IN THE HIGH COURT OF AUSTRALIA **No P34 of 2013**

PERTH OFFICE OF THE REGISTRY

BETWEEN

ERNEST MUNDA

Appellant

and

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

Part I – Publication

1. This submission is in a form suitable for publication on the internet.

Part II – Concise statement of issues

2. This appeal raises the following issues:

10 2.1. Whether the appellant's background of deprivation and disadvantage as an aboriginal warranted a lesser sentence being imposed given the particular circumstances of this case.

2.2. Whether the Court of Appeal correctly applied principle in determining that the sentence imposed on the appellant was manifestly inadequate. In particular, should doubt attend to the principle that a sentence within the range of sentences which are customarily imposed, may, given all existing relevant sentencing circumstances, be manifestly inadequate?

2.3. Whether there were factors to justify the exercise of the residual discretion in the appellant's favour.

20 ### Part III –Section 78B of the *Judiciary Act 1903* (Cth)

3. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation.

Prepared on behalf of the Respondent by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: DPP 10/2014 Telephone No: 9425 3901 Facsimile No: 9425 3614
Filed on: 22 July 2013

Part IV –Statement of contested material facts

4. The appellant's statement of facts, whilst accurate, emphasises the personal circumstances of the appellant whilst paying limited regard to the circumstances of the offending and previous history of domestic violence.

5. An account of the circumstances of the offence may be found in the judgment of Buss JA in the Court of Appeal at paragraphs [73] to [77] (AB 186-187) and McLure P at paragraphs [43] to [47] (AB 180-181).

10 6. An account of the appellant's history of domestic violence towards the deceased may be found in the judgment of Buss JA at [78] to [83] (AB 187-188), and his personal circumstances generally at [84] to [89] (AB 189).

Part V – Applicable statutes and regulations

7. The appellant's statement of applicable statutes and regulations is accepted.

Part VI – Statement of argument

Ground 2.1 - Manifest inadequacy

8. The Respondent's sole ground of appeal in the court below was that the sentence imposed by the sentencing Judge was manifestly inadequate. The error being of the last kind referred to in *The House v King* that there was a 'failure to properly exercise the discretion
20 which the law reposes in the court of first instance.'[1] In determining what 'reveals manifest excess, or inadequacy, of sentence is consideration of all of the matters that are relevant to fixing the sentence.'[2]

9. McLure P, consistent with principle, determined the single ground by having regard to the maximum sentence for the offence, standards of sentencing customarily observed, the place which the criminal conduct occupies on the scale of seriousness and the personal circumstances of the offender[3] (AB 176). This approach is conventional[4], was adopted by Buss JA,[5] and is accepted by the appellant as a formulation that is unexceptionable.[6]

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[1] ***House v King*** (1936) 55 CLR 499 at 505.
[2] ***Hili v The Queen*** (2010) 242 CLR 520 [60].
[3] ***The State of Western Australia v Munda*** [2012] WASCA 164 [57].

10. The appellant complains of three alleged misapplications of sentencing principles by the Court of Appeal being:

    10.1. The reliance on an alleged contention by the respondent or the Court of Appeal of prevalence;

    10.2. The failure to properly identify, and apply consistent with principle, the standards of sentences customarily imposed; and

    10.3. The reliance on weighting errors.

Prevalence

11. In both its written[7] (AB 69 to 84) and oral submissions[8] (AB 115-119) before the Court of Appeal the respondent did not rely upon an increase in the prevalence in offending of this type in order to establish that the original sentence was manifestly inadequate.

12. Paragraphs [15] and [17] of the appellant's submissions reproduce extracts from the hearing of the appeal where the respondent's counsel was questioned by the court as to prevalence. Counsel was referring to the pre-existing and ongoing nature of this type of offending (hence the need for deterrence) and was not relying upon any increase in prevalence to submit that any tariff (to the extent that one can be identified) ought to be increased.

13. Although the issue of prevalence was raised by the Court of Appeal at the hearing, ultimately no reliance was placed on that issue in its judgment determining that the sentence was manifestly inadequate.

14. At paragraph [64] (AB 184.40), McLure P refers to the decision of ***The State of Western Australia v Richards***[9]. In ***Richards***, Martin CJ referred to statistics concerning the over-representation of Aboriginal people, particularly men, in the Western Australian criminal justice system. ***Richards*** concerned child sexual offending; it is factually unrelated to the present case. In citing this authority, McLure P was not referring to any increase in

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[4] ***Chan v R*** (1989) 38 A Crim R 337 at 342; ***The Queen v Morse*** (1979) 23 SASR 98 at 99.
[5] ***The State of Western Australia v Munda*** [2012] WASCA 164 [103].
[6] Appellant's submissions [26] & [29].
[7] Respondent's (appellant's) written submissions before the Court of Appeal.
[8] Transcript of the hearing before the Court of Appeal, pp 2 to 6.
[9] ***The State of Western Australia v Richards*** [2008] WASCA 134.

prevalence but to the various social issues particular to many Aboriginal offenders to which the ***Fernando*** principles are relevant. When one has regard to her Honour's preceding paragraph [63] (AB 184.30), it is clear that these remarks are being made in the context of the need for deterrence and not due to any issue of prevalence. Buss JA expressly disavowed any reliance upon prevalence in his concurring judgment[10] (AB 230.20).

