

MUNDA v. THE STATE OF WESTERN AUSTRALIA (P34/2013)

Court appealed from: Court of Criminal Appeal of the Supreme Court of
Western Australia
[2012] WASCA 164

Date of judgment: 22 August 2012

Date of grant of special leave: 6 June 2013

After a plea of guilty to one count of manslaughter, the appellant was sentenced to five years and three months imprisonment. The appellant beat his spouse to death whilst both were intoxicated. He was 32 years of age, Aboriginal, and with a history of violent offences against his spouse. In mitigation, Commissioner Sleight took into account the early plea of guilty, clear demonstration of remorse and the appellant's isolation from family and friends in his community whilst incarcerated. By way of aggravation, his Honour noted that there was a life violence restraining order preventing the appellant from contacting the victim, that the violence occurred in the context of a domestic relationship and the sustained and violent nature of the assault.

The Crown appealed on the ground that the sentencing Judge had erred in law in imposing a sentence that was so inadequate as to manifest error. On 22 August 2012, the Court of Appeal (McLure P, Buss JA and Mazza JA) allowed the appeal and re-sentenced the appellant to seven years and nine months imprisonment. McLure P, with whom Mazza JA agreed, found that the sentence of five years and three months was manifestly inadequate and 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 personal and general deterrence. Buss JA noted comparable sentences and found that the offence was in the upper range of seriousness. His Honour agreed that the sentence was not commensurate with the seriousness of the offence, and failed to recognise the importance of the protection of vulnerable women, personal and general deterrence and the value Parliament placed on human life.

This appeal concerns the so-called residual discretion. McLure P noted that in a State appeal against sentence, the Court has a residual discretion to decline to allow an appeal against sentence that is erroneously lenient and that "save where parity considerations arise, the residual discretion is only likely to be exercised if the error has not resulted in a manifestly inadequate sentence". However, her Honour further noted this Court's decision in *Green v The Queen* (2011) 86 ALJR 36 that the discretion could be enlivened by circumstances including the creation of unjustifiable disparity between any new sentence and an unchallenged sentence of a co-offender, delay in the determination of the appeal, the imminent or past occurrence of the offender's release and the effect of re-sentencing on the rehabilitation of the offender.

The Court declined to exercise the residual discretion. McLure P found there was nothing in the facts or circumstances of the appeal which would justify its exercise. Buss JA observed that the discretion could be exercised if the interests of justice

required it or justified it and that this depended on all the facts and circumstances of a particular case. His Honour referred to the factors relevant to the discretion in *Green v The Queen* and found the arguments advanced by the appellant in favour of the exercise of the residual discretion to be without merit.

The grounds of appeal are:

- The Court of Appeal erred when it set aside the sentence imposed by the trial judge and re-sentenced the appellant.

Particulars

- The Court of Appeal failed to apply the principles that attend the disposition of a State appeal brought on the basis of alleged manifest inadequacy.
- The Court of Appeal erred in principle in determining the scope and regard that should be given to the appellant's antecedents and personal circumstances.
- The Court of Appeal erred in the identification and exercise of its discretion not to set aside the original sentence, even if sufficient error was found.