) altered the prevailing principles concerning the exercise of a court's power in relation to State appeals against sentence. All members of the Court of Appeal either accepted or were prepared to assume that, notwithstanding s 41(4), the Court of Appeal retained a residual discretion under s 31 of the Criminal Appeals Act to decline to allow an appeal against a sentence that is erroneously lenient[58].

66 McLure P noted that the purpose of an appeal by the prosecution was "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."[59] As to the existence and nature of the residual discretion, her Honour said[60]:

> "I will assume in the [appellant's] favour that there is a residual discretion to dismiss a State appeal against a sentence that is manifestly inadequate at the time of the appeal. However, such an outcome would be rare. With one possible exception, the residual discretionary considerations are themselves relevant to an assessment of whether a sentence is manifestly

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58 (2012) 43 WAR 137 at 146 [26], 183 [251], 185 [260].

59 (2012) 43 WAR 137 at 147 [31].

60 (2012) 43 WAR 137 at 147 [33].

> inadequate as at the date of the hearing of the appeal. Questions of parity (and disparity) may not inform such an assessment."

McLure P concluded that there were no facts or circumstances which would justify or require the Court to exercise the residual discretion in this case[61].

67 Buss JA gave extensive consideration to the nature and scope of the residual discretion, concluding after careful analysis that there was indeed a discretion to be exercised but that none of the discretionary factors agitated by the appellant warranted the exercise of the Court's discretion in his favour[62].

68 The appellant relied, in particular, on the remarks made by French CJ, Crennan and Kiefel JJ in *Green v The Queen* concerning the purpose of a prosecution appeal under s 5D of the *Criminal Appeal Act* 1912 (NSW). Their Honours observed that the purpose is[63]:

> "'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons'. That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges." (footnote omitted)

69 The remarks harked back to a comment of Barwick CJ in *Griffiths v The Queen*[64] which, as explained in *Everett v The Queen*[65], must be understood as encompassing within its reference to "principles" the avoidance of manifest inadequacy or inconsistency in sentencing standards. They introduced a discussion of the residual discretion conferred by s 5D which included the statement that, despite there being a finding that a sentence is manifestly

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61 (2012) 43 WAR 137 at 149 [42].

62 (2012) 43 WAR 137 at 165-185 [145]-[257].

63 (2011) 244 CLR 462 at 477 [36]; [2011] HCA 49.

64 (1977) 137 CLR 293 at 310; [1977] HCA 44.

65 (1994) 181 CLR 295 at 300.

inadequate, an appellate court "may decide not to intervene so as not to disturb parity"[66].

70 The appellant argued that McLure P misinterpreted whatever was said in *Green* in remarking that "[s]ave where parity considerations arise, the residual discretion is only likely to be exercised if the error has not resulted in a manifestly inadequate sentence."[67] The appellant argued that McLure P misapplied *Green*, pointing to the comments made by her Honour set out above[68].

71 In addition, the appellant argued that, although McLure P held[69] that there was "nothing in the facts and circumstances … that would require or justify this court exercising the residual discretion", her Honour gave no explanation as to why this was the case.

72 It is to be noted that in *Green*[70] French CJ, Crennan and Kiefel JJ referred to circumstances in addition to considerations of parity which might create injustice if a State appeal against sentence is allowed. Those circumstances were said to include "delay in the hearing and determination of the appeal, the imminent or past occurrence of the respondent's release on parole or unconditionally, and the effect of re-sentencing on progress towards the respondent's rehabilitation." The conduct of the Crown might also be relevant[71], for example, if the Crown were to seek on appeal a higher sentence than it had successfully sought at first instance.

73 To the extent that McLure P's observations suggest a more confined view of the scope of the discretion, they are unduly narrow. That having been said,

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66 (2011) 244 CLR 462 at 478 [40].

67 (2012) 43 WAR 137 at 149 [41].

68 (2012) 43 WAR 137 at 147 [33].

69 (2012) 43 WAR 137 at 149 [42].

70 (2011) 244 CLR 462 at 479-480 [43].

71 *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 658-660 [104]-[115].

none of the matters urged by the appellant was apt to exert a claim upon the residual discretion to dismiss the respondent's appeal.

74 The first of these matters was that the grounds on which the Court of Appeal held that the initial sentence was manifestly inadequate had not been raised before Commissioner Sleight. That contention is, for the reasons already given, without substance.

75 The second discretionary factor agitated by the appellant was that, having seen the accused, a sentencing judge is uniquely well placed to exercise the discretion[72]. But to say this is merely to repeat an aspect of the argument, which has also been rejected, that the Court of Appeal was wrong to conclude that the initial sentence was manifestly inadequate.

76 The third discretionary consideration relied upon by the appellant was that no error of principle was corrected by the Court of Appeal. This was not a case of mere leniency reflecting error: the Court of Appeal came to the conclusion that the sentence imposed was manifestly inadequate. That was sufficient to justify intervention given that to decline to intervene would have been to perpetuate a manifest injustice.

77 The fourth consideration was that there was nearly one year delay in the hearing and determination of the appeal, and that under the original sentence the appellant was to become eligible for parole on 13 October 2013. McLure P specifically acknowledged that one of the circumstances "relevant to the exercise of the residual discretion include[s] delay in the hearing and determination of the appeal"[73]. But there was no evidence of any tardiness by the respondent in the prosecution of its appeal to the Court of Appeal. Significantly, the appellant's release on parole was not imminent when the Court of Appeal delivered its judgment on 22 August 2012.

78 The fifth discretionary factor urged by the appellant was that his children will be affected by the delayed release of their father in circumstances where they have already lost their mother. This consideration was not advanced before the Court of Appeal. Given the circumstances in which the appellant's children lost

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72 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 588 [34]; [2011] HCA 10.

73 (2012) 43 WAR 137 at 144 [14].

their mother, that is perhaps unsurprising. It was not a consideration with any claim upon the discretion of the Court of Appeal.

