SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBY* [2014] QCA 17
PARTIES:	**R** **v** **MBY** (applicant)
FILE NO/S:	CA No 249 of 2013 DC No 41 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	18 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2013
JUDGES:	Muir and Morrison JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to two counts of rape and one count of maintaining a sexual relationship with a child under 16 years – where the applicant was sentenced to five years imprisonment for the first count of rape, seven years for the second count of rape, and 10 years with a serious violent offence declaration for the maintaining count – where the applicant was the complainant's father – where the complainant fell pregnant as a result of the second count of rape – where the applicant seeks leave to appeal against the sentence imposed in respect of the maintaining count – where the applicant contends that the learned sentencing judge failed to give regard to the applicant's deprived upbringing and rehabilitative prospects – whether the learned sentencing judge erred *Penalties and Sentences Act* 1992 (Qld), s 9(6)(f) *Bugmy v The Queen* (2013) 87 ALJR 1022; [2013] HCA 37, considered *Munda v Western Australia* (2013) 87 ALJR 1035; [2013] HCA 38, considered

Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55, cited
R v Bell; ex parte Attorney-General [1994] QCA 220, cited
R v Engert (1995) 84 A Crim R 67, cited
R v Fernando (1992) 76 A Crim R 58, considered
R v KU; ex parte Attorney-General (No 2) [2011] 1 Qd R 439; [2008] QCA 154, considered
Rogers v The Queen (1989) 44 A Crim R 301, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: A Boe for the applicant
S J Farnden for the respondent

SOLICITORS: Boe Williams Anderson for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that leave to appeal should be refused for the reasons given by Morrison JA.

[2] **MORRISON JA:** This is an application for leave to appeal against sentence. The applicant entered a guilty plea to three counts on an indictment and on 26 August 2013 the learned sentencing judge imposed the following concurrent sentences:

(a) count 1 (rape): five years imprisonment;

(b) count 2 (maintaining a sexual relationship with a child under 16): 10 years imprisonment with an automatic declaration that the conviction was for a Serious Violent Offence ("**SVO**"); and

(c) count 3 (rape): seven years imprisonment.

[3] The application only concerns the sentence imposed in respect of count 2, that of maintaining a sexual relationship with a child under 16.

[4] At the hearing of the application, leave was granted to amend the grounds of appeal in accordance with an amended notice of appeal filed on 15 November 2013. Then, in oral submissions, the third ground (that the sentence was manifestly excessive) was abandoned.

[5] The consequence is that the only grounds of the application for leave to appeal are:

(a) the sentencing judge failed to give regard to the applicant's circumstances of deprivation in his upbringing; and

(b) the sentencing judge failed to give regard to the applicant's rehabilitative prospects.

Circumstances of the offences

[6] An agreed schedule of facts was provided.[1] They reveal the nature of the activities between the applicant and the complainant, who is his natural daughter.

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1 AB 52.

[7] The history prior to count 1, that relating to the first time the applicant had sexual intercourse with the complainant, occupied a period of some five years. During that time the applicant "groomed and showed a sexual interest in the complainant", which manifested as inappropriate touching. During that period the applicant regularly threatened to "bash or flog" the complainant if she told anyone what had occurred. On one occasion the complainant threatened to tell her mother and the applicant hit her.

[8] The first occasion of sexual intercourse occurred when the complainant was 12 years old, in grade 8. The applicant entered the room in which she was watching television, while lying on a mattress on the floor. He lay on top of her and forced her to have sexual intercourse. The complainant said he was very heavy and that she could not get up with him lying on top of her. She was a virgin at the time of this event, which occurred at some point in the first 10 months of 2002.

[9] The circumstances of the offence the subject of this application, that of maintaining a sexual relationship, took place between 1 May 2003 and 31 December 2005 – a period of two years and eight months. The complainant was in grade 9 in 2003. The applicant continued to force her to have unprotected sexual intercourse when her mother was absent. Most of the time he would ejaculate with his penis outside her vagina, but sometimes he would ejaculate with his penis inside her vagina. The intercourse would occur either in her bedroom or her parents' bedroom, after the applicant made the younger brothers go to bed early.

[10] The applicant made the complainant watch pornographic movies on occasions, and on occasions he would suggest different sexual positions. The complainant used to lie still while intercourse occurred.

[11] The applicant continued to enter the complainant's room at night while her mother was asleep, when he would rub and touch her vagina and insert his finger into her vagina. The touching went on for about 10 to 15 minutes. The applicant also started to suck the complainant's breasts, as she had started to develop.

[12] The applicant would do these things to the complainant about three times per week. He continued to threaten to "bash" the complainant if she told anybody. Those threats occurred directly after the sexual intercourse, and most of the times that the applicant had sexual intercourse with her.

