IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P34 of 2013

BETWEEN:

ERNEST MUNDA
Appellant

-and-

THE STATE OF WESTERN AUSTRALIA
Respondent

APPELLANT'S ANNOTATED REPLY

Part II: Issues

1 The State's identification of the issues is unduly narrow. The issues that properly fall for consideration in this appeal include all those raised by the appellant.

Part V: Facts

2 The additional facts are not disputed.

Part VI: Argument - Ground 2.1

Manifest inadequacy

3 The State's argument seeks to avoid the requirements for appellate intervention on the ground that a sentence is manifestly inadequate. Intervention 'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'. Rather, 'the difference (must be) such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent...'.[1] There must be some 'yardstick'.[2]

4 The State also contends that the majority's reference to 'weighting errors' was confined to considerations of deterrence in the context of 'broadly comparable cases'.[3] As explained below, that submission cannot be sustained.[4] In any event, such an intervention seeks to proceed on the basis of a failure to give adequate weight to factors expressly identified by the primary judge. Absent anything equating to 'a failure properly to exercise the discretion which the law reposes in the court of first instance,'[5] intervention on such a basis is not permissible.[6]

Sentences customarily imposed

5 The State's continued regard for *Luff*,[7] *Walley*[8] and *Gordon*[9] remains flawed. In its written submissions below, these were summarised under the heading 'Cases

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[1] Cf. RS [8]; *Wong* (2001) 207 CLR 584, 605 [58], *Hili* (2010) 242 CLR 520 at 538 [59]. AS [27]-[29]
[2] *Hili* (2010) 242 CLR 520 at 537 [54]; AS [27]; Cf. AR 105 to 112: the appellant's schedule.
[3] COA [63], AR 184, RS [25].
[4] Nor is it a true characterisation of what the majority actually did: AS [29]-[31]
[5] *House v The King* (1936) 55 CLR 499 at 505.
[6] *Dinsdale* v *The Queen* (2000) 202 CLR 321 at 330 [26] and 343 [69]; *Storie v Storie* (1945) 80 CLR 597, 599-600; *Mallett v Mallett* (1984) 156 CLR 605, 614; *Lovell v Lovell* (1950) 81 CLR 513, 519.
[7] *Luff v State of Western Australia* [2008] WASCA 89.
[8] *State of Western Australia v Walley* [2008] WASCA 12.

broadly similar to the present case' and described as those 'which are most factually similar to the present case'.[10] At the appeal hearing, counsel completely departed from this characterisation.[11] Now, the State suggests that the conclusion that those cases are of 'little guidance' was 'apt'[12] and paradoxically reasserts, in the same breath, its original premise that 'the State's reference to deterrence was made in the context of reviewing broadly comparable cases...'.[13] The approach is confused and in any event does not show any 'marked difference' with 'cases most comparable,'[14] a necessary step towards a proper conclusion of manifest inadequacy.

Prevalence - 'by any other name'

6 The State's submission that 'no reliance' was placed upon the issue of prevalence by the COA is untenable. True it is that the State's written submissions expressly 'did not rely upon an increase in prevalence', but they suggested, after citing the dissenting judgment in *Gordon*,[15] that 'despite the passage of time between *Gordon* and the present case, Aboriginal women are still exceptionally vulnerable to drunken violence.'[16] This is now explained as 'referring to the pre-existing and ongoing nature of this type of offending (hence the need for deterrence)'.[17] The contended distinction between 'an increase in prevalence' and 'the pre-existing and ongoing nature of this type of offending' is one without substance.[18] At the appeal hearing, counsel referred to *Wongawol*,[19] noting that the President had commented 'about this ongoing problem...and it's for that reason that the state submits that those principles are to be taken into account in considering the factual circumstances of this case and make it an appropriate case for the Court to intervene...'[20] (our emphasis).

7 The COA made clear its intention to rely upon prevalence in order to 'conclude' manifest inadequacy.[21] The majority undertook the task in a manner akin to how the authorities stipulate prevalence is to be addressed by sentencing courts; that is, '...the prevalence of a particular offence...must play some part...particularly in emphasising the importance of general deterrence'.[22] This is to be done by 'giving less weight to – which is not to ignore – mitigating factors which may be found within the antecedents of the prisoner'.[23] Prevalence can permit 'weighting the instinctive synthesis in favour of general deterrence and giving less weight to mitigatory factors'.[24] The majority alleged a 'grossly disproportionate' involvement of indigenous offenders (and victims) in the offence of manslaughter 'in recent years' and had an attenuated regard