15. In short, the Court of Appeal raised the issue of prevalence. The respondent disavowed any reliance upon increased prevalence. McLure P (with Mazza JA) did not refer to prevalence or comparable concepts and her reasons for upholding the appeal are independent of any issue of prevalence. Therefore, the appellant's extensive reference to issues of prevalence is misconceived and accordingly, does not give rise to any identifiable error of law by the Court of Appeal.

Sentences Customarily Imposed

16. A history of sentences may establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range or that the upper or lower limits are 'correct' limits.[11] The range of sentences imposed does not of itself establish the range of a sound sentencing discretion in a particular case. It is one of a number of relevant factors that are relevant to fixing a sentence and hence in determining whether a sentence is manifestly excessive or manifestly inadequate.[12] In exercising the sentencing discretion the judge must act in a manner that is consonant with reasonable consistency.[13]

17. The sentencing judge noted that there is no tariff for offences of this kind[14] (AB 56.15) and that cases such as ***Gordon*** were only of 'limited assistance'[15] (AB 56.30) in determining the appropriate penalty.

18. The majority recognised [16](AB 184.20) that sentences for immediate imprisonment imposed for manslaughter (for a plea of guilty with the 20 year maximum penalty) range

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[10] ***The State of Western Australia v Munda*** [2012] WASCA 164 [256].
[11] ***Hili v The Queen*** (2010) 242 CLR 520 [54].
[12] ***Hili v The Queen*** (2010) 242 CLR 520 [60]; [62].
[13] ***Elias v The Queen; Issa v The Queen*** [2013] HCA 31 [28].
[14] ***The State of Western Australia v Munda*** [2011] WASCR 87 [30].
[15] ***The State of Western Australia v Munda*** [2011] WASCR 87 [31].
[16] ***The State of Western Australia v Munda*** [2012] WASCA 164 [62].

between 2 years 4 months and 12 years)[17]. McLure P noted that whilst the sentence imposed on the appellant was within that range it does not 'prevent a conclusion that that, in all the circumstances of this case' the sentence is manifestly inadequate[18] (AB 184.20).

19. Far from being 'unconvincing', as submitted by the appellant, McLure P's characterisation of the three Crown or State appeals of ***Churchill***, ***Walley*** and ***Gordon*** as of 'little guidance' is apt. Principles of double jeopardy applied to all three appeals.[19] In particular:

    19.1. The sentence in ***Churchill*** was characterised by the Court of Criminal Appeal[20] as 'excessively lenient' but, 'having regard to the principles which apply to Crown appeals' the appeal was nonetheless dismissed;

    19.2. The Crown appeal in ***Gordon*** was dismissed. Kennedy J held that another judge may well have imposed a higher sentence, but nonetheless dismissed the appeal because of the requirement of the Court 'to impose a lesser sentence than might otherwise be justified having regard to the element of double jeopardy.'[21] Anderson J described the sentence as 'very lenient' but agreed with Kennedy J in dismissing the appeal.[22] Wheeler J, in dissent, would have allowed the appeal and imposed a sentence of 9 years' imprisonment (6 years post-transitional); and

    19.3. Although the State appeal in ***Walley*** was allowed, the Court of Appeal was cognisant of the application of the principles of double jeopardy to successful Crown appeals;[23]

20. The sentences in ***Churchill*** and ***Gordon*** were erroneously lenient[24] but were left undisturbed due to double jeopardy. The increase in sentence in ***Walley*** was less than it ought to have been because of the application of double jeopardy principles to re-sentencing where the Crown is successful on appeal. It is in this context that McLure P

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[17] Attachment A to the Respondent's Submissions before the Court of Appeal provides a summary of past sentences (AB 85-94).
[18] ***The State of Western Australia v Munda*** [2012] WASCA 164 [62].
[19] Section 41(4)(b) of the *Criminal Appeals Act 2004* was inserted by the *Criminal Law and Evidence Amendment Act 2008* and commenced on 27 April 2008.
[20] ***R v Churchill*** [2000] WASCA 230 [27] (Kennedy ACJ, Anderson and Wheeler JJ agreeing).
[21] ***R v Gordon*** [2000] WASCA 401 [18].
[22] ***R v Gordon*** [2000] WASCA 401 [19] – [20].
[23] ***The State of Western Australia v Walley*** [2008] WASCA 12 [26] (Wheeler and Miller JJA); [37] (McLure JA).
[24] In the sense that the sentencing judge had made an appealable error and that a different sentence should have been imposed, but for the application of double jeopardy considerations. See: ***State of Western Australia v Munda*** [17] (AB 174.40).

considered these cases to be of 'little guidance'. Buss JA also considered that ***Gordon***, ***Walley*** and a further case of ***Luff v The State of Western Australia***[25] are distinguishable from the appellant's offending and were 'of limited utility in considering the disposition of the appeal'[26] (AB 202.20). The appellant submits in this Court that these cases were 'useful, if not decisive'[27] in determining manifest inadequacy in the present case. Such a submission is misconceived in that it does not pay proper regard to the erroneous leniency reflected in the sentences.

