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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SCC 21102367

THE QUEEN

and

EDWARD NAFI

(Sentence)

KELLY J

TRANSCRIPT OF PROCEEDINGS  
AT DARWIN ON THURSDAY 19 MAY 2011

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HER HONOUR: Since the last mention of this matter, I have considered the construction point. The issue is whether the offence of which Mr Nafi was convicted on 3 October 2001 was a repeat offence within the meaning of the Migration Act 1958. The term 'repeat offence' is defined in s 236B(5) and the relevant portion of that section is subsection 5(b)(i):

A person's conviction for an offence is for a repeat offence if, in proceedings after the commencement of the Border Protection (Validation and Enforcement Powers) Act 2001 whether in the same proceedings as the proceedings relating to the offence or in previous proceedings, a court has convicted the person of another offence being an offence against s 232A or 233A of this Act as in force before the commencement of this section.

Mr Nafi was convicted of an offence against s 232A as in force before the commencement of the section. The anomaly in his case is that the proceedings were arguably, at least, commenced before the commencement of the Act but the conviction occurred after the commencement of that Act. The construction problem therefore is to ascertain the meaning of the phrase 'in proceedings after the commencement of' the nominated Act'.

The defence contends that there cannot have been a conviction in proceedings after the commencement of the Act if part of those proceedings occurred before the commencement of the Act. The Crown, on the other hand, contends that the question to be asked is: 'Were there proceedings on foot after the commencement of the nominated Act and, if so, was the accused convicted of a relevant offence in those proceedings?' and if the answer to both questions is 'yes', then there is a repeat offence.

The Crown also contends that to construe the definition of repeat offence in the way contended for by the defence would be to impermissibly insert the word 'commenced' into the definition, that is to say, to read the words: 'In proceedings after the commencement of the Act' as 'In proceedings commenced after the commencement of the Act'. It is accepted, I think, by both parties that if there is any ambiguity, then the section ought to be construed in favour of the liberty of the subject.

Unfortunately, I can find no relevant ambiguity. It seems to me that if there are proceedings on foot after the commencement of the Act and the accused was convicted of a relevant offence in those proceedings, then there is a repeat offence within the meaning of the Act. To construe the section in the manner contended for by the defence would be to impermissibly add the word 'commenced' into the phrase 'proceedings after the commencement of the Act'. It would be to read it 'in proceedings commenced after the commencement of the Act'.

If proceedings were in existence partially before and partially after the commencement of the Act, I can see no way that you can say that they were not proceedings after the commencement of the Act. They are both proceedings before the commencement of the Act and proceedings after the commencement of the Act

and fall squarely within that definition. I have to say, I come to that construction with great reluctance in the circumstances but I feel I have no choice because that, it seems to me, is the plain meaning of the section.

I therefore find that the offence of which Mr Nafi was convicted on 3 October 2001 is a repeat offence for the purposes of the Act.

I now come to sentence Mr Nafi.

Edward Nafi, you have pleaded guilty to an offence against s 233C of the Migration Act 1958. The maximum penalty for this offence is 20 years imprisonment and/or a fine of \$220,000. However, the fine is not available in the circumstances of the mandatory minimum sentencing provisions of the Act.

The facts of the offending are as follows:

On the afternoon of 15 June 2010, members from HMAS Armidale boarded and secured a vessel about 19 nautical miles south-west of Ashmore Islands and that is approximately 5.3 nautical miles inside the Australian Contiguous Zone. The Australian Contiguous Zone extends to a maximum of 24 nautical miles from the low water line. In this zone Australia is able to enforce its customs, fiscal immigration and sanitary laws and regulations.

There were a total of 36 people on board the vessel. There were 3 Indonesian crew on board, you, and 2 other people who were under the age of 18 and have been sent home. Also on board were 6 Iraqi men, 12 Iranian men, 7 Iranian women and 8 Iranian children. All passengers and crew were transferred onto an Australian Customs vessel and taken to Christmas Island to the Immigration Reception and Processing Centre. You were later transferred to the Northern Immigration Detention Centre in Darwin.

The passengers have provided evidence and it is an agreed fact that most of those passengers say that they travelled from their country of residence to Indonesia, that they paid between US\$10,000 and US\$20,000 before boarding the vessel for their passage, and in one case the passage of their whole family, to Australia. This was not paid to you or the other crew. They were taken from various places to a place on the coast in Indonesia at night where they boarded a small boat which took them out to a larger boat. They say you and two crew were aboard the larger boat.

You appeared to be the captain of the boat and were in charge and were seen steering the boat during the voyage. You were also seen navigating the boat with the assistance of a compass. The two other crew members refuelled the boat, tended to the engine and steered it when you were resting. The vessel started taking on water at one stage and the crew took steps to remove it. The voyage took about ten days.

During the voyage, they were not asked for any travel documents including passports or visas. There was food and water on the boat and some passengers saw a small number of lifejackets but they were not distributed. One passenger said some passengers had brought their own lifejackets. Five of the passengers identified you as the captain of the vessel.