Conclusion and order

79 The appellant's grounds of challenge to the decision of the Court of Appeal are not made out.

80 The appeal should be dismissed.

81 BELL J. The appellant pleaded guilty in the Supreme Court of Western Australia (Commissioner Sleight) on 4 July 2011 to the manslaughter of his de facto wife. The appellant is a traditional Walmajarri man and the deceased was a Walmajarri woman. They had lived together as husband and wife for 16 years. At the time of the fatal assault they were living in an Aboriginal community near Fitzroy Crossing. They had spent the afternoon at the local tavern and both were intoxicated. After returning home they argued and the appellant assaulted the deceased. It was a prolonged and brutal assault during which the appellant threw the deceased about the room ramming her head into the fibro walls. He repeatedly punched her about the face and head. The cause of death was traumatic brain injury. Among other injuries sustained by the deceased in the course of the assault were a fractured jaw and five fractured ribs.

82 The appellant was 32 years of age at the date of the killing. As a child he had led a traditional life with his extended family. He had hunted with his father and participated in the traditional ceremonies of his people. He spoke the language of the Walmajarri and other Aboriginal languages. He attended school to year 10 and he has a good ability to communicate orally in English. His upbringing exposed him to the negative influences of alcohol and family violence. He started drinking alcohol at the age of 17 and he has a history of alcohol and cannabis abuse. At the time of the killing, he was intoxicated by alcohol and cannabis. He has a lengthy criminal record for offences of violence. In May 2009 he was sentenced to 12 months' imprisonment, wholly suspended, for the infliction of grievous bodily harm on the deceased. That, too, was a brutal assault. At the time of the killing he was subject to a "lifetime violence restraining order" prohibiting him from contact with the deceased[74]. It appears that they had both chosen to ignore the order by living together. The killing took place a little over two months after he completed the suspended sentence for the earlier assault.

83 The maximum penalty for manslaughter at the time was 20 years' imprisonment[75]. The primary judge assessed that, taking into account all of the relevant factors save for the appellant's plea of guilty, the appropriate sentence for the offence was seven years and six months' imprisonment. After making allowance for the appellant's plea of guilty, his Honour imposed a sentence of five years and three months' imprisonment and made a parole eligibility order[76]. The appellant will be eligible for parole after serving three years and three months of the sentence.

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74 *Western Australia v Munda* (2012) 43 WAR 137 at 150 [50] per McLure P.

75 *Criminal Code* (WA), s 280. The maximum penalty has since been increased to imprisonment for life: *Manslaughter Legislation Amendment Act* 2011 (WA), s 4.

76 *Sentencing Act* 1995 (WA), s 89(1).

84 The Director of Public Prosecutions ("the Director") appealed to the Court of Appeal of Western Australia against the sentence on the ground that it was manifestly inadequate. The Court of Appeal (McLure P, Buss and Mazza JJA) allowed the appeal and re-sentenced the appellant to a term of seven years and nine months' imprisonment. The Court of Appeal did not interfere with the parole eligibility order.

85 The appellant appeals by special leave, contending that the Court of Appeal erred in its application of the principles governing prosecution appeals against sentence. The determination of the appeal requires consideration of those principles. In particular, it requires consideration of the significance of the standard which is customarily applied in sentencing offenders for similar offences to an appellate court's conclusion that a sentence is manifestly inadequate.

The principles governing prosecution appeals

86 The Court of Appeal's jurisdiction to entertain an appeal by the prosecution against a sentence imposed as the result of conviction on indictment is conferred by s 24(1) of the *Criminal Appeals Act* 2004 (WA) ("the CAA"). Section 31 governs the determination of appeals against sentence whether commenced by the offender or the prosecutor[77]. The Court of Appeal may allow the appeal if, in its opinion, a different sentence should have been imposed[78]. If the Court of Appeal allows the appeal it must set aside the sentence and may either impose a new sentence that is more or less severe or send the charge back to the court that imposed the sentence to be dealt with further[79].

87 The principles governing the determination of prosecution appeals against sentence were stated by Barwick CJ in *Griffiths v The Queen*[80]. Prosecution appeals are brought to establish some matter of principle and to allow the appellate court to lay down principles for the governance and guidance of sentencing courts[81]. *Griffiths* was an appeal under s 5D of the *Criminal Appeal*

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77 CAA, s 31(1).

78 CAA, s 31(4)(a).

79 CAA, s 31(5).

80 (1977) 137 CLR 293 at 310; [1977] HCA 44.

81 *Griffiths v The Queen* (1977) 137 CLR 293 at 310; *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ; [1994] HCA 49; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 581 [16] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *Green v The*

(Footnote continues on next page)

Act 1912 (NSW). Prosecution and offender appeals against sentence are dealt with separately under that Act[82]. However, these principles, affirmed by the Court in *Lowndes v The Queen*[83], are not confined to appeals under the New South Wales statute. The Court in that case endorsed Charles JA's summary of the principles in *R v Clarke*[84]. His Honour identified the following six occasions for the bringing of a prosecution appeal[85]:

> "(a) where a sentence reveals such manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle; (b) where it is necessary for a court of criminal appeal to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons; (c) to enable the courts to establish and maintain adequate standards of punishment for crime; (d) to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected; (e) to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience; (f) to ensure, so far as the subject matter permits, that there will be uniformity in sentencing." (citations omitted)

The residual discretion

88 This Court has said that the bringing of prosecution appeals should be a rarity[86]. This reflected, at least in part, the view that the jurisdiction is contrary to

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Queen (2011) 244 CLR 462 at 465 [1] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49.

82 Section 5D(1) provides that "[t]he Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper."

Section 6(3) provides: "On an appeal [by a person convicted on indictment] under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

83 (1999) 195 CLR 665 at 671 [15]; [1999] HCA 29.

84 (1999) 195 CLR 665 at 671 [15], citing [1996] 2 VR 520.

85 [1996] 2 VR 520 at 522.

86 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ.

"deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy"[87]. In 2007 the Council of Australian Governments ("COAG") reached an agreement that each of the jurisdictions should enact legislation to remove consideration of the element of double jeopardy from the determination of prosecution appeals[88]. Western Australia's response to the agreement was to repeal s 41(4) of the CAA and to insert a new s 41(4) in these terms[89]:

> "The appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor)—
>
> (a) may take into account any matter, including any material change to the person's circumstances, relevant to the sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but
>
> (b) despite paragraph (a), must not take into account the fact that the court's decision may mean that the person is again sentenced for the offence."