[13] The complainant could recall an evening in the middle of 2004 when the applicant entered her room and gave her a vibrator. He told her that he had bought it for her mother, who did not want it, and that that the complainant could have it. She put it in a clothes bag and placed that on the top shelf of her cupboard. About a month later the complainant's mother found it and asked the complainant where she had got it from. The complainant told her that the applicant had given it to her.

[14] On one night in 2004, whilst in grade 10, the complainant confronted the applicant about his sexual abuse of her. The complainant then spent the next three weeks at a different address, but moved back home with the applicant and her mother. The applicant continued to force her to have sexual intercourse with him on a regular basis.

[15] At about this time the complainant had an "on/off boyfriend/girlfriend" relationship with a young man. In October 2005 the complainant had been kicked out of the

house by the applicant. At that time she was sexually involved with her boyfriend. After she moved back home the applicant continued to have sexual intercourse with her.

[16] At the end of November 2005 the applicant and the complainant's mother separated. As a consequence the applicant's offending conduct ceased. In December 2005 the complainant's sexual relationship with her boyfriend ceased. She turned 16 on 30 December 2005.

[17] Over the course of time the complainant said that the threats of violence had become less prevalent. However, she had never agreed to have sexual intercourse with the applicant. She said she "could not speak up because it had been part of her life for so long that she had no voice".[2]

[18] Count 3 concerned an occasion of rape which occurred between 31 August 2005 and 1 November 2005, within the period of maintaining the sexual relationship. It resulted in the complainant falling pregnant with the applicant's child. In January 2006 the complainant discovered she was pregnant. She gave birth on 6 July 2006 to a son. After the birth the complainant no longer saw the applicant, as he had left the family.

Circumstances of detection and arrest

[19] In December 2008 the complainant told her pastor some of what had been done to her by the applicant. In February 2009 she attended a police station, telling police that her father had sexually abused her between 1996 and 2006, in different locations in Australia.

[20] On 28 January 2011 the applicant attended the Townsville watchhouse where he was arrested. He declined to participate in a record of interview, and was charged.

Victim impact statements

[21] Two victim impact statements from the complainant were tendered on the sentencing.[3] The first revealed the very significant impact upon her of the applicant's behaviour over a prolonged period. The complainant said that the applicant's conduct had "destroyed any chance of me having a normal childhood, teenage years, and early adulthood that everyone deserves". She did not have the chance to have a normal childhood in a normal family lifestyle, "because it was taken away from me at a young age, it has ripped me to pieces and torn my world apart from the inside and out". The complainant went on to say that she had no control over what was happening to her, she was being violated and there was nothing she could do to stop it. "I was so intimidated and was very horrified while that man was doing this crime against my own will. I also felt physical pain whilst he was assaulting me".

[22] The statement reveals that the complainant has been suffering from anxiety and depression for many years because of what was done. She has no self-esteem and does not socialise with people because her anxiety starts up. She also finds it very difficult to trust people. She is reminded of the abuse every day, because her son was the product of her father raping her. She described the conduct as being that the applicant:

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2 AB 53.

3 AB 54 and 58.

> "made his mind up and he acted upon his own lust and violated his own child's life. … [The applicant] did it willingly, even knowing that it was wrong what he was doing and he didn't care about the impact that it would have on my life."[4]

[23] The second victim impact statement was in response to the applicant's apology letter to the court, dated 3 June 2013. The applicant's letter focussed very much on his own plight without showing any real appreciation of the complainant's position. More particularly, the letter states that the applicant would like to have a father/son relationship with the child that was born as a consequence of his conduct, that he has "not given up my parental rights and I do not give permission for my son to be taken out of Townsville". He goes on to express a desire for his son to carry his last name "so that he can be recognized and to have connection to me and my family".

[24] Not surprisingly the complainant's second victim impact statement objected to there being any contact with her son. She expressed a desire to not have anything to do with the applicant, nor for the applicant to have any part in her son's life or to exercise any legal rights in respect of her son. It also revealed that because her mother was having contact with the applicant, the complainant was no longer having contact with her own mother. That was said to be because of her main aim, namely to protect her son.

The applicant's personal circumstances

[25] Lengthy written submissions on the sentencing were provided by the applicant.[5] They included nearly four pages of personal antecedents.[6] Those antecedents were addressed in some detail in oral submissions, to which I will return.

[26] The applicant is an Aboriginal man, born in 1967. During the offence period he was aged between 34 and 38, and was 45 years old at the time of sentence. He had a criminal history of a variety of offences between 1984 and 2003, but none of them had any particular relevance to his sentence, as none were offences of a sexual nature.

[27] The applicant grew up with 15 siblings on a property outside Collinsville, which had been owned originally by his grandparents. His eldest brother was born when their mother was still only 13 years old. His father reportedly "drank heavily". His older siblings went to work at an early age. Their parents sold the property, purchasing another one near Proserpine, which was then destroyed by a cyclone. In 1975 to 1977 the applicant's parents became destitute and the family became homeless. At this time, in Proserpine, around the ages of six to seven years old, the applicant was subjected to significant sexual abuse from a male member of his extended family. The abuse included the applicant being rendered drunk, indecently assaulted and anally raped by an older brother-in-law.