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[9] *R v Gordon* [2000] WASCA 401.
[10] AR 75.
[11] AR 116, L7-14, at least in respect of *Luff* and *Walley* (which is erroneously referred to as *Wallam*).
[12] RS [19]-[20].
[13] RS [25].
[14] *Hili* (2010) 242 CLR 520 at 540 [62].
[15] In *Gordon* at [35], Wheeler J cited the incidence of 'drunken violence against Aboriginal women'.
[16] AR 83, L40, at [47].
[17] RS [12].
[18] Such a distinction is criticised in *R v Downie & Dandy* (1997) 95 A Crim R 299 at 304.
[19] *Wonganol* (2011) 212 A Crim R 284 at 291 [39]: 'The incidence of alcohol and drug fuelled violence within Aboriginal communities is distressingly high ...'.
[20] AR 118, L9-19.
[21] AR 129, L36-40.
[22] *Peterson* (1983) 11 A Crim R 164 at 167, per Burt CJ (Smith and Pidgeon JJ agreed).
[23] *Peterson* (1983) 11 A Crim R 164 at 167.
[24] *R v Downie & Dandy* (1997) 95 A Crim R 299 at 305 point 9.

for the appellant's antecedents.[25] The emphasis on the 'need for both specific and general deterrence'[26] in the conclusion of manifest inadequacy was a 'weighting [of] the instinctive synthesis in favour of general deterrence'[27] due to a finding of prevalence of such offending by this particular racial group, albeit seeking to avoid naming it as such. There was simply no sufficient evidentiary basis to do so.[28]

The separate reasons of Buss JA

8 The State seeks to rely on the separate reasons of Buss JA where they differ from the majority viz., where his Honour expressly eschewed reliance upon prevalence;[29] acknowledged that the appellant faced traditional punishment;[30] and his Honour's explanation of the residual discretion.[31] These cannot bolster the majority's conclusion. His Honour's 'agreement on the outcome' here 'may be incidental' and his reasons are better viewed as a dissent.[32] If the majority's reasons are wrong, the appeal must be allowed even if the separate reasons do not contain the same error.

Ground 2.2

No new grounds – issues not spent

9 The State accepts that the weight to be attributed to the factors in a particular case 'is ordinarily a matter for the court exercising the sentencing discretion'.[33] Yet it speciously points out the appellant's counsel's observation in argument below that the appellant's aboriginality was 'of little moment in terms of disposition of [*that*] appeal'[34] and his failure to address the 'faint regard' given to *Fernando* principles and the issue of traditional punishment by the primary judge.[35] The purported criticism ignores that those observations were made during argument in a State appeal. Resisting *that* appeal would not have been assisted by making those points. Now that the COA has concluded manifest inadequacy, and displaced regard for these factors, it is appropriate that the treatment of these issues be critiqued in *this* appeal.[36]

The Fernando principles and the Canadian jurisprudence

10 The State accepts the '*Fernando* principles'[37] as relevant to the appellant's sentence,[38] and contends that the COA 'identified' and gave them 'appropriate weight'.[39] In citing *Richards*[40] however, the majority did not 'identify' these principles. *Richards* was a State appeal against the inadequacy of a wholly suspended term imposed for a sexual offence committed by an Aboriginal man from a remote community, who had limited education and a limited capacity to communicate in English. The sentencing judge found that the offender would 'waste his time in

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[25] COA [58], [64] & [67; AR 183-185.
[26] Also see *R v Masagh* (1990–91) 12 Cr. App. R. (S.) 568.
[27] *R v Downie and Dandy* (supra n24) at 305 point 9.
[28] AS [29] and the cases cited in fn 33.
[29] COA [256], AR 230; RS [14].
[30] COA [95], AR 191; RS [40].
[31] COA [254] to [257], AR 229-230; RS [53].
[32] *The Oxford Companion to the High Court of Australia*, Oxford University Press, page 129.
[33] RS [33]; *Markarian v The Queen* (2005) 228 CLR 357.
[34] RS [39].
[35] RS [31].
[36] RS [39].
[37] *Fernando* (1992) 76 A Crim R 58.
[38] RS [27]-[29], [38].
[39] RS [29], [35]-[36], [38]-[40], [45].
[40] *State of Western Australia v Richards* (2008) 185 A Crim R 413.

prison' due to 'no culturally appropriate treatment nor...sex offender treatment'.[41] No other issue of deprivation or disadvantage was considered. The COA there found 'a material sentencing consideration' was the service of imprisonment 'distant from his community, isolated from his culture, unable to by visited by his family and friends and subject to communication problems'. *Fernando* was cited solely to recognise this factor.[42] The gamut of principles relating to the sentencing of Aboriginal offenders was not canvassed. No real examination was undertaken.