21. The appellant erroneously contends that these were the three cases specifically relied upon by the State in the Court of Appeal.[28] ***Walley*** and ***Gordon*** were referred to by the State, but ***Churchill*** was not in this context. The third particular case relied upon was ***Luff v The State of Western Australia***[29], where an appeal against a sentence of 7 years and 4 months imprisonment was dismissed.

Reference to weighting errors

22. The appellant contends that McLure P 'transmogrified' various explanations for the conclusion of manifest inadequacy into 'specific errors'[30] and that this purported reframing of the ground of appeal 'goes to the competency of the appeal itself.'[31] There is no substance to these contentions.

23. It is correct that McLure P stated[32] (AB 184.25):

> *'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.'*

24. This observation of McLure P must be considered in the context of the entirety of her Honour's judgment. A fair reading of her Honour's judgment does not support the contention that the Court of Appeal 'transmogrified' the State's sole ground of appeal (manifest inadequacy) into one alleging weighting errors.

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[25] ***Luff v The State of Western Australia*** [2008] WASCA 89.
[26] ***The State of Western Australia v Munda*** [2012] WASCA 164 [138].
[27] Appellant's submissions [29].
[28] Appellant's submissions [29].
[29] ***Luff v The State of Western Australia*** [2008] WASCA 89.
[30] Appellant's submissions [30].
[31] Appellant's submissions [31].
[32] ***The State of Western Australia v Munda*** [2012] WASCA 164 [63].

25. The respondent's written submissions in the Court of Appeal made extensive reference to both specific and general deterrence[33] (AB 82-84). It is acknowledged that one of the particulars of the ground of appeal referred to the need for the sentence to reflect the importance of general deterrence[34] (AB 68.20). However, the State's reference to deterrence was made in the context of reviewing broadly comparable cases in order to establish manifest inadequacy. Given the concealed nature of implied errors, a finding of manifest inadequacy may or may not be the result of insufficient weight being given to the principle of deterrence. However, upon appeal, the State did not submit any express error of this nature and only referred to deterrence in the context described. Although McLure P uses the words 'weighting errors' towards the end of her judgment, it is clear from what precedes those words that her Honour was not using the phrase in the context of an express error.

Ground 2.2 The approach to the antecedents of the appellant

26. The principles outlined by the appellant at paragraph [33] are accepted as correct.

27. The relevant principles enunciated in ***R v Fernando***[35] and in ***Richards***[36] were identified by the Court of Appeal[37] (AB 184.40, 197-199). The overriding principle being that whilst there is no separate system of sentencing for aboriginal offenders and the relevant sentencing principles apply irrespective of the identity of the particular offender or his membership of an ethnic group the circumstances of deprivation and disadvantage that may apply by reason of the offender's aboriginality must be taken into account.[38]

28. The background circumstances may affect the moral culpability of the offender and therefore moderation of denunciation and of general or personal deterrence is required. The circumstances may affect the assessment of rehabilitation and indicate that custody may be more onerous for the particular offender. Whilst a sentencing court must give proper regard to the ***Fernando*** principles it is appropriate, in particular cases, to place necessary emphasis on considerations of denunciation, deterrence and protection of the

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[33] Respondent's (appellant's) written submissions before the Court of Appeal [41] to [48].
[34] Appellant's (respondent's) Case, p 2.
[35] ***R v Fernando*** (1992) 76 A Crim R 58 at 63.
[36] ***The State of Western Australia v Richards*** (2008) 185 A Crim R 413.
[37] ***The State of Western Australia v Munda*** [2012] WASCA 164 [64] (McLure P); [124]-[129] (Buss JA).
[38] ***Neal v The Queen*** (1982) 149 CLR 305 at 326 (Brennan J); ***Rogers v The Queen*** (1989) 44 A Crim R 301 at 307 (Malcolm CJ).

community. Mitigating factors should be given their full weight but not 'as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence'.[39]

29. The issue is to what degree such considerations apply given the circumstances of this case. In this case, the ***Fernando*** principles were relevant and given appropriate weight by the Court of Appeal, as were 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 respondent's previous convictions for violent offending against the deceased and other women. This approach is, contrary to the appellant's contention[40], consistent with ***Richards***.[41]

30. In this court the appellant complains of three alleged misapplications of sentencing principles by both the sentencing judge and the Court of Appeal concerning:

    30.1. The mitigatory weight to be given to the appellant's social disadvantage and alcohol abuse generally;
    30.2. The mitigatory weight to be given to traditional punishment; and
    30.3. The alleged particular hardship that would be suffered by the appellant due to his imprisonment.