[28] After the family were rendered destitute and homeless, they relocated to Mackay. The applicant's mother made an application for public housing assistance, and the family's circumstances became known to regulatory authorities. As a consequence welfare authorities took the applicant (when he was eight) and three of his brothers as "wards of the State". They were placed into "care" for two and a half years.

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4 AB 54-55.
5 AB 71.
6 AB 73-77.

During that time the applicant (and his brothers) were subjected to severe sexual and physical abuse, which included hitting, punching, being made to run to the point of exhaustion, being made to run naked to the laundry, being made to perform oral sex on a priest, and being anally raped.

[29] The applicant was about 11 years old when he left, returning home to his family. The family moved again about a year later. At that point it was noticed that the applicant had learning difficulties, as a result of which he was sent to a "special school". He remains illiterate to this day.

[30] When the applicant was about 14 he again became known to authorities, and was taken from his family and placed in a home for troubled children. He was employed, from the ages of 14 through to 34, on stations throughout his traditional lands, before changing employment to cane farming, and working on properties near and around Townsville and Rockhampton. More recently, he has undertaken cultural heritage roles throughout the area of his tribal traditional lands.

[31] The applicant has struggled with alcohol abuse for most of his life, and at times other drugs. The offences were committed at a time when he was indulging in alcohol and drug abuse. However, in 2009 he ceased drinking alcohol and taking drugs, and in 2010 converted to Christianity.

[32] Prior to being sentenced the applicant was living in Townsville with his two sons, his second wife and her four children. That marriage remained a healthy relationship at the time of sentence. His second wife was one of the persons who provided a letter as to the applicant's character and recent behaviour.[7]

[33] The applicant's submissions pointed out that he maintains strong ties to his traditional lands, having been initiated and having imparted hunting and cultural heritage skills to his sons, step-sons and nephews, including fishing for food to give to elders in the community.

[34] It remains to note that much of the applicant's antecedents were derived from letters provided to the court by a variety of the applicant's relatives.[8]

Sentencing submissions

[35] The applicant's written submissions before the sentencing judge included a detailed account of his history, which emphasised his Aboriginality, his deprived childhood, and the circumstances of his long periods of severe sexual and physical abuse. The submissions then addressed the relevance of that background to the sentencing process.[9] Considerable emphasis was given to the applicant's Aboriginality and the need for a sentencing court to take into account "mitigating factors [which] include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race."[10]

[36] The sentencing judge was urged to consider the principles adopted in Australian courts to assist in the sentencing process where that involves disadvantaged

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7 AB 119.

8 AB 115 (older brother); 117 (sister-in-law); 124 (son); 129 (the applicant, when applying for payment to Redress Services in 2009); 131 (brother); 135 (brother); 137 (sister); 142 (brother); 145 (sister); 147 (sister).

9 AB 77.

10 AB 77; *Rogers v The Queen* (1989) 44 A Crim R 301 at 305 and 307.

Aboriginal offenders, particularly in the context of offences arising from alcohol abuse or other symptoms of endemic dysfunction.[11] The proposition advanced, and supported by reference to authority, was that where a court is sentencing such an Aboriginal offender[12] the court should "sentence the respondent as leniently as the circumstances of his offence admitted".[13] Reliance on the decision in *R v KU; ex parte Attorney-General (No 2)*[14] was urged, and in particular the court's statement that:

> "the "pressures and disadvantages" shown by the evidence to have been suffered by a particular offender must be taken into account in order to fix a sentence for that individual offender which is as lenient in the circumstances as is consistent with punishment proportionate to the gravity of the offence …".[15]

[37] The applicant's written submissions went on to detail "mitigating features … associated with the defendant's Aboriginality".[16] In a separate section the sexual abuse of the defendant was specifically dealt with.[17]

[38] In oral submissions on the sentencing, counsel for the applicant indicated that he was not going to rehearse the written submissions, but rather speak to them.[18] The sentencing judge said that he had read the submissions carefully, and some of the material included with those submissions he had read "more than once".

[39] The submissions made about the applicant's Aboriginality, and what should be drawn from that, were also addressed orally.[19] What was urged was the disadvantage or deprivation involved in the notion of Aboriginality:

> "does not have to be attended by a removal or displacement from the white community, it is really the systemic disadvantage that flows from being Aboriginal, and in this case my submission is that the fact that, due to difficulties at home resulted in being placed into a boys home is an Aboriginal experience, if I can put it that way, of an era."[20]

[40] The submission urged the sentencing judge that:

> "it's not necessary to make a race distinction for him, it's just that his antecedents include considerable disadvantage as a child, considerable abuse when he was a child, and that has carried with it difficulties for him into his adult life."[21]

[41] The question of sexual abuse committed by someone who had, themselves, been the subject of sexual abuse, was then addressed.[22] Counsel for the applicant was asked

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11 AB 78, para 28.