11 The balance of the majority's reasons do not show an appropriate recognition or application of the '*Fernando* principles' occurred. Where reference was made to the appellant's Aboriginality (or social disadvantage) it was dismissively pejorative, including disputing the evidentiary basis for some matters.[43] The majority found that the appellant's ability 'to communicate in English' and his 'prior experience in the prison system' meant that the only '*Fernando* consideration' identified by the primary judge – hardship in custody – was not 'particularly' relevant.[44] Their Honours did not mention traditional punishment, a factor the State properly accepts as relevant.[45]

12 The State accepts that the appellant's personal circumstances are accurately placed before this Court.[46] They included:
12.1 The social, economic and other disadvantages arising from birth into a remote Aboriginal community. Alcoholism and family violence are endemic. He had limited educational and vocational opportunities, such that his work prospects were curtailed. This exposure contextualised his alcohol abuse, despite his parents' attempts to protect him. He turned to alcohol at age sixteen and in the two years preceding the offence, this had become a daily problem such that he was banned from the local tavern. This background was a causative feature for the offence and relevant to assessing his 'culpability' and the 'extent to which he should be punished'.
12.2 The inevitability of facing significant traditional punishment.[47]
12.3 The particular hardship he will suffer in custody.[48]

13 These factors meant that more 'subtle remedies' than a lengthier prison term required consideration. It justified a sentence within the range, but at the lesser end of that necessary to meet the public interest.[49] Whilst his spouse's vulnerability should be recognised, the fact that she came from the same community should not deprive the appellant of full weight being given to these mitigating circumstances.

14 The disposition of this appeal provides the opportunity for this Court to affirm and augment what has been referred to as the '*Fernando* principles,'[50] to guide sentencing and intermediate appellate courts in the accommodation of all relevant

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[41] Ibid at 418-419 [19].
[42] Ibid at 424 [44]-[46].
[43] COA [67], AR 185.
[44] COA [67], AR 185.
[45] RS [38].
[46] AS [6] & [10]. RS [4].
[47] Given that such punishment would more appropriately meet the aims of personal (and indeed general, within his community) deterrence and restorative justice, than a lengthier gaol term.
[48] Due to distance from familial supports, separation from his country, community and culture and the postponement of 'making peace' within his community from facing traditional punishment.
[49] AS [45].
[50] Noting that *Fernando* (1992) 76 A Crim R 58 did not consider the role of traditional punishment.

features which arise in respect of Indigenous offenders, to ensure that even justice is done. This exhortation should descend to the detail of the complexities and subtleties attending Indigenous disadvantage and consider the validity of constraints placed upon the relevance of such principles in light of competing factors. The treatment in *Fernando* is not exhaustive and reference to other authorities, including those canvassed in the appellant's primary submissions,[51] may be productive.

15 The appellant in *Bugmy v The Queen*[52] cites *Gladue v The Queen*[53] and *Ipeelee v The Queen; Ladue v The Queen.*[54] These cases in the Supreme Court of Canada dealt with a statutory regime requiring courts to give 'particular attention to the circumstances of Aboriginal offenders' when applying the general principle applicable to all offenders and to first consider non-gaol sentencing options.[55] Otherwise, the sentencing principles and systemic background factors affecting Aboriginal offenders are substantially in line with statutory regimes and common law principles employed in this jurisdiction.[56] The *Gladue* principles, as clarified in *Ipeelee*, are broadly equivalent to those referred to in *Fernando*.[57] They provide a considered and persuasive treatment of these nuanced and multifaceted issues and corrected two misunderstandings; that there is no requirement for a causal link between background factors and the commission of the offence as 'the interconnections are simply too complex',[58] and that these principles apply to serious or violent offences.[59]

16 This Court should affirm the particular relevance of an offender's Aboriginality. It should explain that courts are not to diminish this relevance by idiosyncratic approaches to what those features must be in any given case or employ principles such as perceived prevalence, however expressed, to unduly elevate aggravating features or otherwise give 'attenuated consideration'[60] to an offender's personal circumstances in the exercise of the sentencing discretion.

Ground 3

17 The State seemingly accepts that the COA's approach to the residual discretion at COA [41(4)] is wrong.[61]

Andrew Boe
29 July 2013

Dominic Brunello

Paula Morreau

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[51] AS [41]-[47], [49]-[50].
[52] S99/2013.
[53] [1999] 1 SCR 688.
[54] [2012] 1 SCR 433.
[55] Section 718.2(e) of the *Criminal Code*.
[56] For example, sections 6, 7, 8 and 39 of the *Sentencing Act 1995* (WA); *Veen v The Queen [No.2]* (1988) 164 CLR 465 at 472; *Dinsdale v The Queen* (2000) 202 CLR 321 at 328 [14], 338 [53]-[54], 345-346 [77].
[57] *Ipeelee* (supra n53) at 60 [75].
[58] *Ipeelee* (supra n53) at 63-64 [81]-[83]. This would display an 'inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples'.
[59] *Ipeelee* (supra n53) at 65-66 [84]-[85].
[60] *Ipeelee* (supra n53) at 69 [90].
[61] RS [52].