89 The effect of the New South Wales provision implementing the COAG agreement on double jeopardy[90] was discussed in the joint reasons in *Green v The Queen*[91]. Their Honours pointed out that the purpose of prosecution appeals distinguishes them from offender appeals, the latter being concerned with the correction of error in particular cases[92]. They said that the residual discretion to

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87 *Malvaso v The Queen* (1989) 168 CLR 227 at 234 per Deane and McHugh JJ; [1989] HCA 58.

88 Council of Australian Governments, *Double Jeopardy Law Reform: Model Agreed by COAG*, (2007), discussed in *Green v The Queen* (2011) 244 CLR 462 at 471 [25] per French CJ, Crennan and Kiefel JJ.

89 *Criminal Law and Evidence Amendment Act* 2008 (WA), s 39, which commenced on 27 April 2008.

90 *Crimes (Appeal and Review) Act* 2001 (NSW), s 68A.

91 (2011) 244 CLR 462.

92 *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1] per French CJ, Crennan and Kiefel JJ.

decline to interfere with an "erroneously lenient" sentence had not been extinguished by removal of the consideration of double jeopardy[93].

90 The Court of Appeal proceeded upon the assumption that the statements in *Green* applied to the determination of prosecution appeals under the CAA[94]. McLure P (with whose reasons Mazza JA agreed) said that, save in a case in which parity considerations were raised, the residual discretion is only likely to be exercised if the error has not resulted in a manifestly inadequate sentence[95]. I agree with the joint reasons that this is an unduly narrow statement of the scope of the discretion[96]. Delay in bringing the appeal and, more generally, the conduct of the prosecution are among the considerations which may lead the appellate court to dismiss a prosecution appeal notwithstanding that the sentence is manifestly inadequate.

The ground of appeal – manifest inadequacy

91 The Director's appeal was brought on the sole ground that the sentence imposed on the appellant was manifestly inadequate. Five considerations were particularised as supporting that conclusion:

> "(a) the maximum penalty prescribed by law;
>
> (b) the standards of sentencing customarily observed for such offences;
>
> (c) the serious nature of the offending;
>
> (d) the need for the sentence to reflect the importance of general deterrence; and
>
> (e) the personal circumstances of the [appellant]."

92 *Everett v The Queen* clarified that manifest inadequacy or inconsistency in sentencing standards is a matter of principle that is properly the subject of

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93 *Green v The Queen* (2011) 244 CLR 462 at 466 [1], 472 [26] per French CJ, Crennan and Kiefel JJ.

94 *Western Australia v Munda* (2012) 43 WAR 137 at 145 [16]-[19] per McLure P, 181-182 [240]-[241] per Buss JA.

95 *Western Australia v Munda* (2012) 43 WAR 137 at 149 [41(4)].

96 Reasons of French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ at [73].

correction on a prosecution appeal[97]. McHugh J linked the jurisdiction to correct manifestly inadequate sentences to the need for uniformity of sentencing[98]. His Honour said that it is only when the appellate court is convinced that the sentence imposed by the sentencing judge is "definitely outside the appropriate range" that it is ever justified in granting leave to the prosecution to appeal against the inadequacy of a sentence[99]. *Everett* was concerned with a prosecution appeal brought under the *Criminal Code* (Tas), for which leave was required. However, his Honour's remarks were of general application. He said that if a judge imposes a sentence that is "definitely below the range of sentences appropriate for the particular offence" the case could be regarded as sufficiently exceptional to warrant leave to appeal[100]. He cautioned that such cases are likely to be rare, noting that "[d]efining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task"[101].

93 The need for reasonable consistency in sentencing was prominent in Gleeson CJ's discussion of the principles in *Wong v The Queen*[102]:

> "The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

94 His Honour pointed out that day by day, sentencing judges and appellate courts are referred to sentences imposed in what are said to be comparable cases. He acknowledged that there will often be room for argument about comparability and the conclusions to be drawn from comparisons[103]. Nonetheless, as his

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97 (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ, 306-307 per McHugh J.

98 *Everett v The Queen* (1994) 181 CLR 295 at 306.

99 *Everett v The Queen* (1994) 181 CLR 295 at 306.

100 *Everett v The Queen* (1994) 181 CLR 295 at 306.

101 *Everett v The Queen* (1994) 181 CLR 295 at 306.

102 (2001) 207 CLR 584 at 591 [6]; [2001] HCA 64.

103 (2001) 207 CLR 584 at 591 [7].

Honour observed, "inadequacy or excessiveness is often demonstrated by a process of comparison"[104].

95 Past sentencing decisions are sometimes described as evidencing "the range" of sentences for an offence. This is a misleading description because the pattern of sentences imposed in past cases does not define the limits of the sentencing discretion[105]. To speak of the range of sentences for an offence is a shorthand way of acknowledging that there is no one correct sentence for an offence and an offender[106]. It follows that the correct application of sentencing principles may result in a range of sentences, all of which are correct. Nonetheless, information about sentences imposed in comparable cases, where available, is relevant to the exercise of the sentencing discretion and to an appellate court's conclusion of manifest excess or inadequacy. A sentence that is in line with sentences that have been imposed in relevantly similar cases has the virtue of consistency and is unlikely to impress as unreasonable or plainly unjust. At least that will be so unless the past decisions reflect a standard of punishment for a crime that is unreasonable or plainly unjust. As will appear, the question of whether the sentences customarily imposed in Western Australia on Aboriginal men for the drunken, brutal manslaughter of their wives are unreasonably low was raised in the Court of Appeal. In the event, the appeal was determined without addressing that question.

96 The prosecution annexed a Schedule to its written submissions in the Court of Appeal, "Attachment 'A'", in support of particular (b) of its ground of appeal, that the sentence imposed by the primary judge was manifestly inadequate when measured by the standards of sentencing customarily observed for such offences. Attachment "A" contained details of 10 manslaughter sentences reviewed by the Court of Appeal in the period since 1995. Of these, only three were relied upon by the prosecution as relevantly comparable: *Luff v The State of Western Australia*[107]; *The State of Western Australia v Walley*[108]; and *R v Gordon*[109]. The appellant also annexed a Schedule to his written submissions

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104 (2001) 207 CLR 584 ar 593 [12].