Social disadvantage and alcohol abuse

31. The appellant contends that the sentencing judge only had 'faint regard' to the relevance of social disadvantage and alcohol abuse.[42] This was not a proposition advanced before the Court of Appeal. In any event, there is no error in principle in the way that the sentencing judge and the Court of Appeal approached these issues.

32. The sentencing judge observed that the same sentencing principles apply in every case regardless of an offender's ethnic group[43] (AB 54.40). His Honour was cognisant of the fact that a court must recognise problems of alcohol abuse and violence in Aboriginal communities and the resulting social disadvantages. His Honour was also conscious of the fact that these circumstances may condition the relevant community to accept alcohol

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[39] *Veen (No 2) v R* (1988) 164 CLR 465 at 477.
[40] Appellant's Submission [48].
[41] *The State of Western Australia v Richards* (2008) 185 A Crim R 413.
[42] Appellant's submissions [39].
[43] *The State of Western Australia v Munda* [2011] WASCR 87 [22].

abuse and violence as a normal way of life. His Honour observed that, although punishment and both personal and general deterrence had a role to play in changing such behaviour, a change in social circumstances is also necessary to achieve that change[44] (AB 55.10). All of this is consistent with the ***Fernando*** principles.[45]

33. Social disadvantage, including disadvantage that arises from the appellant's status as an Aboriginal man, is a relevant sentencing consideration and the weight to be attributed to the factors in a particular case 'is ordinarily a matter for the court exercising the sentencing discretion'.[46] In a particular case, whilst full weight must be given to the factors, it may not be the dominant sentencing consideration. Another relevant sentencing consideration was stated by Buss JA[47] (AB 200.10), that sentences imposed for drunken violence against Aboriginal women within Aboriginal communities, especially violence that results in their death must properly reflect the requirement of personal and general deterrence.

34. At paragraphs [35] and [36] of the appellant's submission it is suggested that McLure P was critical of the sentencing judge's approach to the appellant's personal circumstances and disadvantage. A fair reading of her Honour's remarks does not support that construction. McLure P was articulating the importance of deterrence in this case. Her Honour's remarks that it is 'wrong in principle' to reduce the weight to be given in such circumstances should not be read as suggesting that the sentencing judge made this error of principle.

35. McLure P noted that social disadvantage does not reduce the weight to be given to general deterrence. Contrary to the appellant's submission, it does not follow from such an observation that her Honour considered such circumstances to be irrelevant to the sentencing process. Her Honour's remarks are consistent with principle (D) in ***Fernando***[48] and do not reveal error.

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[44] ***The State of Western Australia v Munda*** [2011] WASCR 87 [23].
[45] ***R v Fernando*** (1992) 76 A Crim R 58.
[46] ***Neal v The Queen*** (1982) 149 CLR 305 [326].
[47] ***The State of Western Australia v Munda*** [2012] WASCA 164 [130].
[48] ***R v Fernando*** (1992) 76 A Crim R 58.

36. As noted by Buss JA whilst summarising the appellant's circumstances, the appellant did not commence drinking until age 17 and had taken some steps to address his drinking problem[49] (AB 189). Under the heading 'family background', the pre-sentence report notes that the appellant's family shielded him from the worst aspects of alcohol and violence. The appellant witnessed an incident of family violence on only one occasion. McLure P's conclusion that the appellant was not raised in circumstances of such deprivation and difficulty as to render his alcohol abuse mitigatory[50] (AB 185.30) is a finding that was fairly open on the evidence before the court. Buss JA made similar findings.[51]

10 **Traditional punishment**

37. The appellant's contention that this is a case where there is no evidence that the violence resulting from traditional punishment would be unlawful[52] is incorrect. Under the *Criminal Code* (WA) one may consent to an offence of which assault is an element[53], such as common assault and assault occasioning bodily harm. Non-consent is not an element of other violent offences under the *Criminal Code*.[54] The elder's letter states that the appellant would be beaten in the head and back with sticks and nulla nullas to a degree that may require hospitalisation[55] (AB 3.40). Repeated and serious violence to such vulnerable areas of the body would likely constitute an offence of such serious violence that would be unlawful regardless of the appellant's consent.

