

SUPREME COURT OF QUEENSLAND

CITATION: *R v Daoed* [2005] QCA 458

PARTIES: **R**
v
DAOED, Khaleed Shnayf
(applicant)

FILE NO/S: CA No 203 of 2005
SC No 430 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 December 2005

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2005

JUDGES: McPherson and Keane JJA and Mackenzie 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 dismissed**

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OTHER OFFENCES - where the applicant was charged with two counts of having aided the entry into Australia of persons without a legal right to do so in contravention of s 232A *Migration Act* 1958 (Cth) - where the applicant had helped arrange for a vessel to carry over 300 people to Australia from Indonesia - where this vessel sank with major loss of life - where the applicant was convicted after trial on one count but acquitted on the other - where the learned sentencing judge found that the applicant was not motivated by altruism and appreciated the dangers of the voyage - where the applicant had himself come to Indonesia as a refugee - where the applicant was sentenced to nine years imprisonment with a non-parole period of four and a half years - whether the sentence imposed on the applicant was manifestly excessive

Migration Act 1958 (Cth), s 232A, s 233C

Cita v R; Lamaha v R [2001] WASCA 5; (2001) 120 A Crim R 307, considered

R v Al Jenabi, unreported, Supreme Court of the Northern Territory, Mildren J, No 20302840 and No 20302843, 21 September 2004, considered

R v Ayoub, unreported, District Court of Western Australia, Nisbet DCJ, 16 December 2004, cited

R v Disun; R v Nurdin [2003] WASCA 47; (2003) 27 WAR 146, considered

R v Feng Lin [2001] NSWCCA 7; (2001) 119 A Crim R 194, cited

COUNSEL: G P Long for the applicant
G R Rice for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Keane JA for dismissing this application and with the additional comments of Mackenzie J.

[2] The application for leave to appeal against sentence should be dismissed.

[3] **KEANE JA:** Between 1 July 2001 and 19 October 2001, the applicant aided Abu Quassey to organise the proposed entry into Australia of more than 300 people, none of whom had a legal right to enter Australia, in circumstances in which Quassey was reckless as to whether those people had a right to enter Australia. The kind of activity in which the applicant and Quassey were involved is colloquially referred to as "people smuggling".

[4] The group left Sumatra on 18 October 2001 on board a vessel that will be referred to in these reasons, for the sake of convenience, as "the SIEV-X". After some hours of sailing, 23 of the passengers on the vessel asked to be set down on an island from which they returned to Indonesia. Most of the remaining were drowned when the SIEV-X capsized in the open sea on 19 October 2001. Forty five people were rescued by a fishing boat and returned to Indonesia.

[5] As a consequence of these events, the applicant was charged with two counts of contravening s 232A of the *Migration Act 1958* (Cth) ("the Act"). After a trial, the applicant was convicted on one count and acquitted on the other by a jury on 8 June 2005. On 14 July 2005, the applicant was sentenced to nine years imprisonment with a non-parole period of four and a half years. The learned sentencing judge declared 785 days spent by the applicant in pre-sentence custody between 22 May 2003 and the date of sentence as time already served.

[6] The applicant desires to appeal against that sentence on the ground that it is manifestly excessive.

Circumstances of the offence

[7] The learned sentencing judge found that the applicant had assisted Abu Quassey extensively in the organisation of the attempted entry into Australia in a number of respects. His Honour found that the applicant had been involved in:

- (a) attending promotional meetings with prospective passengers;
 - (b) negotiating the price and terms of travel to Australia directly with passengers;
 - (c) receiving payment and keeping records of the names of passengers and their payments;
 - (d) providing information to passengers concerning the vessel and the time of departure;
 - (e) assisting in the transfer of passengers between places of accommodation pending a bus trip to the point of departure in Sumatra;
 - (f) assisting the boarding of passengers for that bus trip;
 - (g) accompanying passengers with Quassey and another on the bus trip;
 - (h) collecting passengers' mobile phones;
 - (i) issuing instructions to passengers at the hotel in Sumatra prior to departure and assisting in the transfer of passengers to the embarkation point; and
 - (j) issuing instructions at the point of embarkation and assisting to ferry passengers from the beach to the SIEV-X.
- [8] At the applicant's trial, his case was that his intention was not to help Quassey but to assist the passengers to migrate to Australia. The applicant also denied working as part of a team led by Quassey. The jury clearly accepted the prosecution case, which was that the applicant was part of a team led by Quassey and that the applicant intended to assist Quassey in organising the people smuggling venture.
- [9] The learned sentencing judge found that the applicant was not motivated solely by altruistic concern to help the would-be illegal immigrants. His Honour found that the applicant was motivated, in part at least, by the prospect of profit, although his Honour was not able to reach a conclusion as to the extent to which the applicant had profited from the venture.
- [10] The learned sentencing judge also found that the applicant appreciated the dangers involved for the passengers in the voyage which he helped to organise and that it was for this reason that he decided not to try to make the voyage himself. The SIEV-X was so overcrowded with passengers that, once a passenger had been brought on board, he or she could not move about. While it was not inevitable that the SIEV-X would founder, it must have been obvious to the applicant that, in his Honour's words, "this would be a highly dangerous voyage".
- [11] The learned sentencing judge was at pains to emphasise that the offence for which the applicant was being sentenced was not causing the deaths of hundreds of desperate people, but aiding in the organisation of their proposed entry into Australia. It cannot be denied, however, that the dangerous overcrowding of the vessel, attributable to greed, renders the applicant's offence one of the more serious cases of a contravention of s 232A of the Act.
- [12] It should also be emphasised at this point that a contravention of s 232A is a serious matter in and of itself. As was pointed out in a unanimous decision of the Court of Criminal Appeal of Western Australia in *Cita v R*; *Lamaha v R*:¹