105 *Hili v The Queen* (2010) 242 CLR 520 at 537 [54]-[55] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45.

106 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; [1998] HCA 57.

107 [2008] WASCA 89.

108 [2008] WASCA 12.

109 [2000] WASCA 401.

containing particulars of 16 sentences imposed at first instance in the period 1998 to 2011 that were relied on as comparable to the circumstances of the appellant's offending.

97 On the hearing in the Court of Appeal the prosecutor submitted:

> "to the extent that there could be said to be a range, this case obviously falls somewhere in that range. Our submission is that it's falling at the bottom end of the range or possibly outside of or at the very bottom end. It's a lenient sentence and we say too lenient a sentence for the serious nature of this particular offence."

98 The Court of Appeal raised with the parties the question of whether, if the sentence was within the range of sentences customarily imposed for such offences, the range should be reviewed because the incidence of violent behaviour of this description appeared to be increasing. The prosecution had not advanced a case of increased prevalence at the sentence hearing. It disavowed reliance on increased prevalence in the Court of Appeal.

99 The appellant submits that McLure P wrongly took judicial notice of the increased prevalence of offences of this description in her determination of the Director's appeal. The submission is based on her Honour's statement[110]:

> "It is the experience of judicial officers in this jurisdiction that the gross over-representation of Aboriginal people in this State's criminal justice system referred to in *Richards*[111] is directly related to alcohol abuse and, more recently, often in combination with illicit drug abuse. As those working in the criminal law in this State would know, a grossly disproportionate number of offenders convicted and sentenced for manslaughter in the Supreme Court in recent years are Aboriginal, as are most of their victims."

100 Her Honour's observation is a statement of the experience of judges of appeal in Western Australia. It is not a finding of increased prevalence of alcohol-related manslaughter offences. McLure P applied the same test as Buss JA to the determination of the Director's appeal. Each of their Honours said that the conclusion of manifest inadequacy required consideration of the maximum penalty for the offence, the standards of sentencing customarily

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110 *Western Australia v Munda* (2012) 43 WAR 137 at 152 [64].

111 *Western Australia v Richards* (2008) 37 WAR 229.

observed, the place which the criminal conduct occupied on the scale of seriousness and the personal circumstances of the offender[112].

101 The appellant's complaint is not with McLure P's statement of the test but with her Honour's application of it. He submits that her Honour failed to identify the standards of sentencing customarily observed or the place which his conduct occupied in the scale of seriousness in reasoning to her conclusion. He complains of the absence of consideration of the material filed by both parties respecting past sentences, which, he submits, provides a relevant yardstick.

102 *Gordon* and *Walley* were prosecution appeals that were determined when double jeopardy was a relevant consideration. McLure P said that they provided little guidance[113]. Her Honour went on to say[114]:

> "Sentences of immediate imprisonment imposed for manslaughter (for a plea of guilty with the 20-year maximum penalty) range between two years four months and 12 years. The fact that the sentence imposed on the [appellant] falls within that range does not prevent a conclusion that it is, in all the circumstances of this case, manifestly inadequate. As noted in *Walley*, manslaughter is by its very nature an offence in respect of which the facts and circumstances differ widely in every case and sentences for the offence should reflect the value placed upon human life by the legislature".

103 Buss JA said that the decisions in *Gordon*, *Walley* and *Luff* had "some features comparable to the [appellant's] offending"[115]. His Honour detailed the circumstances of each. He observed, without further elaboration, that he had examined other of the sentencing dispositions to which the parties had referred the Court[116].

104 Buss JA approached consideration of the standard of sentencing customarily observed in the same way as McLure P. His Honour said that the great variation in the circumstances of offending and offenders in manslaughter

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112 *Western Australia v Munda* (2012) 43 WAR 137 at 151 [57] per McLure P, 157-158 [103] per Buss JA; and see *R v Morse* (1979) 23 SASR 98 at 99 per King CJ; *Chan* (1989) 38 A Crim R 337 at 342 per Malcolm CJ.

113 *Western Australia v Munda* (2012) 43 WAR 137 at 151-152 [61].

114 *Western Australia v Munda* (2012) 43 WAR 137 at 152 [62].

115 *Western Australia v Munda* (2012) 43 WAR 137 at 158 [109].

116 *Western Australia v Munda* (2012) 43 WAR 137 at 161 [123].

is such that there is no "tariff" for the offence[117]. Each case, he said, must be decided on its own facts[118]. The latter observation is true with respect to every sentencing determination. It explains why a sentencing judge may properly impose a sentence markedly greater or lesser than past sentences. However, in issue here was the conclusion of manifest inadequacy. A consideration of whether the sentence imposed on the appellant was consistent with sentences imposed in relevantly similar cases was material to whether that conclusion should be drawn.

105 The appellant advanced a positive case that a sentence of five years and three months' imprisonment was not "unreasonable or plainly unjust"[119] when assessed against sentences imposed in relevantly like cases. The Court of Appeal did not address the material relied on in support of that case. Before turning to that material, there should be mention of changes in the scheme for the sentencing of offenders in the period that it covers.

Changes to the statutory scheme for sentencing

106 Before 31 August 2003 sentences of imprisonment were subject to automatic remission after the offender had served two-thirds of the term[120]. The automatic remission of sentences was abolished with effect from 31 August 2003[121]. The object of this amendment, implementing the concept of "truth in sentencing", was not to increase the length of sentences but rather to make the sentence reflective of the time actually spent in prison[122]. The transitional provisions provided that a court sentencing an offender to imprisonment was to impose a term that was two-thirds of the term that the court would have imposed under the former regime[123]. The transitional provisions were repealed with effect

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117 *Western Australia v Munda* (2012) 43 WAR 137 at 158 [106], citing *Wicks v The Queen* (1989) 3 WAR 372 at 379-380 per Malcolm CJ and *Colledge v The State of Western Australia* [2007] WASCA 211 at [17] per Wheeler JA, Owen and Miller JJA agreeing.