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38. Traditional punishment is a relevant factor at sentencing[56] and was accepted by the sentencing Judge[57] (AB 55) as being so. The sentencing judge's reference to the weight attributable to traditional punishment as being 'necessarily limited'[58] (AB 55.40) must be read in the context of his Honour's preceding paragraphs[59] (AB 55.20). His Honour qualified the weight due to the need to avoid sanctioning unlawful violence, the lack of a

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[49] ***The State of Western Australia v Munda*** [2012] WASCA 164 [84]-[89].
[50] ***The State of Western Australia v Munda*** [2012] WASCA 164 [67].
[51] ***The State of Western Australia v Munda*** [2012] WASCA 164 [134].
[52] Appellant's submissions [51].
[53] Section 222, *Criminal Code*.
[54] For example, grievous bodily harm (s 294), unlawful wounding (s 301) and acts or omissions causing bodily harm or danger (s 304). In this context see ***Houghton v The Queen*** [2004] WASCA 20 [39] ***Kaporonovski v The Queen*** (1973) 133 CLR 209 (217) and ***Lergesner v Carroll*** [1991] 1 Qd R 206.
[55] Letter from the Elders to the Sentencing Judge dated 28 June 2011.
[56] See: ***Law Reform Commission of WA Aboriginal Customary Laws Final Report 94 2006*** at 178.
[57] ***The State of Western Australia v Munda*** [2011] WASCR 87 [25]-[27].
[58] ***The State of Western Australia v Munda*** [2011] WASCR 87 [27].
[59] ***The State of Western Australia v Munda*** [2011] WASCR 87 [25] and [26].

guarantee that the traditional punishment would in fact occur and uncertainty regarding its severity in the event that it was inflicted. This is not a case where the appellant had already been subjected to extra-curial punishment prior to sentencing. This cautious approach to the issue of traditional punishment was appropriate given the limited amount of evidence before the court and does not reveal any error of principle.

39. The appellant's written submissions before the Court of Appeal referred to his social disadvantage in the context of alcohol abuse[60] (AB 101-104) but did not refer to the relevance or weight to be given to traditional punishment. Those submissions were not critical of the sentencing judge's consideration of the appellant's circumstances and implicitly endorsed his Honour's approach[61] (AB 104). At the hearing before the Court of Appeal, the appellant's counsel submitted that the appellant's aboriginality was 'of little moment in terms of the disposition of this appeal'[62] (AB 122.25). Nonetheless, the appellant now submits in this court that the 'failure' of McLure P to expressly address the particular circumstance of tribal punishment constituted error.[63]

40. Buss JA expressly considered "payback" and considered that the approach of the sentencing Judge in according little weight to that factor in mitigation was correct[64] (AB 201.45).

Hardship suffered by the appellant in prison

41. Before the sentencing judge, the appellant's counsel conceded that (emphasis added) [65] (AB 36.35):

> *'He, it needs to be acknowledged, is **not** in that situation of a traditional Aboriginal offender from a remote part of the state who is serving a sentence for the first time in a Perth gaol and Dr Watts's [sic] report reflects that he is coping reasonably well in Greenough [prison] and that much is recognised.'*

42. Despite this concession, the appellant's counsel submitted that the appellant's sentence 'would be more burdensome for him than, it would be for, say, a non-Aboriginal prisoner

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[60] Appellant's (respondent's) written submissions before the Court of Appeal [27]-[35].
[61] Appellant's (respondent's) written submissions before the Court of Appeal [35]-[36].
[62] Transcript of the sentencing hearing, p 9.
[63] Appellant's submissions [51].
[64] ***The State of Western Australia v Munda*** [2012] WASCA 164 [135].
[65] Transcript of the sentencing hearing, p 24.

from Perth serving a sentence in a Perth gaol'[66] (AB 37.10) but did not adduce any evidence in support of that proposition. Rather, the appellant's counsel simply referred to authority that established that such a consideration is a legitimate mitigatory factor to be taken into account in the sentencing process.

43. The sentencing judge nonetheless accepted, and expressly took into account, that the term of imprisonment would be served in a prison where the appellant would be isolated from family and distant from his community[67] (AB 54.40). This finding was not challenged by either party in the Court of Appeal.

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44. Given the concession by the appellant, it is hardly surprising that McLure P concluded[68] (AB 185.30):

> *'It is the case that the respondent 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.'*

45. McLure P's conclusion in this respect was consistent with the concession made by the
20 appellant's counsel before the sentencing judge and the material that was placed before the court. There is no error of principle in her Honour's approach. Her Honour's conclusion as to the relatively little weight to be placed upon this circumstance is confined to the particulars of this case and is not worded in a way suggestive of general application. The appellant's complaint, in substance, is simply one of contending that insufficient weight was given in a case where the appellant's own antecedents would not justify considerable weight being placed on this particular mitigatory circumstance.

Ground 2.3 -Residual Discretion

46. The appellant contends that the Court of Appeal made the following errors in the application of the residual discretion, namely:

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46.1. That the Court of Appeal did not expressly identify delay as one residual discretionary factor when identifying applicable principles; [69]

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[66] Transcript of the sentencing hearing, p 25.
[67] ***The State of Western Australia v Munda*** [2011] WASCR 87 [22].
[68] ***The State of Western Australia v Munda*** [2012] WASCA 164 [67].