12 That is, one where there are social, economic or other disadvantages which may be associated with, or related to, membership of the Aboriginal race; or problems of alcohol abuse, sexual violence or other abuse reflecting the socio-economic circumstances and the environment in which such a person has grown up; or one who has come from a deprived background or otherwise disadvantaged by reason of social harm, economic disadvantage or difficulties in communication.

13 Adopting the decision of this Court in *R v Bell; ex parte Attorney-General* [1994] QCA 220 at 6.

14 *R v KU; ex parte Attorney-General (No 2)* [2011] 1 Qd R 439 at 474-5.

15 *R v KU* at 476 [135].

16 AB 80, para 36.

17 AB 81, paras 37-39.

18 AB 34, T 1-7, l 40.

19 AB 38-39.

20 AB 38, T 1-11, ll 29-34.

21 AB 38, T 1-11 ll 38-41.

22 AB 39.

to explain how the court should look at that question. The answer was given as follows:

> "[COUNSEL]: The closest I can get to is this, your Honour: the notion of sexual abuse of an offender will only really be relevant if it can be suggested or inferred that it has had something to do with further offending conduct, and in circumstances where that connection can be inferred sufficiently to speak about how disabled he was by the conduct. In this case the added dimension, it seems, is that the children, that is his siblings and him, are aware of the age of the mother when she first in fact had a child, which was 13. That is clearly a dysfunctional framework to be aware of.
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> It does go to his moral culpability that he has been subjected to sexual violence at the ages of seven and eight and shortly thereafter, and, in particular, in a violent framework in an institution.
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> …
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> … it is a matter in mitigation going to his moral culpability, albeit slight. It can't be the situation that you have a get out of gaol card, as it were, because you've been abused, that's not the submission.
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> It is simply that it is a matter of mitigation in the general sense of his personal circumstances, and, secondly, there seems to be a relationship between the sort of offending that he was the subject of to that which he was committing, as distinct from where submissions are made when people are pleading guilty to a completely different offence … it's more so the case going to moral culpability if the offender himself was the victim of the very sort of abuse that he's perpetrated.
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> HIS HONOUR: Yes, all right, I understand that. But I think you're quite right in casting it in terms of being slight ---
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> [COUNSEL]: It is, yes.
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> HIS HONOUR: --- relevance."

[42] The question of rehabilitation was also the subject of oral submissions, as well as written submissions. In paragraph 5(g), the written submissions had said that there "are some prospects of rehabilitation which minimise the risk of further offending of this kind".[23] When asked about the prospects, counsel for the applicant said that the submission:

> "really comes from the fact that he is at least getting some counselling, that there has been at least cessation of criminal behaviour since 2005. There is a degree of insight coming from the fact that he's had to disclose these matters to a lot of people, including the family … and that the family, now well aware of the offending conduct, are – are going to be mindful of what will occur to him when he comes out of gaol … and, finally, the fact that the abuse of alcohol and drugs has ceased, it seems from all reporting. It

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23 AB 72.

> is very difficult, as your Honour noted in some of the other cases that you've dealt with this these matters, to be too certain about the issue of rehabilitation and – and we're not submitting that we can show it in a clinical sense, it's simply that there are features which suggest that he's on the way towards rehabilitation."[24]

The sentencing remarks

[43] The learned sentencing judge started his remarks by taking into account the plea of guilty as an expression of remorse, and acknowledging that whilst there was some criminal history, it was of "no particular relevance to my sentencing function today".[25] He then characterised, in a general sense, the nature of the offending[26] in this way: "You subjected the victim to a prolonged period of sexual abuse, which seems to me as [sic] committed by you purely for your own sexual gratification".[27]

[44] He then dealt with the offences, reciting most of the facts from the agreed statement. Matters to which I have referred, but which were noted by the sentencing judge included the fact that the applicant's conduct "was accompanied by an exercise of fear and control over the victim", and that he "regularly threatened to bash or flog her if she told anyone about it".[28] The primary judge also noted that the complainant "could not speak up because it had been part of her life for so long, and she had no voice, that being said in the context of the threats and the exercise of the control and fear over her by you".[29]

[45] The sentencing judge referred to the two letters sent by the applicant to the court. The first[30] was characterised as being "entirely self-centred",[31] a characterisation with which the applicant's counsel agreed.[32] The second letter[33] was an addendum written in response to the complainant's victim statement, which expressed the desire on the part of the complainant to have nothing to do with the applicant, and particularly not to have the applicant involved in her son's life. His Honour had this to say:

> "The second and more recent letter does express contrition. I accept that it is an indication of recency of insight that no doubt has arisen from your consultations and the indigenous, cultural, and family context with extended family and community. But it is very late in the piece.
>
> In cases such as this, it is sometimes difficult to divorce remorse that is engendered from the plight which a person such as you, as a prisoner, is facing, from that remorse that might genuinely be attributed to the victim. But I accept there is a change in the letters that you have provided to the court, and that you have expressed sorrow for what you have done in the more recent one of those."[34]

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24 AB 35, T 1-8 l 40 to AB 36, T 1-9 l 7.
25 AB 45.
26 Acknowledging that he was dealing with all counts, and not just the subject of this application.
27 AB 45.
28 AB 45.
29 AB 45.
30 Dated 3 June 2013; AB 56.
31 AB 46.
32 AB36, T 1-9 ll 31-35.
33 Dated 25 August 2013; AB 126.
34 AB 46.

[46] The reference to "consultations" referred to counselling sessions between the applicant and Mr Murray, a psychologist. Mr Murray provided a letter and a report, which revealed that the applicant had attended for counselling on six dates between 8 May and 13 June 2013. It is convenient to turn to the terms of Mr Murray's report.[35] He noted that the applicant "was assessed as an ideal candidate for sex offender counseling (sic), he was willing for treatment and recognised that change was needed". He recorded that the applicant had "talked about being the victim of physical and sexual abuse many times during his childhood. He stated that these experiences caused him to behave in a dysfunctional manner as an adult". Reference was made to the regular abuse of alcohol, marijuana and speed, that started when he was 16. The applicant told Mr Murray that he had abstained from all drugs (apart from nicotine) during the period that the counselling sessions occurred. Significantly Mr Murray records that they:

> "did not specifically discuss [the applicant's] offenses (sic) in session; however content our sessions indicates that [the applicant] has taken responsibility for his actions, feels remorse and empathy for the individuals he feels he has wronged".[36]

[47] As to that report, the sentencing judge accepted that it may reflect "that recency of insight into your conduct which I have referred to", but he considered that "there is little of substance in the report to substantiate the reference to remorse and empathy".[37] That comment seems plainly correct given that the only part of the report dealing with remorse and empathy is the short sentence referred to above.

[48] The sentencing judge also noted that the counselling and the applicant's engagement with family and community about his offending conduct, had all taken place after his first appearance in court.[38] That was a point made in submissions, and the applicant's counsel agreed that it was correct, and also that the counselling had occurred "upon advice of lawyers", and was "not something that's been self-generated, we accept that".[39]

[49] The sentencing judge referred to the many letters which had been provided by members of the applicant's family and community.[40] His Honour made a point of saying that he had read the letters, and in some cases read them again. Referring to them he said:

> "They speak in [sic] you in favourable and supportive terms, but the remarkable feature, and the thread that runs through all of those letters, with perhaps the exception of one or two that refer to acceptance of the child into the community, that is, the child who was conceived, they do not offer any insight by family and community into the plight of the victim and the grievous wrong that she has suffered, and I find that quite extraordinary."[41]

[50] I pause to observe that many of the letters revealed, and in some cases emphasised, the applicant's Aboriginality, his deprived childhood, the sexual abuse he had

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35 Dated 21 August 2013; AB 127.
36 AB 127.
37 AB 46.
38 AB 46.
39 AB 37.
40 Exhibit 9, AB 115–125, and AB 131–153.
41 AB 46-47.

suffered leading to substance abuse, and his efforts to turn his life around. His Honour could not have failed to have been acutely aware of all of those matters, simply as a product of reading the letters, but also because they were emphasised both in written submissions and oral submissions.

[51] Indeed, the sentencing judge dealt with those matters in a more express way:[42]

> "The submissions made on your behalf by your counsel, Mr Boe, have been very thorough. I have read the written submissions more than twice. Your background and upbringing involving your being a victim yourself of physical, sexual, and emotional abuse from a very early age, I think can be fairly said to be a horror story in many respects. It may reflect the story of others from that time when you were a child. I accept that the impact upon you personally must have been very significant. It may have conditioned you in your conduct in adult life. However, whilst you are not being punished for having sexually abused the complainant in this case because you were a victim yourself of such abuse, your unfortunately history may make explicable the conduct which the community at large – and I speak here of the community across all cultures – would and should find disgusting, disgraceful, and revolting."

[52] I pause to note that the sentencing judge's reference to the applicant's "background and upbringing" and the reaction of the community "across all cultures", makes it plain that his Honour was well focussed on that aspect of the applicant's background and upbringing which derived from his Aboriginality, as well as the applicant's physical, sexual and emotional abuse.