118 *Western Australia v Munda* (2012) 43 WAR 137 at 158 [106].

119 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

120 *Sentencing Act* 1995 (WA), s 95.

121 *Sentencing Legislation Amendment and Repeal Act* 2003 (WA), s 20.

122 *Yates v The State of Western Australia* [2008] WASCA 144.

123 *Sentencing Legislation Amendment and Repeal Act* 2003 (WA), Sched 1, cl 2.

from 14 January 2009[124]. However, since the appellant's case was conceded not to fall into the category of the "worst" case[125], it was accepted that the sentencing range established while the transitional provisions applied remained relevant[126].

Comparable sentences?

107 The 16 decisions particularised in the appellant's Schedule are not reported. Each is a sentence imposed at first instance which appears not to have been the subject of appellate challenge. The only material before the Court of Appeal concerning those decisions appears to be that contained in the Schedule. This comprises a summary of the offender's antecedents and the facts together with details of the sentence. It is sufficient to enable an assessment of comparability with the appellant's antecedents and offending. The accuracy of the Schedule was not challenged.

108 Two sentences may be immediately put to one side[127]. Each was imposed for the offence of unlawful assault causing death, which has a maximum penalty of 10 years' imprisonment. Sentences imposed for this offence do not bear on sentencing for manslaughter. Four other sentences in the Schedule were imposed for offences that are too far removed from the appellant's offence to be informative: two were offences arising out of a violent group brawl[128], one involved the sustained beating of the infant child of the offender's partner[129], and another involved the reckless misuse of a dangerous weapon[130].

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124 *Sentencing Legislation (Transitional Provisions) Amendment Act* 2008 (WA).

125 *Western Australia v BLM* (2009) 40 WAR 414 at 430-431 [43] per Wheeler and Pullin JJA.

126 *Western Australia v Munda* (2012) 43 WAR 137 at 151 [60] per McLure P.

127 *The State of Western Australia v Indich* unreported, Supreme Court of Western Australia, 13 January 2010; *The State of Western Australia v Robinson* unreported, Supreme Court of Western Australia, 20 May 2011.

128 *The State of Western Australia v McDonald* unreported, Supreme Court of Western Australia, 2 December 2008; *The State of Western Australia v Tyson* unreported, Supreme Court of Western Australia, 28 August 2009.

129 *The State of Western Australia v Farmer* unreported, Supreme Court of Western Australia, 10 June 2008.

130 *The State of Western Australia v Stumpagee* unreported, District Court of Western Australia, 24 July 2006.

109 The remaining 10 decisions are broadly comparable to the circumstances of the appellant's offending. Of these, *Njana*[131], *Cox*[132], *Richards*[133], *Wallalgie*[134], *Gordon*[135], *Brooks*[136] and *Frazer*[137] were sentences imposed following the Aboriginal offender's conviction for the manslaughter of his partner. The offences in each instance exhibited considerable brutality and were committed when the offender was intoxicated. In each case the offender had a history of alcohol or substance abuse. In four instances there was evidence that the offender faced the prospect of tribal punishment[138]. In one instance tribal punishment had been administered[139]. Five of the seven offenders had criminal records for offences of violence[140].

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131 *R v Njana* unreported, Supreme Court of Western Australia, 13 March 1998.

132 *R v Cox* unreported, Supreme Court of Western Australia, 30 November 1999.

133 *R v Richards* unreported, Supreme Court of Western Australia, 5 March 2003.

134 *The State of Western Australia v Wallalgie* unreported, Supreme Court of Western Australia, 3 April 2007.

135 *The State of Western Australia v Gordon* unreported, Supreme Court of Western Australia, 7 April 2008.

136 *The State of Western Australia v Brooks* unreported, Supreme Court of Western Australia, 9 October 2008.

137 *The State of Western Australia v Frazer* unreported, Supreme Court of Western Australia, 2 November 2009.

138 *R v Cox* unreported, Supreme Court of Western Australia, 30 November 1999; *R v Richards* unreported, Supreme Court of Western Australia, 5 March 2003; *The State of Western Australia v Brooks* unreported, Supreme Court of Western Australia, 9 October 2008; *The State of Western Australia v Frazer* unreported, Supreme Court of Western Australia, 2 November 2009.

139 *R v Njana* unreported, Supreme Court of Western Australia, 13 March 1998.

140 *R v Cox* unreported, Supreme Court of Western Australia, 30 November 1999; *R v Richards* unreported, Supreme Court of Western Australia, 5 March 2003; *The State of Western Australia v Wallalgie* unreported, Supreme Court of Western Australia, 3 April 2007; *The State of Western Australia v Brooks* unreported, Supreme Court of Western Australia, 9 October 2008; *The State of Western Australia v Frazer* unreported, Supreme Court of Western Australia, 2 November 2009.

110 Despite not involving the manslaughter of the offenders' partners, the other three relevant sentences in the Schedule also have some features in common with the appellant's offending. *Qualla*[141], *Rictor*[142] and *Meeway*[143] involved the manslaughter of a relative or friend of the offender. The offender in each instance was an Aboriginal man who was intoxicated at the time of the offence and who had a history of alcohol abuse. Two of the three had convictions for offences of violence[144]. Two faced the prospect of tribal punishment[145] and in one instance tribal punishment had been administered[146].

111 All but one of the sentences in the Schedule was imposed following the offender's plea of guilty[147]. In each case a parole eligibility order was made.

112 Five of the 10 relevant decisions are sentences of imprisonment imposed after the transitional provisions came into effect. The length of these sentences was: three years and four months in *Meeway*; four years in *Wallalgie*; three years in *Gordon*; three years in *Brooks*; and four years in *Frazer*. The other five decisions are sentences imposed when the automatic remission of sentence by one-third applied. After adjustment to bring them into line with sentences imposed under the transitional provisions, the length of these sentences was: two years and eight months in *Njana*; two years and eight months in *Cox*; four years and eight months in *Qualla*; three years and four months in *Rictor*; and four years and eight months in *Richards*.

113 Of course, no two cases involve the same combination of aggravating and mitigating factors. A few of the relevant cases in the Schedule involved

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141 *R v Qualla* unreported, Supreme Court of Western Australia, 1 March 2002.

