***R v MBY* [2014] QCA 17 (18 February 2014) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Mitigating factors' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape, maintaining a sexual relationship with a child under 16.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant, an Aboriginal man committed the offences against his daughter. It is unclear whether at the time of the offences, there was a current or lapsed protection order against the applicant in favour of the victim or other parties. (See further at [6]-[20]).

Issue/s: Whether the primary judge failed to give appropriate weight to circumstances of deprivation in his upbringing, including the social and economic disadvantage associated with his Aboriginality and the physical, sexual and emotional abuse that he had suffered as a child. Another issue was whether the primary judge failed to have regard to the applicant's rehabilitative prospects.

Decision and Reasoning: In dismissing the appeal, Morrison JA (Muir JA and Daubney J agreeing) discussed the relevance of the applicant's Aboriginality in sentencing. See in particular at [60]-[73] where his Honour provides a detailed summary of relevant authority including the High Court decision of *Munda v Western Australia* [2013] HCA 38. Essentially, his Honour accepted that social, economic and other disadvantages (including alcohol and drug abuse) which may be related to an offender's Aboriginality, should be taken into account as a mitigating factor in sentencing. Indeed, there is authority to suggest that when an Aboriginal offender is being sentenced, the Court should, 'sentence (the offender) as leniently as the circumstances of his offence admitted'. (See *R v Bell* [1994] QCA 220). However, this cannot undermine individualised justice. That is, the deprived background of an Aboriginal and Torres Strait Islander offender may be given appropriate weight in sentence mitigation, but it cannot be given undue primacy. It cannot result in a punishment being imposed that does not reflect the gravity of the offending, or which does not pay sufficient regard to considerations such as specific and general deterrence, which are particularly important in domestic violence cases. The second ground of appeal, that the applicant's rehabilitative prospects were not given enough weight was also dismissed.