[53] Having acknowledged those matters the sentencing judge went on to say:[43]

> "However, whatever occurred to you in your life is not an excuse, of course, for your conduct here, and I think you understand that. The complainant has suffered grievously from your conduct, which was entirely focused on your own sexual gratification. It was prolonged. It was repetitive and involved fear and control. And a very significant aggravating factor is that she conceived against her will, a child from an act of penile rape by you. Your previous counsel, Ms McKinnon and your present counsel, Mr Boe, together have made very thorough submissions on your behalf. I have taken into account all of the material, both oral submissions and the written submissions into account, I have also taken into account the expansion of certain matters that arose out of oral submissions this morning.
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> Frankly, from my perspective it seems everything that could be said in mitigation on your behalf has been placed before me. There have been a number of comparative sentences provided to me and I am familiar with them. But more particularly I have considered them in the context of what has occurred in this case. They describe diverse circumstances and in some cases there was more than one

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42 AB 47.
43 AB 47.

> complainant. Whilst there is one complainant, or victim, in this case, there is as I have already indicated a significant distinguishing feature in this case from all of the others in that there was a child conceived from an act of rape."

[54] I pause to note that the sentencing judge's reference to having taken into account "the expansion of certain matters that arose out of oral submissions", clearly refers to the exchange between the applicant's counsel and the court concerning the question of rehabilitation,[44] whether the letters demonstrate true contrition, remorse and empathy,[45] the impact on sentencing of the applicant's Aboriginality,[46] and the impact of the deprived childhood which the applicant endured involving a dysfunctional family background and the disabling effect of the sexual abuse which he had suffered.[47]

[55] The sentencing judge referred to the submission by the applicant's counsel that the appropriate sentencing range straddled 10 years. What was actually said was that:

> "… the range does canvas or straddle both sides of 10 years, and … the Court of Appeal decisions that we've placed before your court provide summary for our submission that it can fall below 10 years."[48]

The applicant's counsel clarified his submission when the judge referred to the range straddling 10 years, by saying that it was a matter of discretion but there were "significant personal circumstances … that would permit your Honour to put it at the lower end of that range".[49]

[56] The sentencing judge held that the range applicable was nine to 12 years, and then went on to make this comment in relation to rehabilitation:

> "Whether you are on the path to rehabilitation is difficult to assess in your circumstances. Frankly, one can only speculate about that but it may be that the opportunity to re-offend may not arise in the future."[50]

[57] I pause to observe that the sentencing judge's comment in that respect reflected the submission by the applicant's counsel[51] that it was:

> "very difficult … to be too certain about the issue of rehabilitation and … we're not submitting that we can show it in a clinical sense, it's simply that there are features which suggest that he's on the way towards rehabilitation."

[58] The sentencing judge then concluded by saying:

> "The purposes for which I am going to impose a sentence is that I will make in a moment now to punish you to an extent and in a way that is just in all the circumstances. To deter you and to deter other

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44 AB 35–36.
45 AB 36–37.
46 AB 38.
47 AB 39.
48 AB 35.
49 AB 40.
50 AB 47.
51 AB 36.

> persons from committing these or similar offences – and to make it clear that the community acting through the court denounces the sort of conduct in which you were involved. I consider that in view of the serious nature of the offences that you have committed and having consideration for your personal circumstances, there nevertheless is no reasonable alternative to my imposing terms of imprisonment of a condign nature to achieve the purposes I've referred to."[52]

[59] It seems to me to be plain that the sentencing judge's reference to "your personal circumstances", the reaction of communities "across all cultures" and the "expansion of certain matters that arose out of oral submissions this morning", coming so soon after his Honour referred to the letters which emphasised the applicant's Aboriginality, deprivation in his childhood and sexual abuse, demonstrated that his Honour was taking into account those aspects of the applicant's background.

Discussion

[60] The first ground advanced by the applicant is that the sentencing judge did not give appropriate weight to the circumstances of deprivation in the applicant's upbringing. The contention is not confined to the question of physical, sexual or emotional abuse, nor a generally dysfunctional background. It includes the aspect of Aboriginality, and reliance was placed on the High Court decisions in *Bugmy v The Queen*[53] and *Munda v Western Australia*.[54]

[61] In *Bugmy* the High Court was faced with two wide-ranging contentions. The first was that sentencing courts should take into account the "unique circumstances of all Aboriginal offenders" as relevant to the moral culpability of an individual Aboriginal offender.[55] The second was that courts should take into account the high rate of incarceration of Aboriginal Australians when sentencing an Aboriginal offender. That rate was said to reflect a history of dispossession and associated social and economic disadvantage.[56]

[62] The court accepted that an Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence, in the same way that the deprived background of a non-Aboriginal offender may do so.[57] Reference was made to the decision in *R v Fernando*[58] where Wood J advanced two propositions.