Department of Immigration and Citizenship records indicate that all of the passengers on board were non-citizens and had no lawful right to come to Australia on the date the vessel was intercepted.

On 9 September 2010, you participated in a taped record of interview and exercised your right not to answer any questions in relation to the offence.

So far as your prior criminal record is concerned, you have a prior conviction under s 232A of the Migration Act for facilitating the bringing into Australia of 108 people in 2001 being reckless as to whether the people had a lawful right to come to Australia. You have two prior convictions for using a foreign boat for commercial fishing in the Australian Fishing Zone without a licence.

So far as your personal circumstances are concerned, I am informed that you are 58 years old and you are from Roti in Indonesia. You are married with four children. Three of the children are adults and your two sons are married. Your youngest daughter is 17 and in Year 10 at school. Your wife and youngest daughter are dependent up on you financially and you are extremely anxious about their welfare while you are in custody in Australia. I am told that you own a modest house in Roti made of bamboo.

Most of the men in Roti work as fishermen as it is a small island and there is little other employment available. You have always worked as a fisherman and have no other skill or trade. You usually fish for sharks fin. I am told you earn a maximum of 500,000 rupiah per fishing trip per month which is approximately AU\$60. You do not earn that every month and if a trip is unsuccessful you can earn nothing. You do not have any other employment opportunities.

I am told you are aware that the offence for which you are before the Court carries a penalty of imprisonment and I am told that your earlier offending and the present offending has all been motivated by extreme poverty. In the words of your counsel, you committed the offence out of financial desperation.

I am told that the circumstances of the offending are that you were approached by a man in Roti and offered ten million rupiah to take on the job. That is about \$1200 which is, in your financial circumstances, an extremely large amount of money but a very modest sum in comparison with the sums of money paid by the people for passage on board the boat.

The prosecutor concedes that you have indicated a willingness to plead guilty at an early opportunity which is indicative of your willingness to facilitate the course of justice. Of course, it might also be seen as a recognition of the inevitable.

Nevertheless, you would be entitled to a discount on your sentence as a result of your early plea, but the mandatory sentencing regime in the Migration Act renders any such discount of no effect. I am unable to give such a discount.

The prosecutor contends that despite your guilty plea you show no real remorse. One would not expect you to display shame or remorse.

By committing the offence to which you have pleaded guilty, you have broken Australian law and must suffer the consequences. However it cannot be said that, apart from the existence of that law, there is any moral culpability in helping to transport willing passengers to a place where they want to go. The same might be said of your earlier convictions of facilitating the bringing of people into Australia and commercial fishing in Australian waters.

So far as sentencing principles are concerned, I am required to take into account such of the matters set out in s 16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s 16A(1) of that Act to impose a sentence which is 'of a severity appropriate in all the circumstances of the offence'. However, I am prevented from doing this by the mandatory sentencing regime in s 236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of five years imprisonment with a minimum non-parole period of three years. In the case of a repeat offence, the mandatory minimum sentence is eight years imprisonment with a minimum non-parole period of five years.

Unfortunately, as I have already ruled, in my view the prosecutor is correct in saying that because of your earlier conviction for facilitating the bringing of people into Australia in 2001, the present offence is a repeat offence. Having regard to the matters in s 16A(2) of the Crimes Act and in particular to the following matters:

- (a) the nature and circumstances of the offence and the fact that it is not suggested that you played a principal or high level role in the operation whereby your passengers paid money and it was organised that they be brought into Australia;
- (b) your personal circumstances, antecedents, age and means, in particular your extreme poverty and your need to provide for your family which was a motivating factor in the offending;
- (c) the probable extreme effect that any lengthy sentence of imprisonment would have on your wife and daughter;
- (d) the fact that you have pleaded guilty;
- (e) the need to ensure that you are adequately punished for the offence;
- (f) paying special attention to the need for both personal deterrence given your prior relevant offending, and general deterrence, both of which must play an important role in any sentence I hand down.

As I say, taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in this Court for offences of the same or higher maximum sentences involving far greater moral culpability including violence causing serious harm to victims.

As his Honour, Mildren J, said in *Trenergy v Bradley* (1997) 6 NTLR 175 at 187:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

This is such a case. I am compelled by the legislation to hand down a sentence which is harsher than a just sentence arrived at on the application of longstanding sentencing principles applied by the Courts and which have been applied by those Courts for the protection of society and of the individual. I have no choice.

You will be convicted and sentenced to imprisonment for eight years commencing on 15 June 2010. I fix a non-parole period of five years.

Had it not been for the mandatory minimum sentencing regime, taking into account the maximum penalty prescribed for this offence and the factors I have already set out I would have considered an appropriate penalty to have been a term of imprisonment for three years with a non-parole period of 18 months.

I therefore recommend that the Commonwealth Attorney-General exercise his prerogative to extend mercy to you, Mr Nafi, after you have served 18 months in prison. There is no guarantee that this will occur. It is a matter for the Attorney-General whether this recommendation is accepted.

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