142 *R v Rictor* unreported, Supreme Court of Western Australia, 30 April 2002.

143 *The State of Western Australia v Meeway* unreported, Supreme Court of Western Australia, 8 October 2007.

144 *R v Qualla* unreported, Supreme Court of Western Australia, 1 March 2002; *The State of Western Australia v Meeway* unreported, Supreme Court of Western Australia, 8 October 2007.

145 *R v Qualla* unreported, Supreme Court of Western Australia, 1 March 2002; *The State of Western Australia v Meeway* unreported, Supreme Court of Western Australia, 8 October 2007.

146 *R v Rictor* unreported, Supreme Court of Western Australia, 30 April 2002.

147 *R v Njana* unreported, Supreme Court of Western Australia, 13 March 1998.

offenders who did not have records for violence[148]. In this respect, they may be distinguished from the appellant's case. Four offences were aggravated by the fact that the fatal assault was carried out with the use of a tree branch[149]. In this respect, the appellant's case may also be distinguished. Nonetheless, in my opinion the decisions are informative of the pattern of sentencing for an offence comparable to the appellant's offence committed by an offender having a comparable background.

114 Some reference should also be made to the cases in the Director's Attachment "A". The first, *Gordon*[150], bears marked similarity to the present case. The offender, a mature Aboriginal man, subjected his de facto wife to a protracted, brutal and fatal flogging. It was likely that he inflicted some injuries on his victim with a piece of angle iron. She bled to death internally. The offender did not seek medical assistance for her. He lied to the police in an attempt to avoid responsibility for his offence. The prosecution accepted a plea of guilty to manslaughter in discharge of an indictment that charged the offender with murder. He had multiple convictions for assault and assault occasioning actual bodily harm. He had killed his former de facto wife in "alarmingly similar circumstances" for which offence he had been sentenced to three years' imprisonment[151]. He was on parole at the date of the subject offence. He was sentenced to seven years' imprisonment, which was subject to automatic remission. After adjustment, the sentence would have been four years and eight months. It was accumulated on 500 days, which remained on the offender's cancelled parole order. The sentencing judge declined to make a parole eligibility order but noted that the possibility remained of the offender's release on parole having regard to the period already "owed" to the Parole Board[152].

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148 *R v Njana* unreported, Supreme Court of Western Australia, 13 March 1998; *R v Rictor* unreported, Supreme Court of Western Australia, 30 April 2002; *The State of Western Australia v Gordon* unreported, Supreme Court of Western Australia, 7 April 2008.

149 *R v Rictor* unreported, Supreme Court of Western Australia, 30 April 2002; *R v Richards* unreported, Supreme Court of Western Australia, 5 March 2003; *The State of Western Australia v Meeway* unreported, Supreme Court of Western Australia, 8 October 2007; *The State of Western Australia v Frazer* unreported, Supreme Court of Western Australia, 2 November 2009.

150 [2000] WASCA 401.

151 *R v Gordon* [2000] WASCA 401 at [6] per Kennedy J.

152 *R v Gordon* [2000] WASCA 401 at [9] per Kennedy J.

115 A State appeal against inadequacy of sentence was dismissed by majority in *Gordon*. As McLure P noted, *Gordon* was decided at a time when State appeals were subject to considerations of double jeopardy[153]. The joint reasons refer to Wheeler J's powerful dissent[154]. It remains that while Kennedy and Anderson JJ each considered the sentence was lenient, neither found that it was outside the range of discretion[155].

116 The relevance of *Luff* is not apparent. In that case, the offender's plea of guilty to manslaughter was accepted in satisfaction of an indictment charging him with the murder of an associate. He was sentenced under the transitional provisions to a term of seven years and four months' imprisonment. His appeal against the severity of the sentence was dismissed. He killed the deceased with repeated punches and kicks to the head delivered with a steel-capped boot. It is notable that while the victim was intoxicated, the offender was not[156].

117 In *Walley* the offender, an Aboriginal woman, was convicted of the manslaughter of her partner. She and the deceased had spent the day drinking and both had consumed amphetamines. They argued and the offender, who was behaving in a generally aggressive way, armed herself with several knives. These were removed by a family member. The offender and the deceased continued to argue. She armed herself with another knife and fatally stabbed the deceased in the neck. She had been raised in a household in which the abuse of alcohol was commonplace. She had been the victim of sexual and domestic violence in past relationships. The sentencing judge imposed a sentence of one year and eight months' imprisonment. The prosecution's appeal against the manifest inadequacy of the sentence was allowed[157]. The offender was re-sentenced to a term of three years' imprisonment. The appeal was decided when considerations of double jeopardy informed re-sentencing on a prosecution appeal. The sentence of three years' imprisonment is to be understood as a

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153 *Western Australia v Munda* (2012) 43 WAR 137 at 151 [61].

154 Reasons of French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ at [41]-[42].

155 *R v Gordon* [2000] WASCA 401 at [17] per Kennedy J, [19] per Anderson J.

156 *Luff v The State of Western Australia* [2008] WASCA 89 at [14].

157 *The State of Western Australia v Walley* [2008] WASCA 12 at [33]-[35] per Wheeler and Miller JJA.

sentence at the "lower end of the range"[158] of appropriate sentences for the offence.

118 It will be recalled that McLure P said that the range of past sentences for manslaughter was between two years and four months and 12 years. None of the sentences to which the parties referred the Court of Appeal was of 12 years[159]. The adjusted sentences for the offences in Attachment "A" in the period before the introduction of the transitional legislation were six years in *Pryor*[160], five years and four months in *Haworth*[161], two years and four months in *Churchill*[162], two years and four months with a period of suspension in *McDonald*[163] and four years and eight months in *Nguyen*[164]. The sentences imposed under the transitional provisions in Attachment "A" were five years' imprisonment in *Bell*[165] and 10 years' imprisonment in *Colledge*[166].