[63] The first was that where an offender's abuse of alcohol is a reflection of the environment in which they have been raised, that should be taken into account as a mitigating factor. Recognising that there are Aboriginal communities in which alcohol abuse and alcohol related violence go hand in hand, Wood J considered that taking the alcohol abuse into account would acknowledge the endemic presence of alcohol in Aboriginal communities and:

> "… the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and

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52 AB 47-48.
53 *Bugmy v The Queen* [2013] HCA 37.
54 *Munda v Western Australia* [2013] HCA 38.
55 *Bugmy* at [28].
56 *Bugmy* at [28].
57 *Bugmy* at [37].
58 *R v Fernando* (1992) 76 A Crim R 58.

> other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects."[59]

[64] The second proposition was that Aboriginality may be relevant to the sentencing determination in a case where that background or lack of experience of European ways would mean that a lengthy term of imprisonment might be particularly burdensome.[60]

[65] The High Court accepted that abuse of alcohol and alcohol fuelled violence may be a mitigating factor:

> "However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."[61]

[66] However, the High Court did not accept that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders, holding it would be "antithetical to individualised justice".[62] The High Court also accepted a submission that the effects of profound deprivation are to be given their full weight in a determination of the appropriate sentence in every case. However, that was qualified:

> "[43] The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> [44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that the offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced."[63]

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59 *Fernando* at 62-63; *Bugmy* at [38].

60 *Fernando* at 63; *Bugmy* at [39].

61 *Bugmy* at [40].

62 *Bugmy* at [41].

63 Internal references omitted.

[67] Properly understood, the High Court was going no further than to say that the deprived background of an offender, be they Aboriginal or otherwise, and whether or not derived from a situation of endemic alcohol abuse and alcohol fuelled violence, may mitigate the sentence imposed on the offender because of its impact on the assessment of moral culpability. However, the proper weight to be given to that factor will depend upon the particular case. Further, the weight that is given to such a factor, in terms of mitigation, will depend upon the interplay of considerations relevant to sentencing, including punishment, protection of society, personal deterrence and general deterrence.

[68] In *Munda*[64] the High Court again considered questions arising in relation to an Aboriginal offender and the impact of the disadvantage associated with the social and economic problems that commonly attend Aboriginal communities. The contention in that case was that those disadvantages should be treated as mitigatory, notwithstanding the weight to be given to considerations such as deterrence. In other words, the submission advanced the notion that the mitigatory effects of deprivation and disadvantage associated with the problems that commonly attend Aboriginal communities, should be given some sort of primacy in the various considerations on sentencing.[65]

[69] The High Court did not embrace that submission. It said:

> "[53] Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence".[66] It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. 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. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour.[67],[68]

[70] The reference by the High Court to ensuring that the mitigating factors do not lead to the imposition of a penalty which is disproportionate to the gravity of the offence, was a reference to the need, in each case, for the sentence to be just. *Munda* involved a violent assault leading to the death of the offender's de facto partner. The High Court held that that was a powerful claim on the sentencing discretion, saying:[69]

> "A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the

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64 Which was handed down the same day as *Bugmy*.

65 *Munda* at [48].

66 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477; 62 ALJR 224.

67 *R v KU; ex parte Attorney-General (Qld) (No 2)* [2011] 1 Qd R 439 at [133].

68 The reference to *Neal* is to *Neal v The Queen* (1982) 149 CLR 305 at 326; 56 ALJR 848.

69 *Munda* at [55].

> 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."

[71] Those comments are apt here where the complainant was the victim of a prolonged series of violent attacks[70], leading to her giving birth to a child, the product of that violence, and suffering considerable psychological impact.

[72] In *Munda* the High Court also emphasised the balance that must be achieved when confronted with the proposition that a particular offender has been affected by a deprived background in which abuse of alcohol is common. It said:[71]

> "The circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending. 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."

[73] Finally, the High Court adopted what was said by Gleeson CJ in *R v Engert*:[72]

> "[T]he interplay of the considerations relevant to sentencing may be complex … In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance …
>
> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances."

[74] In my opinion there can be no doubt that the sentencing judge was acutely aware of the applicant's personal circumstances, including his Aboriginality, violent and dysfunctional upbringing, physical, sexual and emotional abuse, and the alcohol and drug abuse which resulted from that. Those matters were canvassed in great detail in the written submissions, in the material placed before the court (particularly the letters from the applicant's extended family), and in oral submissions as well. Indeed, the exchange between the applicant's counsel and the sentencing judge on these matters occurred only about an hour before the actual sentence was imposed. It is hardly to be thought that the sentencing judge had forgotten them in that time.

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70 Violent in the sense that rape is an inherently violent offence, and also that there was an occasion when the complainant was hit, and she was constantly threatened with violence.

71 *Munda* at [57].

72 *R v Engert* (1995) 84 A Crim R 67, at 68.

In any event there are substantive references in the sentencing remarks that reveal that those matters were taken into account. Reference was made to the applicant's "indigenous, cultural and family context with extended family and community", the letters from the extended family and community, then specifically to the applicant's "background and upbringing involving your being a victim yourself of physical, sexual and emotional abuse from a very early age" which was described as a "horror story in many respects". Further, when the sentencing judge referred to having taken into account "the expansion of certain matters that arose out of oral submissions this morning", that was an undoubted reference to the exchanges concerning the very matters of which complaint is now made.