46.2. An alleged inconsistency between a passage in McLure P's judgment and the decision of the plurality in ***Green*** regarding manifest inadequacy and the residual discretion;[70] and

46.3. That the Court of Appeal did not expressly consider the residual discretionary factors raised by the Appellant.[71]

Identification of Principle - Delay

47. Following the reasoning of this Court in ***Green v The Queen***[72] and ***Lacey v Attorney General***[73], the Court of Appeal determined that, despite the exclusion of the common law principle of double jeopardy in State appeals against sentence, the court has a residual discretion in a State appeal to decline to allow an appeal against a sentence that is erroneously lenient at the time of the hearing of the appeal[74] (AB 176.30, 228.40).

48. McLure P stated that the Court 'will follow the approach of the High Court which requires the identification of particular considerations that enliven the residual discretion to dismiss an appeal from an erroneously lenient sentence'[75] (AB 179.30). Both the President and Buss JA noted the factors set out by the plurality in ***Green*** which might warrant the exercise of the residual discretion[76] (AB 228.40). McLure P specifically acknowledged that one of the circumstances 'relevant to the exercise of the residual discretion include delay in the hearing and determination of the appeal'[77] (AB 172.10). McLure P referred to these factors, including delay, as 'the residual discretionary considerations'[78] (AB 172.10).

49. At [41(3)] the President correctly stated that whilst s 41(4)(b) of the ***Criminal Appeals Act 2004 (WA)*** excludes the double jeopardy principle in the exercise of the discretion under s 31(4) and in re-sentencing the 'relevant actions, events and consequences associated with the serving of the sentence under appeal or the manner of the conduct of the appeal or

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[69] Appellant's submissions [56].
[70] Appellant's submissions [57].
[71] Appellant's submissions [60].
[72] ***Green v The Queen*** [2011] HCA 49; (2011) 244 CLR 462.
[73] ***Lacey v Attorney General*** [2011] HCA 10; (2011) 242 CLR 573.
[74] ***The State of Western Australia v Munda*** [2012] WASCA 164 [26] (McLure P); [251] (Buss JA).
[75] ***The State of Western Australia v Munda*** [2012] WASCA 164 [40] (McLure P).
[76] ***The State of Western Australia v Munda*** [2012] WASCA 164 [14] (McLure P); [251] (Buss JA).
[77] ***The State of Western Australia v Munda*** [2012] WASCA 164 [5].
[78] ***The State of Western Australia v Munda*** [2012] WASCA 164 [5].

otherwise, such as the residual discretionary considerations [as earlier defined]'[79] (AB 180.20) are not excluded. Accordingly, the Appellant's contention that the President at [41(3)] (AB 180.20) excluded delay as a residual discretionary consideration is erroneous.

50. In any event, the application of delay to the exercise of the residual discretion in this case was not a factor raised by the appellant in the Court of Appeal. The merit of delay as an applicable residual discretionary factor is considered below at paragraphs [63] – [70].

Manifestly excessive and residual discretion

51. McLure P did note 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'[80] (AB 180.30). However, that must be read in the context of her Honour's earlier remarks at [32] to [34] relating to whether s 6(1) of the *Sentencing Act 1995* (WA) has a limiting effect on the residual discretion. At paragraph [33], her Honour stated (AB 178.10):

> *'In the absence of detailed submissions on this point, I will assume in the respondent'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 inadequate at the date of the hearing of the appeal. Questions of parity (and disparity) may not inform such an assessment.'*

52. The observations of McLure P at paragraph [41] (AB 180) acknowledged the relevance of the circumstances identified by the plurality in ***Green*** in considering the exercise of the residual discretion. McLure P then observed that, in order to reach a conclusion that a sentence was manifestly inadequate those considerations, other than parity, would necessarily already have been considered. Doubt may attend to that proposition. There are factors, such as the conduct of the Crown or delay that may not necessarily be relevant to determining whether a sentence is objectively manifestly inadequate but may bear on whether the residual discretion should be applied. However, the approach taken by the President does not lead to error given that the residual discretionary considerations are identified and applied in circumstances where the State contends manifest inadequacy.

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[79] ***The State of Western Australia v Munda*** [2012] WASCA 164 [41].
[80] ***The State of Western Australia v Munda*** [2012] WASCA 164 [41].

53. In agreeing with the existence of a residual discretion Buss JA applied principle, contrary to the contention of the appellant,[81] and considered that if the court is persuaded that the primary judge acted in error and a different sentence should have been imposed the appeal court must then consider the residual discretionary factors[82] (AB 228.40). His Honour observed that some factors which may be relevant, including 'delay in commencing or pursuing the appeal, parity with co-offenders, totality as a result of cumulative sentencing having been imposed subsequently for other offences, or the conduct of the State in relation to the appeal or the primary proceedings'[83] (AB 226.20). These are the kinds of relevant factors identified in other Australian jurisdictions.[84] His Honour also acknowledged the relevance of the factors set out by this Court in ***Green***[85] (AB 228.40-229.20).

