Munda v Western Australia **[2013] HCA 38 (2 October 2013) – High Court of Australia**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Antecedents and personal circumstances' – 'Denunciation' – 'Deterrence' – 'Manslaughter' – 'Sentencing' – 'Social disadvantage' – 'Traditional Aboriginal and Torres Strait Islander punishment'

Charge/s: Manslaughter

Appeal Type: Appeal against sentence.

Facts: The appellant, an Aboriginal man, pleaded guilty to the manslaughter of his de facto spouse. He was sentenced to five years and three months' imprisonment with a non-parole period of three years and three months'. The DPP appealed to the Court of Appeal on the basis that the sentence was manifestly inadequate. The Court of Appeal upheld the appeal and resentenced the appellant to seven years and nine months' imprisonment with the same parole eligibility conditions. The appellant and the deceased had been in a relationship for approximately 16 years. On the day the deceased was killed, the appellant and the deceased spent the afternoon at a local tavern and both became intoxicated. After returning home, an argument ensued and the appellant assaulted the deceased in a prolonged and brutal way. He threw the deceased about the room, rammed her head into walls and repeatedly punched her on the face and head. There was a history of significant domestic violence in the relationship, including a conviction for grievous bodily harm for which the appellant was sentenced to 12 months' imprisonment (conditionally suspended) as well as a conviction for common assault. The appellant was subject to a lifetime violence restraining order in favour of the deceased which prohibited him from having any contact with her. However, this order had been ignored by both parties and the relationship had continued.

Issue/s: Some of the issues concerned –

1. Whether the Court of Appeal incorrectly applied the principles which govern manifest inadequacy of a sentence.
2. Whether the Court of Appeal erred by failing to pay sufficient regard to the appellant's antecedents and personal circumstances, in particular the systemic deprivation and disadvantage (including endemic alcohol abuse which is prevalent in Aboriginal and Torres Strait Islander communities) that the appellant faced.

Decision and Reasoning: The appeal was dismissed by majority (Bell J dissenting).

1. The joint majority (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) found no error in the Court's approach to the issue of manifest inadequacy. In the Court of Appeal, McLure P made express reference to the gross over-representation of Aboriginal people in the criminal justice system (particularly in relation to manslaughter) which is directly related to alcohol and drug abuse. Her Honour also made reference to various 'weighting errors' in the sentencing at first instance. The Court held that there was no error in this approach. See in particular at [37], where the joint majority noted *'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".*

   See also McLure P's statement quoted at [41] – *"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".* The joint majority approved these remarks at [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.'*

2. The appellant did not submit that 'Aboriginality per se warrants leniency' (see at [47]). Rather, the appellant contended that social and economic issues commonly associated with Aboriginal communities affected the appellant and that these should have been treated as mitigating factors. He also contended that he was likely to receive traditional Aboriginal and Torres Strait Islander punishment when released from prison and that he was 'willing, and indeed anxious' (see at [49]) to subject himself to this payback. He submitted that this should have received greater significance as a mitigating factor.

   In dismissing these arguments, the Court noted that while mitigating factors such as social disadvantage need to be afforded appropriate weight in sentencing, this cannot result in the imposition of a penalty which is disproportionate to the gravity of the offending. In particular, the Court noted at [53] – *'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' and '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.'*

   The Court also addressed the argument that general deterrence has less significance in relation to crimes which are not premeditated in the context of social disadvantage. In dismissing this assertion, the Court noted that the criminal law is not limited to the 'utilitarian value of general deterrence' and stated that the obligation of the State is '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' (see at [54]). Furthermore, the gravity of the offending in this case was extremely high - see at [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.’

In relation to the appellant’s alcohol addiction, McLure P held that this factor would increase the weight to be given to personal deterrence and community protection. The joint majority of the High Court agreed and noted that the fact the appellant was affected by an environment of alcohol abuse should be taken into account in assessing personal moral culpability, but this has to be balanced with the seriousness of the offending. See further at [57] where the majority of the High Court said– ‘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.’

In relation to the relevance of traditional Aboriginal and Torres Strait Islander punishment, the High Court’s disposition was that the appellant’s willingness to submit to this punishment was not a relevant consideration in sentencing. However, the first instance judge did take it into account, which was not challenged in the Court of Appeal. While the joint majority of the High Court did not offer a conclusive opinion, they noted that the courts cannot condone the commission of an offence or ‘the pursuit of vendettas’ and held that the appellant did not suffer injustice because the prospect of traditional punishment was given only limited weight (see at [61]-[63]).

Bell J dissented. Her Honour held that it was open to the primary judge to reach the sentence that he did, based on comparable authorities. Bell J was also critical of the practice of giving too much weight to the maximum penalty, given the wide variety of circumstances in which manslaughter convictions can arise. Her Honour stated that a sentence well short of half the maximum penalty does not of itself give rise to legal error.