CASENOTE:

MUNDA V WESTERN AUSTRALIA (2013) 302 ALR 207

by Steven Gardiner

INTRODUCTION

In *Munda v Western Australia* ('*Munda*'),[1] the majority of the High Court dismissed an appeal against a decision by the Court of Appeal of the Supreme Court of Western Australia ('WASCA') that increased the sentence originally imposed on the appellant. The principal concerns for the High Court in *Munda* was whether WASCA should have interfered with the original sentence and the appropriate weight that should be accorded to the personal circumstances of the appellant, including his Aboriginality.

BACKGROUND

On 12 July 2010, Mr Munda, the appellant, and the deceased return to their home in the Mindi Rardi community near Fitzroy Crossing, Western Australia ('WA'). The deceased had been the appellant's de facto partner for over 16 years and they had four children together. They were both intoxicated and the appellant had been using some cannabis. Whilst at home, an argument ensued between the appellant and the deceased, each accusing the other of being unfaithful. This culminated in the appellant throwing the deceased, ramming her head into the walls and punching her several times in the face while she was on the ground. The reason the appellant offered for assaulting the deceased was 'to keep her quiet'. Eventually, they both went to sleep. The following morning the appellant had sexual intercourse with the deceased and then left to get some tea. When he returned, the appellant noticed the deceased was no longer breathing. He called for medical assistance and the deceased was subsequently transported to a hospital. She was pronounced dead on arrival.

The appellant was eventually convicted of manslaughter. In sentencing the appellant, the primary judge identified as aggravating factors the existence of a 'life violence restraining order' prohibiting the appellant from contacting the deceased; the protection that being in a domestic relationship should have afforded the deceased; and the considerable violence and sustained nature of the appellant's attack. The fact that there was a 'life violence restraining order' was evidence of a long history of domestic violence.[2]

Along with cooperation with the police, his plea of guilty and demonstrated remorse, the primary judge also identified as a mitigating factor the fact that the appellant was a 'traditional Walmajarri man.'[3] The primary judge drew three implications from this fact for the purposes of sentencing:

- First, the term of imprisonment was likely to be served in a prison distant from the appellant's traditional community, causing feelings of isolation;[4]
- Second, the social disadvantage of some Aboriginal communities served to condition members of those communities to accept the abuse of alcohol and violence.[5] This reality was acknowledged to diminish the effectiveness of deterrence, although the primary judge did say that the seriousness of the offence should always be given proper weight.[6] These remarks echoed the '*Fernando* considerations',[7] although the primary judge did not explicitly advert to the case; and
- Thirdly, the possibility of traditional punishment being meted out by senior Elders beating the appellant with sticks and nulla nullas was given 'limited weight'.[8]

The primary judge sentenced the appellant to five years and three months imprisonment, even though the maximum penalty for manslaughter is 20 years imprisonment.

On appeal, WASCA (McLure P, Buss and Mezza JJA) increased the sentence to seven years and nine months imprisonment on the basis that the earlier sentence was 'manifestly inadequate'.[9] WASCA determined that the sentence was 'manifestly inadequate' because it failed 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 general and personal deterrence.[10] WASCA reached its conclusion regarding

'manifest inadequacy' on the basis that the primary judge had given undue emphasis to the appellant's background and personal circumstances.[11]

THE DECISION

There were three grounds of appeal:

1. WASCA had erred in its application of the principles for an appeal of a sentence that is alleged to be manifestly inadequate;
2. WASCA did not give appropriate regard to the appellant's background and personal circumstances; and
3. WASCA failed in identifying and exercising the residual discretion it had to set aside the original sentence, even if a sufficient error was found.

Chief Justice French, Hayne, Crennan, Kiefel, Gageler and Keane JJ dismissed the appeal in a joint judgment, with Bell J dissenting.