119 The material before the Court of Appeal did not support the Director's contention that the appellant's sentence was manifestly inadequate given the standards of sentences customarily observed for an offence of this kind (particular (b) of the ground of appeal). This was not determinative of the Director's challenge. However, the circumstance that the primary judge's

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158 *Dinsdale v The Queen* (2000) 202 CLR 321 at 341 [62] per Kirby J; [2000] HCA 54, citing *R v Peterson* [1984] WAR 329 at 330-331 per Burt CJ and *R v Clarke* [1996] 2 VR 520 at 522.

159 Attachment "A" referred to *Nguyen v The Queen* [2001] WASCA 176, which was described as a decision in which a total effective sentence of 12 years was imposed on the offender. This was in consequence of the partial accumulation of sentences for three offences including manslaughter. The sentence imposed for the manslaughter was seven years. The sentences were imposed at a time when the scheme of automatic remission of sentence applied.

160 *Pryor v The Queen* unreported, Supreme Court of Western Australia, 12 December 1995.

161 *Haworth v The Queen* [2000] WASCA 175.

162 *R v Churchill* [2000] WASCA 230.

163 *R v McDonald* [2000] WASCA 336.

164 *Nguyen v The Queen* [2001] WASCA 176.

165 *Bell v The Queen* [2003] WASCA 216.

166 *Colledge v The State of Western Australia* [2007] WASCA 211.

sentence was consistent with sentences imposed in comparable cases, and that his Honour's reasons did not disclose any patent error, invites careful attention to the basis on which the conclusion of manifest inadequacy was reached. Before turning to the Court of Appeal's reasons in this respect, there should be reference to the statutory principles that govern the sentencing of offenders and to the approach that the primary judge took to the application of those principles in the appellant's case.

The Sentencing Act principles

120 Section 6(1) of the *Sentencing Act* 1995 (WA) ("the Sentencing Act") states that a sentence imposed on an offender must be commensurate with the seriousness of the offence. The seriousness of an offence must be determined by taking into account the statutory penalty for the offence; the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and any aggravating and mitigating factors[167].

121 Aggravating factors are factors which, in the court's opinion, increase the culpability of the offender[168]. An offence is not aggravated by the fact that the offender has a criminal record or that a previous sentence has not achieved the purpose for which it was imposed[169].

122 The mandate of s 6(1) does not prevent the reduction of a sentence because of any mitigating factors[170]. Mitigating factors are factors which, in the court's opinion, decrease the culpability of the offender or decrease the extent to which the offender should be punished[171]. If, because of a mitigating factor, a court reduces the sentence it would otherwise have imposed on an offender, the court must state that fact in open court[172].

The primary judge's reasons

123 The primary judge identified as aggravating factors: that the appellant was subject to a lifetime violence restraining order which prohibited him from

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167 Sentencing Act, s 6(2).

168 Sentencing Act, s 7(1).

169 Sentencing Act, s 7(2)(b) and (c).

170 Sentencing Act, s 6(3).

171 Sentencing Act, s 8(1).

172 Sentencing Act, s 8(4).

having contact with the deceased; that the intimacy of the relationship ought to have provided the deceased with protection; and that the attack on the deceased was sustained and involved considerable violence. His Honour concluded that the offence was "a serious offence towards the upper end of the range of seriousness"[173].

124 The mitigating factors which the primary judge took into account included the appellant's cooperation with the police, plea of guilty and remorse[174].

125 The primary judge also took into account that the appellant is a traditional Aboriginal, which served to mitigate the sentence in three ways. First, his Honour noted that any term of imprisonment was likely to be served in a prison distant from the appellant's community[175]. Secondly, he also took into account that the social disadvantage in some Aboriginal communities serves to condition members of the community to accept the abuse of alcohol and violence as if it were a way of life[176]. In this respect he said[177]:

> "In such circumstances, there needs to be a recognition that, although punishment plays a role in personal and general deterrence, to change such behaviour requires a change in the social circumstances."

126 The observation echoes a proposition stated in *Fernando*[178], a decision which is discussed in *Bugmy v The Queen*[179]. His Honour immediately went on to advert to another of the propositions stated in *Fernando*[180]. He said[181]:

> "However, notwithstanding these considerations, the seriousness of an offence must always be given proper weight. Like in all communities, the sentences imposed play a role in trying to protect the vulnerable. This

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173 *The State of Western Australia v Munda* [2011] WASCSR 87 at [9]-[12].

174 *The State of Western Australia v Munda* [2011] WASCSR 87 at [20]-[21].

175 *The State of Western Australia v Munda* [2011] WASCSR 87 at [22].

176 *The State of Western Australia v Munda* [2011] WASCSR 87 at [23].

177 *The State of Western Australia v Munda* [2011] WASCSR 87 at [23].

178 (1992) 76 A Crim R 58 at 62 (C) per Wood J.

179 [2013] HCA 37.

180 (1992) 76 A Crim R 58 at 62 (D) per Wood J.

181 *The State of Western Australia v Munda* [2011] WASCSR 87 at [23].

> includes, in Aboriginal communities, Aboriginal women, who are frequently subject to violence."

127 Thirdly, his Honour took account of a letter signed by a number of senior men from the Walmajarri, Wangkatjungka and Gooniyandi people of the Fitzroy Valley, which explained that the appellant will undergo traditional punishment on his release. The appellant will be flogged by "families of his wife who passed away". The beating will be administered with sticks and nulla nullas. People who have been drinking will not be allowed to take part. His Honour commented on the dilemma that is presented to the court by evidence of the likelihood that an Aboriginal offender will suffer payback on release from prison[182]. He observed that there was no certainty that payback would take place or as to its severity if it did occur. Nonetheless, he said that he would take it into account and give it limited weight[183]. The Director submitted in the Court of Appeal that his Honour was correct to do so. The question of whether the occurrence or prospect of traditional punishment is a material factor in sentencing was not in issue in the Court of Appeal or in this Court.

The conclusion of manifest inadequacy – the Court of Appeal

128 McLure P concluded that the sentence was manifestly inadequate because it failed to recognise the seriousness of the offence, the seriousness of the circumstances in which it was committed and the need for both personal and general deterrence[184]. Relevant to the conclusion was her Honour's view that the evidence fell short of demonstrating that the appellant had been raised in circumstances of such deprivation as would allow his addiction to alcohol to mitigate his offence[185]. The fact that the appellant can communicate in English and has experience of prison life meant that imprisonment would not bear particularly harshly on him[186].