¹ [2001] WASCA 5 at [24] - 26]; (2001) 120 A Crim R 307 at 313 - 314 (referred to hereafter as "*Cita*").

"Section 232A operates against a background of a legislative and administrative system by which Australia seeks to deal in a fair and orderly way with non-citizens who wish to enter and, usually, to remain in Australia, including and especially refugees ...

The activities in which [the applicants in that case] involved themselves for their own ends frustrates much that is being attempted by this legislative and administrative scheme ...

... The passengers themselves were being exploited. They had to commit large sums of money to secure their clandestine entry into Australia and in doing so had to face the risks to health and safety, and to endure the privations, of such a journey in a craft ill-suited for the task."

In my view, the observations of the Court of Criminal Appeal in *Cita* are equally applicable to the present case and provide examples of the kind of considerations against which the applicant's complaint about the severity of the sentence imposed upon him must be measured.

The applicant's circumstances

- [13] The applicant was born in December 1967 in Kuwait. He was 37 years of age at the date of sentence. He came from a relatively humble background, but attended school through to high school and obtained work as a silver and goldsmith. He married in 1990. He left Kuwait for Iraq in 1991. In Iraq he suffered persecution for his religious beliefs. He is a member of an Iraqi ethnic minority known as the Sabee or the Sabeen Mandeans.
- [14] In 2000, the applicant and his family, consisting of his wife and four children, crossed into Jordan. From there, the applicant travelled to Malaysia before finally arriving in Indonesia, where he spent six months in immigration detention centres before being released. Soon after this occurred, the applicant became involved with people organising boat passage to Australia.
- [15] After the SIEV-X sank, the applicant was taken into custody in Indonesia for four months. Upon his release, he was accepted for resettlement in Sweden, where he lived from August 2002 until mid 2003 when he was extradited to Australia.
- [16] The learned sentencing judge accepted that the applicant was genuinely remorseful for the loss of life which resulted from the foundering of the SIEV-X. His Honour also accepted that the applicant has been a model prisoner.
- [17] The applicant has no criminal history. The learned sentencing judge found that there were good prospects for the applicant's rehabilitation.

The sentence

- [18] The maximum term of imprisonment for a breach of s 232A of the Act is 20 years. Unless an offender is under the age of 18, a court must impose a minimum penalty of five years imprisonment with a minimum period of three years without parole for a first offence.²
- [19] The learned sentencing judge recognised that people smuggling, in its various forms, is a serious offence. It is conduct which, as Mason P has recently said:

² *Migration Act 1958 (Cth)*, s 233C.

"exposes the participants to exploitation and risk to health and life; and it imposes significant costs upon the Australian public. The need for deterrent penalties is manifest given the difficulties of detection and the exposure of Australia through its vast coastline".³