[75] In my opinion the sentencing judge clearly took into account, as a mitigating factor, the applicant's personal circumstances of childhood deprivation, abuse, the dysfunction nature of his upbringing, and its impact on his adult life. However, the sentencing judge was balancing that with the gravity of the offence and its impact upon the complainant.[73] Thus he referred to the applicant's personal circumstances as possibly explaining his conduct "which the community at large – and I speak here of the community across all cultures – would and should find disgusting, disgraceful and revolting".[74] The learned sentencing judge was correct to point out that the applicant's personal circumstances could not be an excuse for his conduct.[75] In that he was plainly right, as those circumstances may act as a mitigating factor, the weight of which was to be balanced against other competing sentencing considerations. His Honour then immediately went on to characterise the nature of the offence as involving grievous suffering by the complainant, the applicant's conduct being focussed on his own sexual gratification, the offences being prolonged, repetitive and involving fear and control, and then most significantly that it resulted in the complainant conceiving a child, against her will.[76] That his Honour was balancing the various considerations, and in particular the applicant's personal circumstances against the serious nature of the offence, is made clear by his Honour's express statement to that effect.[77]

[76] In my respectful opinion it cannot be demonstrated that the learned sentencing judge erred in that approach. His Honour was doing that which the High Court in *Munda* said was appropriate[78], namely giving appropriate weight to the mitigating factors, but not letting them lead to the imposition of a penalty which was disproportionate to the gravity of the instant offence. In some respects the applicant's approach on this application tacitly accepts that to be so, in that the ground of appeal that the sentence was manifestly excessive, was abandoned, and it was conceded that a sentence of 10 years was within range.

[77] The second ground contended that inappropriate weight was given to the applicant's rehabilitative prospects.

[78] Section 9(6)(f) of the *Penalties and Sentences Act* 1992 (Qld) requires a court have regard to the prospects of rehabilitation, in sentencing an offender. The applicant contends that even though the learned sentencing judge referred to the question of

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73 As required in *Bugmy* at [44] and *Munda* at [53], [55], and [57].
74 AB 47.
75 AB 47.
76 AB 47.
77 At AB 48.
78 *Munda* at [53].

rehabilitation,[79] he should have made a finding regarding the rehabilitative prospects, specifically that there were good prospects of rehabilitation.

[79] The arguments about rehabilitation were set forth in detail in the applicant's written submissions, and then were the subject of further exchanges between the applicant's counsel and the judge.[80] That exchange commenced with the sentencing judge focussing on paragraph 5(g) of the written submissions[81] which referred to the fact that offending ceased in 2005, the fact that there was no prior history of similar offending, the fact that the focus had been on one complainant, and the steps taken since. The submission was put that "there are some prospects of rehabilitation".

[80] As expanded in oral submissions, the sentencing judge was also referred to the fact of the counselling, the degree of insight reflected in the letters from the applicant and his extended family, and that abuse of alcohol and drugs had ceased. That was followed by the submission that it was:

> "very difficult … to be too certain about the issue of rehabilitation … and we're not submitting that we can show it in a clinical sense, it's simply that there are features which suggest that he's on the way towards rehabilitation."[82]

[81] Given that submission, and the limitations to which I have referred to in respect of the evidence from Mr Murray as to counselling, the comments by the learned sentencing judge about rehabilitation are unexceptional. They do not indicate that the learned sentencing judge did not weigh the factors to which the applicant refers. To the contrary, he clearly did. More than once the sentencing judge referred to having read and re-read the letters of support, which spoke of the applicant's reform, abstinence from drinking and drug taking, his conversion to Christianity and acceptance of responsibility.[83] The counselling was taken into account, as was what the applicant said himself in his letters of apology.

[82] In my opinion it has not been demonstrated that the primary judge fell into error. Once again the applicant's submissions confront the difficulty that they accept that 10 years was within the range of sentences that might be given. Further, the applicant's contentions give too little weight to the statement by the primary judge, namely that one of the purposes of imposing the sentence was "to punish you to an extent and a way that is **just in all the circumstances**".[84] Given the matters expressly referred to by the sentencing judge in his remarks, it is very difficult to see that the prospects of rehabilitation were not one of the circumstances to which he was referring.

Disposition

[83] For the reasons that I have expressed above, I would refuse leave to appeal.

[84] **DAUBNEY J:** I agree with the reasons for judgment of Morrison JA and with the order he proposes.

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79 AB 47.
80 AB 35-36.
81 AB 72.
82 AB 36.
83 For instance, the letter from the applicant's partner at AB 119 and the letter from Ms Boland, at AB 118.
84 AB 47-48 (emphasis added).