MANIFESTLY INADEQUATE

The nature of the appellant's complaint was that WASCA was not in a position to determine whether the sentence was 'manifestly inadequate' because there was no applicable yardstick of comparable cases to draw such a conclusion.[12]

THE MAJORITY

The majority dismissed this ground of appeal, finding nothing unorthodox in the approach taken by WASCA.[13] The majority said that a yardstick derived by reference to comparable cases was not an essential precondition to finding a sentence manifestly inadequate; it is merely indicative of inadequacy.[14] The majority also emphasised that the maximum penalty fixed by the legislature also provides a relevant yardstick when determining manifest inadequacy.[15] Considering this, the majority made clear that the gravity of the appellant's offence here made it difficult to impugn the conclusion reached by WASCA, that the sentence imposed at first instance was manifestly inadequate.[16]

JUSTICE BELL'S DISSENT

Justice Bell held that it was open to the primary judge to reach the sentence that he did despite WASCA's conclusion to the contrary. Justice Bell placed great weight on whether the sentence was consistent with sentences imposed in similar cases in order to determine 'manifest inadequacy',[17] reaching the conclusion that WASCA was not justified in holding that the sentence fell below the range of sentences that were open to the primary judge's discretion.[18] Furthermore, Bell J was critical of giving too much relevance to the maximum penalty for manslaughter considering the wide range of sentences that are commonly given for the offence.[19]

PERSONAL CIRCUMSTANCES

The appellant contended that WASCA erred in principle in treating the personal circumstances of the appellant as having a limited mitigatory effect.[20] It was submitted that the social and economic problems common in Aboriginal communities that affected the appellant should be treated as a mitigating factor.[21] The appellant did not argue for treating Aboriginality per se as warranting leniency.

Moreover, the appellant also argued that the prospect of suffering traditional punishment should have been given more weight by both the primary judge and WASCA.[22]

THE MAJORITY

The majority dismissed this ground of appeal in a judgment distinguished by its strong emphasis on the importance of individual justice and the need to vindicate the human dignity of both offender and victim by applying consistent sentencing standards in all cases.

The majority reaffirmed that the approach to be taken when it comes to sentencing is to apply the same sentencing principles in every case regardless of the particular offender's identity or membership of an ethnic or other group.[23] While acknowledging that an offender's Aboriginality may play a role as a mitigating factor, it would be inconsistent with principle to treat Aboriginal offending systematically as less serious than offending by persons of other ethnicities.[24] To do that would, according to the majority, mean that the dignity of individual offenders was diminished by consigning them to a category of persons 'less capable than others of decent behaviour' as well as the dignity of their victims by suggesting they were somehow less deserving of the protection and vindication offered by the criminal law.[25]

Furthermore, the majority argued that the view that general deterrence is of limited value when dealing with individuals from communities demoralised or alienated from prolonged and widespread social disadvantage, rested on a narrow conception of the role of the criminal law. The majority argued that the criminal law was more than a tool of regulation to deter deviant behaviour, but also a means for the state to:[26]

> 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.

The importance of this was even greater where the offender has taken, by his drunken and violent conduct, a human life.[27] A failure to administer just punishment in those circumstances, the majority said, would be a failure to vindicate the dignity of the victim.[28]

The affect on the appellant from an environment in which alcohol abuse was common did not, according to the majority, necessarily diminish moral culpability. The majority suggested that the presence of addiction might lead to increasing the weight accorded to personal deterrence because of the risk of reoffending.[29]

The majority acknowledged that the High Court is reluctant to interfere with an exercise of sentencing discretion —the synthesis of competing considerations that made up the sentence imposed by WASCA was found not to be affected by an error sufficient to justify such interference.[30]

Lastly, the majority did not offer a considered view as to whether the prospect of traditional punishment being meted out was a relevant consideration, simply saying that the appellant did not suffer any injustice for the limited weight it was accorded.[31]

Justice Bell considered these issues in the context of what was appropriate for the primary judge to take into account in exercising sentencing discretion. Bell J concluded that the personal circumstances of the appellant and that the general condition of his community could be mitigating factors, even if WASCA thought otherwise.[32]

RESIDUAL DISCRETION

The appellant submitted that WASCA erred in its identification and application of the court's residual discretion to dismiss a prosecution appeal against a sentence that is manifestly inadequate.