- [20] The circumstances of this case were such as to make this one of the more serious cases of a breach of s 232A of the Act. The learned sentencing judge referred to a number of decisions which involved offences by persons whose involvement in acts of people smuggling consisted in the physical transport of people to Australia.
- [21] One of these was *Cita*, a decision of the Court of Criminal Appeal of Western Australia to which I have already referred. In that case, the two applicants for leave to appeal against sentence, Cita and Lamaha, had each pleaded guilty to one contravention of s 232A of the Act. Each had been the captain of separate Indonesian vessels carrying large numbers of non-citizens that were intercepted near Christmas Island. The vessel captained by Cita was carrying 282 non-citizens while the vessel captained by Lamaha was carrying 180 such persons. Providing a means of transport from Indonesia to Australia in return for financial reward was the only involvement the two applicants had in the broader people smuggling operation that was being conducted. Cita had been sentenced to seven years imprisonment with a non-parole period of three and a half years while Lamaha had been sentenced to five and a half years imprisonment with a non-parole period of two years and nine months.⁴ The Court of Criminal Appeal refused leave to appeal against these sentences on the basis that, despite "the relatively lowly role of the applicants in the hierarchy of those involved in organising or facilitating the bringing of such large numbers of people to Australia", the sentences imposed could be not be said to be excessive when regard was had to other considerations including that the applicants had "knowingly participated in the offences, did so for personal financial gain, and the strong need for a deterrent sentence".⁵ Those same considerations are also present in this case. It may also be said that the level of involvement by the applicant in organising the transportation to Australia of non-citizens was considerably greater than that of the applicants in *Cita*.
- [22] Another case to which the learned sentencing judge was referred was *R v Disun; R v Nurdin*,⁶ another decision of the Court of Criminal Appeal of Western Australia. That case concerned two crew-members of an Indonesian fishing vessel that broke down approximately 60 nautical miles from Christmas Island while carrying 433 non-citizens. The crew and passengers of the fishing vessel were subsequently transferred to the *MV Tampa*, a Norwegian registered vessel, which proceeded to transport all these persons into Australian territorial waters. It is unnecessary for present purposes to discuss the events which then transpired involving that vessel. Disun, the captain of the fishing vessel, and Nurdin, who assisted Disun with the steering and management of the vessel, were among four persons who were charged and convicted after a trial of contravening s 232A of the Act. Disun was sentenced to seven years imprisonment with a non-parole period of three years while Nurdin was sentenced to four years imprisonment with a non-parole period of 18 months.

³ *R v Feng Lin* [2001] NSWCCA 7 at [3]; (2001) 119 A Crim R 194 at 195.

⁴ This sentence was imposed on 6 June 2000. The addition of s 233C of the Act, which requires a minimum non-parole period of three years for contraventions of s 232A, only took place in 2001: *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), s 3, sch 2, cl 5.

⁵ *Cita* [2001] WASCA 5 at [32] - [33]; (2001) 120 A Crim R 307 at 315.

⁶ [2003] WASCA 47; (2003) 27 WAR 146 (referred to hereafter as "*Disun*").

The Crown appealed against the leniency of these sentences. Anderson J, with whom Murray and Templeman JJ agreed, was of the opinion that it was not an exceptional case of that kind that required the sentence imposed by a primary sentencing judge to be increased and disposed of the appeal on that basis. All three judges noted, however, that the sentences imposed might properly be said to have been "lenient" and "being at the bottom end of the range of sentences which had hitherto been imposed by the courts".⁷ Again, it may be noted that the applicant in the present case played a much greater role in organising the transport of non-citizens than either Disun or Nurdin.

- [23] These cases emphasise that severe punishments will usually be meted out to those convicted of contravening s 232A but their factual circumstances are somewhat removed from those of the present applicant. These cases were, therefore, of less assistance to the learned sentencing judge. It is evident his Honour gained more assistance from a consideration of the sentence imposed by Mildren J of the Supreme Court of the Northern Territory in *R v Al Jenabi*.⁸
- [24] *Al Jenabi* was a case in which the offender pleaded guilty - although only after the commencement of his trial - to two counts of contravening s 232A of the Act. The offender also requested that a third charge be taken into account for the purposes of sentencing. This was done. Mildren J sentenced the offender on the most serious of these counts to eight years imprisonment with a non-parole period of four years. Mildren J said that the offender was given a discount of 10 per cent for his late plea of guilty. The offender was not the principal organiser of the people smuggling operation, but he was heavily involved in controlling each operation. The court accepted that he was motivated "largely by a desire to get his family to Australia".
- [25] Counsel for the applicant criticised the learned sentencing judge's use of the decision in *R v Al Jenabi* on the basis that his Honour gave insufficient recognition to the circumstance that, in *Al Jenabi*, the offender was being sentenced for involvement in three contraventions of s 232A of the Act. It is true that the number of contraventions charged is a relevant point of difference.
- [26] On the other hand, it is critically important to recall that, in *Al Jenabi*, there was no suggestion that the mode of conveyance used for the people smuggling exercises was dangerous to the lives of the passengers. The present is a case where the risks to human life which arose from the kind of commercial activity in which the applicant was engaged were very serious and readily apparent. They were risks to which the applicant was unwilling to expose himself. They were risks that, when realised, led to an horrific loss of human life. In this case, the learned sentencing judge made the important point that, in *Al Jenabi*, the vessels involved were not unseaworthy, whereas in the present case the SIEV-X "presented a plain danger" to the lives of its passengers. These circumstances make the present case one in which the claims of deterrence are stronger than in *Al Jenabi*.
- [27] The applicant's counsel also contends that the learned sentencing judge paid insufficient regard to the personal circumstances of the applicant as a ground of mitigation, especially, so it was submitted, as the applicant's successful repatriation

⁷ *Disun* [2003] WASCA 47 at [5], [25], [30]; (2003) 27 WAR 146 at 148, 152 - 153.