129 Buss JA's conclusion of manifest inadequacy was based on essentially the same reasoning. His Honour acknowledged that the offence was alcohol-related and that alcohol abuse had been rife in the appellant's extended family when he was a child[187]. He pointed out that the appellant had demonstrated the capacity to

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182 *The State of Western Australia v Munda* [2011] WASCSR 87 at [26].

183 *The State of Western Australia v Munda* [2011] WASCSR 87 at [27].

184 *Western Australia v Munda* (2012) 43 WAR 137 at 153 [68].

185 *Western Australia v Munda* (2012) 43 WAR 137 at 153 [67].

186 *Western Australia v Munda* (2012) 43 WAR 137 at 153 [67].

187 *Western Australia v Munda* (2012) 43 WAR 137 at 164 [134].

abstain from alcohol when working at cattle stations for long periods[188]. His Honour also considered that the fact that the appellant had previously been imprisoned and had obtained some education meant that the experience of lengthy imprisonment would not be unduly harsh[189]. He said that to the extent that the "*Fernando* propositions" were relevant, they were decisively outweighed by other sentencing factors, which he identified as the protection of vulnerable women and personal and general deterrence[190].

Conclusion

130 The Court of Appeal considered that the killing of a defenceless Aboriginal woman by her drunken partner in a sustained, brutal assault was a serious offence requiring a sentence with a significant deterrent component. The primary judge assessed the offence as a serious one and determined that a sentence of five years and three months' imprisonment appropriately served the ends of punishment, including deterrence. It is accepted that in arriving at the sentence, the primary judge correctly made a reduction to take into account the appellant's fast-track plea of guilty. The maximum penalty for manslaughter is 20 years' imprisonment. Absent the plea of guilty, was the Court of Appeal correct to conclude that a sentence of seven years and six months' imprisonment is manifestly inadequate to meet the purposes of punishment in the appellant's case?

131 The joint reasons in *Markarian v The Queen* recognised that while careful attention to the maximum penalty will almost always be required, the relevance of this consideration is not uniform[191]. The great variety of circumstances which may result in a conviction for manslaughter explains why the range of sentences for the offence is notoriously wide[192]. This recognition carries with it the consequence that the maximum penalty for manslaughter will often be of limited relevance. The determination of a sentence falling well short of half the maximum sentence for the offence does not of itself necessitate the conclusion of error.

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188 *Western Australia v Munda* (2012) 43 WAR 137 at 164 [134].

189 *Western Australia v Munda* (2012) 43 WAR 137 at 164 [134].

190 *Western Australia v Munda* (2012) 43 WAR 137 at 164 [134].

191 (2005) 228 CLR 357 at 372 [30]-[31] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25.

192 *Wicks v The Queen* (1989) 3 WAR 372 at 385 per Malcolm CJ, 390 per Wallace J, 393 per Brinsden J; *R v Isaacs* (1997) 41 NSWLR 374 at 381 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ.

132 Central to the Court of Appeal's conclusion of implicit error was consideration of the seriousness of the offence in the circumstances in which it was committed. Material to that assessment is the role played by alcohol in its commission. The circumstance that the appellant was very intoxicated at the time he carried out this sustained assault ordinarily would not be a mitigating factor.

133 The analysis in *Fernando*, to which the primary judge obliquely referred, was directed to the significance of intoxication to the sentencing of an Aboriginal offender raised in a community that is demoralised by social and economic disadvantage and in which the abuse of alcohol and alcohol-fuelled violence are endemic. It is recognised that a background of profound disadvantage of this description may be taken into account in mitigation of drunken offending[193]. A second proposition stated in *Fernando* has particular application to traditional Aboriginal offenders: that the court may take into account in mitigation of sentence that a lengthy term of imprisonment served in a facility distant from the offender's community may be particularly harsh[194].

134 The "*Fernando* propositions" do not all favour mitigation of sentence. They contemplate the necessity to ensure that Aboriginal Australians are not deprived of the protection which it is assumed punishment provides and to avoid the perception that serious violence in Aboriginal communities will be treated by the law as a matter of little moment[195]. The propositions have internal tensions which fall to be weighed by the sentencing judge along with all of the other factors that bear on the ultimate discretionary determination.

135 The law confers a wide discretion on the sentencing judge[196]. It is trite to observe that inadequacy of sentence is not established by mere disagreement by the appellate court with the sentence imposed by the sentencing judge[197]. It was open to the primary judge to take into account the isolation that the appellant, a traditional Aboriginal man, would experience in a prison distant from his

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193 *Bugmy v The Queen* [2013] HCA 37 at [38]-[40], [43] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

194 See *Bugmy v The Queen* [2013] HCA 37 at [39] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

195 *Fernando* (1992) 76 A Crim R 58 at 62 (D).

196 *Griffiths v The Queen* (1977) 137 CLR 293 at 327 per Jacobs J.

197 *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ; *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672 [15].

community. So, too, was it open to his Honour to take into account the social disadvantages within the appellant's community, which had led to an acceptance of alcohol abuse and violence as normal[198]. His Honour recognised that these factors were to be weighed against the need to structure a sentence that would play a role in protecting vulnerable Aboriginal women, who are frequently subject to abuse[199]. In question is not the principles applied but whether, in the result, a sentence of five years and three months' imprisonment is eloquent of error.

136 The mandate of s 6(1) of the Sentencing Act required the imposition of a sentence commensurate with the seriousness of the offence. But this did not prevent the reduction of the sentence by reason of any mitigating factors. The fact that the Court of Appeal did not find that features of the appellant's background and circumstances were mitigating factors does not make the primary judge's contrary conclusion wrong.

137 In circumstances which include that the sentence was consistent with sentences imposed for comparable offences, I consider that the Court of Appeal was not justified in the conclusion that it fell definitely below the range of discretion.

138 I would allow the appeal, set aside the orders of the Court of Appeal and, in lieu thereof, dismiss the Director's appeal to that Court.

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198 *The State of Western Australia v Munda* [2011] WASCSR 87 at [23].

199 *The State of Western Australia v Munda* [2011] WASCSR 87 at [23].