The majority reaffirmed the existence of a residual discretion, despite the abrogation of the double jeopardy rule,[33] to decline to allow an appeal against a sentence that is erroneously lenient.[34] Moreover, the joint judgment (with Bell J agreeing on this point) found that the scope for the exercise of the residual discretion, as stated by McLure P of WASCA, was too narrow. Justice McLure said the residual discretion was only likely to be exercised, absent parity considerations, where the sentence in question was not manifestly inadequate.[35] Both the joint judgment and Bell J referred to, amongst other things, delayed in bringing the appeal and the conduct of the prosecution as relevant factors in dismissing a prosecution appeal, notwithstanding a manifestly inadequate sentence.[36]

Nevertheless, this ground of appeal was dismissed by the majority on the basis that none of the matters urged by the appellant were 'apt to exert a claim upon the residual discretion' to dismiss the prosecution appeal.[37] The finding of 'manifest inadequacy' (which the majority held that WASCA was entitled to reach) meant that there were grounds not to exercise the 'residual discretion' to dismiss the prosecution appeal.

CONCLUSION

It was clear that the nature and gravity of the offence was decisive in the majority refusing to overturn the decision reached by WASCA that the sentence originally imposed was 'manifestly inadequate'. While Aboriginality was not rejected as a relevant consideration, *Munda* confirms that the weight it will be accorded is to be understood through the lens of individual justice. The appeal of this clearly stems from a view of the role of the criminal law in upholding human dignity and articulating the concerns of the community. Any attempt to address Aboriginality systemically in sentencing is unlikely to succeed if these views are not engaged with.

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1 (2013) 302 ALR 207.

2 *Munda v Western Australia* [2011] WASCSR 87, [9]-[12] (Commissioner Sleight).

3 Ibid [22]-[23] (Commissioner Sleight).

4 Ibid [22] (Commissioner Sleight).

5 Ibid [23] (Commissioner Sleight).

6 Ibid.

7 See *R v Fernando* (1992) 76 A Crim R 58, 62.

8 *Munda v Western Australia* [2011] WASCSR 87, [27] (Commissioner Sleight).

9 *Western Australia v Munda* (2012) 43 WAR 137.

10 Ibid 153 [68] (McLure P).

11 Ibid 152-3 [66]-[67] (McLure P), 164 [134] (Buss JA).

12 *Munda* (2013) 302 ALR 207 [30] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ). Other aspects of this ground of appeal relating inappropriateness of referring to "weighing errors" and the suppose reliance on the prevalence of manslaughter by Aboriginal defendants as a consideration only received cursory treatment.

13 Ibid [33] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

14 Ibid [39] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

15 Ibid [40] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

16 Ibid [42] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

17 Ibid [104] (Bell J).

18 Ibid [137] (Bell J).

19 Ibid [131] (Bell J).

20 Ibid [47] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

21 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

22 Ibid [49] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

23 Ibid [50] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) citing *Neal v The Queen* (1982) 149 CLR 305, 326 (Brennan J).

24 Ibid [53] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

25 Ibid.

26 Ibid [54] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

27 Ibid [55] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

28 Ibid.

29 Ibid [57] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

30 Ibid [60] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

31 Ibid [61]-[63] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

32 Ibid [135]-[136] (Bell J).

33 The relevant provision abrogating the double jeopardy rule here was the *Criminal Appeals Act 2004* (WA), s 41(4).

34 The HCA held there still existed a residual discretion even when double jeopardy had been abrogated in *Green v The Queen* (2011) 224 CLR 462.

35 *Western Australia v Munda* (2012) 43 WAR 137, 147 [33] (McLure P).

36 *Munda* (2013) 302 ALR 207 [72]-[73] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ), [90] (Bell J).

37 Ibid [74]-[78] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

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