Residual discretion – matters said to favour the exercise of the discretion in the appellant's favour

54. The appellant contends, in this court, that five matters justified the exercise of the residual discretion.[86] Before the Court of Appeal the appellant contended that there were four factors that required the exercise of the residual discretion[87] (AB 229.30). The four factors are different from the factors now relied upon (with delay and the effect on children not being raised before the Court of Appeal).

55. All three Judges in the court below agreed that the factors raised did not require the exercise of the residual discretion[88] (AB 180.35; 229.30). The President did not expressly refer to each matter raised by the appellant.[89] The failure to mention those matters individually did not vitiate the sentence nor mean that the factors were not considered in deciding that intervention was warranted. The President applied established principle

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[81] Appellant's submissions [57].
[82] ***The State of Western Australia v Munda*** [2012] WASCA 164 [251] (Buss JA).
[83] ***The State of Western Australia v Munda*** [2012] WASCA 164 [242] (Buss JA).
[84] See, for example, ***Director of Public Prosecutions (Vic) v Karazisis*** [2010] VSCA 350; (2010) 206 A Crim R 14 [104] – [115] (Ashley, Redlich and Weinberg JJA).
[85] ***The State of Western Australia v Munda*** [251] – [253] (Buss JA) citing ***Green*** [42] – [44] (French CJ, Crennan and Kiefel JJ).
[86] Appellant's submissions [61].
[87] Appellants Submissions before the Court of Appeal at [64]; and recited in ***The State of Western Australia v Munda*** [2012] WASCA 164 [254] (Buss JA).
[88] ***The State of Western Australia v Munda*** [2012] WASCA 164 [42] (McLure P; Mazza JA agreeing), [256]-[257] (Buss JA).
[89] Buss JA determined that the factors relied upon by the Appellant, before the Court of Appeal, did not require or justify, either individually or in combination, the exercise of the discretion at [254] (AB 229.30) and [255] (AB 230.10).

regarding the factors relevant to the exercise of the residual discretion, and determined that 'there is nothing in the facts or circumstances of this appeal that would require or justify this court exercising the residual discretion to decline to allow the State appeal'[90] (AB 180.30).

56. For the reasons outlined below, the matters now relied upon by the appellant are irrelevant or do not justify the exercise of the discretion in his favour.

Manifestly inadequate determined by factor not raised by State in Court of Appeal[91]

57. The Court of Appeal did not rely upon any suggestion of prevalence in deciding whether to allow the appeal or in deciding upon the appropriate disposition in re-sentencing.

The sentencing judge was 'uniquely well placed... to exercise discretion'[92]

58. The appellant's quotation in his written submissions[93] from ***Lacey v Attorney-General (Qld)***, which cites the earlier Queensland decision of ***York v The Queen***[94] is incomplete. The passage, without editing, reads:[95]

> *'... the Court also relied upon the common law rule against double jeopardy and the advantage of the sentencing judge, who had seen the accused and perhaps witnesses and heard oral evidence.'*

59. The appellant does not point to any particular advantage enjoyed by the sentencing judge. The material before the sentencing judge consisted of written material[96] which was supplemented by oral submissions. This was not a sentencing proceeding that required the judge to make findings based on contested oral evidence. Further, this was not a case where the sentencing judge had the advantage of seeing and hearing the appellant give evidence in mitigation. It is not apparent why, absent these considerations, the sentencing judge would have an appreciably superior position to exercise discretion. This is not the type of case where the limitations upon an appellate court as opposed to a trial judge apply.[97]

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[90] ***The State of Western Australia v Munda*** [2012] WASCA 164 [42].
[91] Appellant's submissions [61.1].
[92] Appellant's submissions [61.2].
[93] Appellant's submissions [61.2].
[94] ***York v The Queen*** [1995] 2 Qd R 186.
[95] ***Lacey v A-G (Qld)*** (2011) 244 CLR 573 [34].
[96] Items 2 to 14 of the Appeal Book index in this hearing.
[97] ***Fox v Percy*** (2003) 214 CLR 118 [23]-[25] (Gleeson CJ, Gummow and Kirby JJ).

60. Furthermore, this is a submission made for the first time in this court. This proposition was not raised in the court below.

61. There is no basis to conclude that the sentencing judge had some identifiable benefit in determining the appropriate sentence which was denied to the Court of Appeal that would warrant the exercise of the residual discretion in his favour.

No error of principle was corrected by the Court of Appeal[98]

62. A ground of appeal alleging manifest inadequacy (or manifest excess) by its very nature does not allege an error of principle (but a failure to properly exercise the discretion which the law reposes in the court of first instance). Taken to its logical conclusion, the appellant in effect submits that the fact that the error complained of is implied rather than express is relevant to the exercise of the residual discretion. Such an approach would be wrong in principle, and no authority is cited by the appellant in support of the proposition.

