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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SCC 20918263 and 20918261

THE QUEEN

and

MOHAMED TAHIR and  
BENY

(Sentence)

MILDREN J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON WEDNESDAY 28 OCTOBER 2009

Transcribed by:  
Merrill Legal Solutions

HIS HONOUR: You, Beny, and you, Mohamed Tahir, have each pleaded guilty to one count of facilitating bringing to Australia of a group of five or more non-citizens without visas, being reckless as to whether those persons had a lawful right to come to Australia contrary to s 232A of the Migration Act 1958. The maximum penalty for this offence is imprisonment for 20 years or a fine of \$220,000 or both.

In this case, there is also a mandatory minimum sentence of five years with a mandatory minimum non-parole period of at least three years. It is not submitted by counsel for the Commonwealth DPP that a sentence greater than the mandatory minima should be imposed.

On 15 April 2009 a Type IV Indonesian fishing vessel, about 15 metres in length of wooden construction with an inboard engine, was intercepted by HMAS Albany approximately two and a half nautical miles south-east of Ashmore Reef inside the Territory of Ashmore and Cartier Islands. The vessel has been given the name SIEV 36 by Australian authorities. At the time of interception you were both inside the wheelhouse at the helm of the SIEV 36. The vessel also carried 47 unlawful non-citizens, 46 from Afghanistan and one from Iran. The SIEV 36 had been at sea for about five days and nights after leaving Indonesia. The vessel carried sufficient food and water and it was equipped with a compass but it only had one life jacket. The passengers each paid up to \$6000 to reach Australia.

You, Beny, had been employed in South Sulawesi as a fisherman. Approximately 12-18 months ago, you left South Sulawesi to go to Java in order to find work. You obtained some employment but about a month before you became involved in this matter, you left Java to go to Lombok in order to find work there. You were approached in Lombok by an older man who offered you employment on this trip. You were to be paid five million rupiah (about \$560) which to you is a very large sum of money. You were lured into the task by the money. You expected to be caught. You were told that you would be returned home after a short time.

You, Mohamed Tahir, were born in a village called Muncar near Banyuwangi in East Java. You also had been employed as a fisherman. You were approached by two older men at the wharves near your village and were offered five million rupiah to undertake this job. You had not been in work for some months and to you this was a very substantial sum of money. You left your village with the men and you were taken to Lombok. There the vessel was loaded with the passengers on a beach. At the time of departure, a captain was also on board.

At some time before the vessel was intercepted, the captain left the vessel in a small boat and instructed you both to continue on your present course to Australia. This you did, taking turns to steer the vessel and to sleep. You each refuelled the engine on a number of occasions and operated the bilge pumps. You also occasionally provided food and water to the passengers.

After you were intercepted, a detention notice was issued and given to you, Tahir. Although you read a little Indonesian, you did not understand the card.

Throughout the night of 15 April 2009, nine members of the Australian Defence Force were on board the SIEV 36. You were both required to operate the bilge pumps in order to expel excess water from the vessel.

On the morning of 16 April 2009, the custody of SIEV 36 was transferred to HMAS Childers. At about 8 am, an explosion occurred on board. Of the 47 unlawful non-citizens on board at the time of the explosion, three are confirmed dead, two are missing and presumed dead, and most of the remaining number were injured. Both of you were injured.

You, Beny, received medical treatment at the Royal Brisbane and Womens Hospital. You received burns to your left leg, left arm, left foot and the left side of your back. You were also thrown into the water for about 25-30 minutes before you were rescued. You were hospitalised for about 20-30 days.

You, Tahir, also received burns to your right arm and left leg. You have permanent significant scarring. You are still wearing bandages and will need to wear the bandages for the next two years. You still have pain.

SIEV 36 subsequently sank approximately four nautical miles from Ashmore Island. It is not alleged that either of you were responsible for the explosion.