⁸ Unreported, Supreme Court of the Northern Territory, No 20302840 and No 20302843, 21 September 2004.

to Sweden and his prospects of being reunited with his family may be jeopardised if the sentence imposed is allowed to stand.

- [28] In my respectful opinion, these considerations cannot diminish the seriousness of the offence in this case and the compelling claims of deterrence. Having regard to the seriousness of the offence in this case, it is my view that the learned sentencing judge gave proper weight to the applicant's tragic personal circumstances when determining the extent to which the sentence to be imposed upon the applicant was to be moderated.

Conclusion and order

- [29] In my respectful opinion, the sentence which was imposed was not excessive. The application should be dismissed.
- [30] **MACKENZIE J:** The essential factual background of this application for leave to appeal against a sentence of nine years imprisonment, with a non-parole period of four and a half years is set out in the reasons of Keane JA.
- [31] The findings of fact relied on by the learned sentencing judge show that the applicant was engaged, in Indonesia, in all phases of a people smuggling scheme from the time when passengers were recruited to their embarkation for Australia. His role was subordinate to the main organiser's. On the facts found by the learned sentencing judge, his motives were not solely altruistic. The learned trial judge concluded from the extent of his involvement that he must have profited personally from his activities although the profit could not be quantified on the evidence available. The learned sentencing judge also concluded that the applicant must have known that the overcrowding on the boat made it a highly dangerous voyage.
- [32] Regrettably, the vessel capsized. An estimated number of about 300 passengers lost their lives. However, as the learned sentencing judge emphasised, the applicant was to be sentenced for his part in organising the proposed entry into Australia of people not authorised to enter, not for being a party to their deaths.
- [33] The learned sentencing judge took into account a number of matters relating to the applicant's background, including that he was a member of a persecuted minority group, that he had been expelled from Kuwait to Iraq and that he had travelled from there via Jordan and Malaysia to Indonesia with the intention of reuniting his family when he was safely settled in another country. The learned sentencing judge also took into account that he had spent time in immigration detention in Indonesia before being released into the community. When the boat foundered, he was returned to custody but released again. He then went to Sweden, having been accepted for resettlement, and was extradited from there to Australia. It was also noted that it was unresolved whether the present conviction would affect his right to re-enter Sweden.
- [34] The learned sentencing judge took into account the personal grief and stress suffered by the applicant over the loss of life in the sinking and his separation from his family. His exemplary conduct in prison was also noted.
- [35] Against that background, the learned sentencing judge analysed a variety of cases concerning s 232A of the *Migration Act* 1958 (Cth). He treated *R v Al Jenabi* (unreported, Supreme Court of the Northern Territory, Mildren J, 21 September 2004) as a comparable case. Mildren J imposed sentences of eight years and six

years three months imprisonment for two counts on the indictment, on a person in an organisational role, the extent of which was not clearly defined, but at least no less than the applicant's. The sentences reflect a stated discount of 10 per cent for a belated plea of guilty, which, in the case of the eight year term, translates to a sentence of almost nine years without such allowance. (The present applicant went to trial).

- [36] The applicant relied on the fact that Al Jenabi had been convicted of offences relating to two separate voyages, with a third being taken into account as a reason for reducing the applicant's sentence to eight years. However, the other two voyages, although serious in the sense that they were intended to circumvent immigration restrictions on entry into Australia, involved only 33 and 65 passengers. The count for which imprisonment for eight years was imposed involved 225 passengers. Mildren J found that although the vessels were not well appointed, it was not suggested that they were unseaworthy.
- [37] Another factual difference between *Al Jenabi* and the present case is that Al Jenabi was sentenced on the basis that he was "largely motivated by the need to get his family to Australia". Mildren J found that Al Jenabi had mixed motives in that he had that motivation, while making living expenses from his activities.
- [38] Mildren J noted that, while there were a number of cases involving masters of vessels and crewmen, cases where organisers were involved were rarer. I agree with his observation that those who are involved at the level of the applicant are at a level higher than mere masters or crew.
- [39] There are factors in the two cases that, in my view, largely balance out. It may also be noted that the sentence in the present matter does not sit uncomfortably with the sentence in *R v Ayoub* (unreported, District Court of Western Australia, Nisbet DCJ, 16 December 2004), a more serious case, where a person who was characterised as having gone to Indonesia to set up a people smuggling operation was sentenced to 10 years and 12 years for two offences which occurred sequentially in a short period of time.
- [40] In my view, the learned sentencing judge did not err in his weighing of the facts relevant to sentence. When all factors are taken into account, the sentence imposed on the applicant cannot be characterised as manifestly excessive. The application for leave to appeal against sentence should therefore be refused.