Delay[99]

63. The appellant complains of the passage of time between the lodging of the appeal notice and the hearing of the appeal, in addition to the length of time taken by the Court of Appeal to publish its reasons for decision.

64. The matter progressed from the filing of the appeal notice to the hearing of the appeal in a regular manner with both parties filing court documents within the timeframes set by the Court of Appeal and the relevant rules.[100]

65. This was not a case where the State was seeking to substitute a non-custodial sentence with a custodial sentence. Further, there was no genuine risk that the appellant would have served his non-parole period before the determination of the appeal.[101] Contrary to the implicit assertion in the appellant's submissions,[102] this is not a case where the appellant's release on parole was imminent. Accordingly, there was no reason why either party ought to have taken steps to have the appeal expedited.

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[98] Appellant's submission [61.3].
[99] Appellant's submissions [61.4].
[100] ***Supreme Court (Court of Appeal) Rules* 2005.**
[101] Had the Court of Appeal declined to interfere with the original sentence, the appellant would not have become eligible for parole until 13 October 2013.
[102] Appellant's submissions [61.4] and, in particular, footnote 155.

66. The delay between the hearing of the appeal (13 February 2012) and the publishing of the court's decision (22 August 2012) is, in part, attributable to the appellant's conduct in the court below.

67. The appellant filed his 'Respondent's Answer' in the court below on 11 October 2011. The Respondent's Answer contained a signed certification (AB 96) that the appellant (then respondent) was prepared for the hearing of the appeal. On the morning of the hearing of the appeal, the appellant's counsel purported to raise for the first time issues concerning the application of the residual discretion. This resulted in the Court of Appeal granting leave to both parties to file subsequent submissions addressing that issue, as neither the court nor the respondent (then appellant) were in a position to properly address the issues raised for the first time that morning. This process was not complete until the filing of the respondent's (the appellant) supplementary submissions on 13 March 2012.

68. A delay in the hearing of an appeal may often be related to the Crown or State's conduct in pursuing the appeal. The State before the Court of Appeal did not act, or fail to act, in a manner that contributed to any delay.

69. The ***Director of Public Prosecutions (Cth) v Bui***[103] was a successful Crown appeal which set aside a non-custodial sentence and imposed, upon appeal, a term of immediate imprisonment. The period between the filing of the appeal notice and the delivery of the judgement was 10 months. In the context of this delay and the proven anxiety of the offender flowing from the appeal process in applying the residual discretion, the Victorian Court of Appeal[104] observed:[105]

> *'[If] such considerations were sufficient to invoke the residual discretion then almost every offender faced with a Crown appeal against sentence would be entitled to a favourable exercise of that discretion.'*

70. The time taken to finally resolve the appeal below was not inordinate. It could not properly be said to have given risen to any unfairness or injustice that would justify the exercise of the residual discretion in the appellant's favour.

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[103] ***Director of Public Prosecutions (Cth) v Bui*** [2011] VSCA 61.
[104] ***Director of Public Prosecutions (Cth) v Bui*** [2011] VSCA 61 (Ross AJA, Nettle and Hansen JJA agreeing).
[105] ***Director of Public Prosecutions (Cth) v Bui*** [2011] VSCA 61 [90].

Effect on appellant's children[106]

71. The only reason why the appellant's children have 'lost their mother' is because of the appellant's offending.

72. The appellant's counsel did not submit before the Court of Appeal that this was a reason justifying the exercise of the discretion in the appellant's favour. This factor was raised for the first time in this Court. The appellant presumes an adverse effect on his children because of the increase in his term of imprisonment led but no evidence in support of this proposition.

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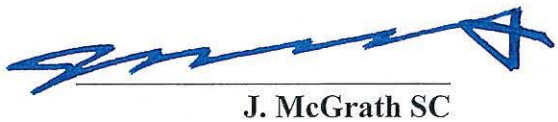
73. Absent exceptional circumstances, consequential hardship on family members resulting from the imprisonment of an offender is a matter that has no role to play in the sentencing process.[107] Adverse consequences almost invariably flow from the fact of incarceration, whether at first instance or as a consequence of a Crown appeal, but such consequences do not justify the exercise of the residual discretion in an offender's favour.[108]

74. Accordingly, the five matters relied upon by the appellant as residual discretionary factors, do not, either individually or in combination, justify or require the court to decline the State appeal.

20 **Part VIII – Estimate of length of oral argument**

75. The respondent estimates it will require one hour for the presentation of oral argument.

DATED this 22nd day of July 2013



J. McGrath SC

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[106] Appellant's submissions [61.5].
[107] ***The State of Western Australia v Wynne*** [2008] WASCA 195 [81] (Miller JA, Steytler P and Murray J agreeing).
[108] ***R v Cortese*** [2013] NSWCCA 148 [69] (Beech-Jones J, Hoeben CJ at CL and Harrison J agreeing).