Following your discharge from hospital you, Beny, were arrested and detained at the Brisbane Immigration Transit Accommodation at Pinkenba in Brisbane. You falsely told officers of the Department of Immigration and Citizenship that you were 17 years of age. A bilateral wrist X-ray taken for the purpose of age determination subsequently revealed that you had the skeletal maturity of a male of at least 19 years of age. I accept your counsel's submission that the question of your age is one of some difficulty. You do not know your date of birth and there were conflicting reports about how old you were. It is accepted now that you are over 18 and that you are probably about 19, although you may be 20. This information has been confirmed by your solicitors through speaking to your family.

You, Tahir, were arrested following your discharge from hospital and detained at the DIAC juvenile facilities at Redcliffe in Perth. You had falsely told officers at the DIAC that you were 13 years of age. A bilateral wrist X-ray taken for the purpose of age determination subsequently revealed that you had the skeletal maturity of a male of at least 19 years of age. You do not know your exact age but you accept that you are older than 18.

As for your personal circumstances you, Beny, were born in Bonay in South Sulawesi. Your father was a fisherman and labourer. You are one of twelve children, two of whom died whilst very young. You attended school to

about Year 2 in primary school. It appears that you left school at a very early age, probably when you were about seven years of age. Initially you worked for your father's boss, cleaning boats and so on. When you were about 13, you began working as a fisherman doing short trips. Later you were given responsibility for steering and also for doing longer trips.

You know now that what you did was very wrong. Through your counsel, you have said that you are very sorry for your behaviour now that you have an understanding of the reasons why this law has been passed by the Australian Parliament. You say that when you are released from prison, you will not re-offend. I note that you have pleaded guilty at any early opportunity and you have expressed your remorse. I note also that you are prepared to assist the authorities by helping to identify some of the others who may have been involved.

You, Mohamed Tahir, are one of seven children. You also had limited schooling to about Grade 4 or 5 at primary level. You were employed as a fisherman working only on small vessels with usually one other person.

You too have expressed your remorse and have pleaded guilty at the first opportunity. You say through your counsel that you did not have a good understanding of the seriousness of your conduct and that you have no intention of re-offending. I note that whilst in prison you were diagnosed with tuberculosis and you have been treated for that condition by medication. You also have made an offer of assistance to the authorities.

Because of the mandatory minimum sentences which I am required by law to impose, the usual principles which apply to sentencing do not apply to you. They might have applied if I thought that a longer sentence than five years was appropriate but this is clearly not the case. But for the mandatory minimum sentences which I am required to impose, I would have imposed a much lesser sentence than I am now required by law to do. There are dangers when the Courts are required to impose mandatory minimum sentences. In cases such as this, the ordinary sentencing principles play no function.

I was provided with a number of sentencing remarks from other jurisdictions but most of those were for people who, like you, received a mandatory minimum sentence. Sentencing in cases of that kind are no assistance to the Court whatsoever in a case of this type.

The other dangers of mandatory minimum sentencing, apart from the fact that the Court is required to impose a sentence which is greater than the justice of the case would otherwise require include the fact that principles of parity between offenders has little or no role to play. All offenders that fall within the class will be treated equally no matter what their level of criminality may be.

However this is not the occasion to debate the merits of mandatory minimum sentencing. The Parliament has prescribed mandatory minimum

sentencing laws and it must take responsibility for the consequences. It is my duty to apply these laws. Plainly, they are designed to act as a deterrent. In other words, in cases of this kind general deterrence is given primacy. What that means is that the sentence of the Court is intended to deter others who, like you, might be encouraged to offend in this way.

Nothing I have said should be taken as in any way playing down the importance of this law which is there to protect Australian sovereignty and to discourage people trafficking which is risky for the people who are being brought to Australia illegally and which also exposes Australia to the risks of disease.

You are each convicted and sentenced to a term of imprisonment for five years. In respect of each of you, I impose a non-parole period of three years. Your sentences and non-parole periods are backdated to 15 April 2009 to take into account time already spent in custody.

I note your offers of assistance to the authorities. Having regard to your ages and personal circumstances I would recommend to the Executive that you be considered for release on licence after you have served a period of twelve months if, in fact, you are able to provide any useful assistance to the authorities.

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