R v Zainudin & Ho [2005] NTSC 14

PARTIES:	THE QUEEN v ZAINUDIN and LEI JAN HO
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20423893 & 20425275
DELIVERED:	24 January 2005
HEARING DATES:	18 and 21 January 2005
JUDGMENT OF:	MILDREN J

CATCHWORDS:

SENTENCE – Commonwealth offences – whether time spent in immigration detention is time spent in custody – backdating of sentence – *Sentencing Act (NT)* s 63(5)

Fisheries Management Act s 84(1)(a), s 84(1)(ai), s 84(1)(i)(a), s 84(1)(j), s 84A(1), s 84A(2), s 100(1), s 100A, s 100A(1), s 100A(2)(a), s 100(1), s 101A, s 101A(1), s 101A(2), s 106C; *Criminal Code (Cth)* s 149.1; *Crime Acts 1914* s 4B(2), s 16A , s 16C(1), Div 2 of Pt IC; *Migration Act* s 5, s 250; *Immigration Act* s 198; *Sentencing Act* s 18, s 26(2), s 63(5); *Prisons (Correctional Services) Act* s 5

Referred to
Williams v R (1986) 161 CLR 278; *Donaldson v Broomby* (1982) 60 FLR 124; *Putland v R* (2004) 204 ALR 455; *Pearce v R* (1998) 194 CLR 610; *R v Muhammad Yusup* (20 January 2005), sentencing remarks of Angel J

REPRESENTATION:

Counsel:

Plaintiff:	R. Curnow
Defendant:	T. Berkley

Solicitors:

Plaintiff:	Commonwealth Director of Public Prosecutions
Defendant:	NT Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	mil05349
Number of pages:	18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Zainudin & Ho [2005] NTSC 14
No. 20423893 & 20425275

BETWEEN:

THE QUEEN
Plaintiff

AND:

ZAINUDIN
First Defendant
LEI JAN HO
Second Defendant

CORAM: MILDREN J

SENTENCING REMARKS

(Delivered 24 January 2005)

[1] I am dealing firstly with the case of *R v Zainudin*. Some of the remarks that I am going to make in *Zainudin* will apply equally to the case of *Ho*.

[2] The prisoner Zainudin had pleaded guilty to three offences against Commonwealth law. The first is an offence of using a foreign vessel for fishing in the Australian Fishing Zone contrary to s 100A(1) and s 100A(2)(a) of the Fisheries Management Act.

[3] As the vessel in question was 24 metres long, the maximum penalty fixed by the Parliament for this offence is 7500 penalty units or $825,000.

[4] The second offence is that of having a foreign boat equipped for fishing in an Australian Fishing Zone, contrary to s 101A(2) of the Fisheries Management Act. The maximum penalty for that offence is 5000 penalty units or $550,000.

[5] The third offence is resisting a public official in the performance of his functions, contrary to s 149.1 of the Criminal Code of the Commonwealth. The maximum penalty for that offence is two years' imprisonment and in addition or alternatively the court may impose a fine of $13,200 pursuant to s 4B(2) of the Crimes Act 1914.

[6] The facts in relation to the matter of Zainudin are that on Tuesday 14 September 2004, a foreign fishing vessel, the *Sinar Sempurna* under the command of the defendant was located 3.5 nautical miles inside the Australian Exclusive Economic Zone by the Australian Customs Vessel *Botany Bay*. The *Sinar Sempurna* is an Indonesian Type III motorised ice boat used for drop line fishing. It has a hull length of 24 metres and an overall length of 26.7 metres. Together with its equipment, it was valued at $28,000. The equipment included two GPS units, a magnetic compass, a high frequency radio, an echo sounder, a 19k diesel engine to run a 240 volt generator or to run a hydraulic pump as well as a quantity of fishing gear.

[7] The vessel's holds have a storage capacity of four tonnes. At the time of apprehension, the vessel had a large catch of red snapper on board stored on ice. I am not told the exact quantity.

[8] The commanding officer of the *Botany Bay* flew the ensigns ordering the *Sinar Sempurna* to heave to. This was ignored. At this stage, a boarding party had already been launched and had drawn alongside. Requests to stop from the boarding party in English, in Indonesian and using hand signals were ignored. The boarding party fell astern. The *Botany Bay* ordered the vessel to heave to by loud hailer and threatened to shoot. Shortly thereafter, a shot was fired across the bows of the *Sinar Sempurna*. This was repeated on a further seven occasions but the defendant did not cause his vessel to stop and the *Botany Bay* followed it in hot pursuit.

[9] At 9:03 am, the defendant's vessel left the Australian Exclusive Economic Zone. The vessel was boarded eventually at 9:10 am whilst still underway. The boarding party went to the wheelhouse and ordered the defendant to stop the boat. He made no response. He was ordered to get out of the wheelhouse and he still made no response. He was eventually physically removed and handcuffed.

[10] The vessel was stopped at 9:11 am at a position 0.7 of a nautical mile outside the Australian Exclusive Economic Zone in Indonesian waters. At 10:24 am the vessel was officially apprehended under s 106C of the Fisheries Management Act. It was later taken to the port of Gove.

[11] On 17 December the defendant was interviewed through an interpreter, the interview being electronically recorded. He said that the home port of the *Sinar Sempurna* is Tanjungbalai which is a coastal town on the island of

Sumatra. He said that he travelled from there to Probolinggo which is another coastal town in East Java. From there he said that he travelled to Kaimana, which is another coastal town in the province of West Irian, and he said that he sailed from there to the area where he was apprehended, which is approximately south east of Kaimana. He admitted being able to use the navigational equipment and that he was the master of the vessel. The ship's papers contained photographic identification confirming that he was the master.

[12] A chart showing the border of the Australian Exclusive Economic Zone was on the vessel and he knew of the existence of the zone. He claimed that on the evening of 30 September his crew employed their fishing equipment whilst in Indonesian waters. He claimed that subsequently he fell asleep and the vessel drifted into the Australian Fishing zone overnight. He said that he heard the Australian Customs vessel blow its horn and he thought that the purpose of this was to scare the boats away because they had crossed the border. He said that he did not stop when it became clear to him that his vessel was to be boarded because he was frightened.

[13] It has frequently been said by the Courts that offences against the Fisheries Management Act are serious offences and that the elements of general deterrence and personal deterrence must assume great importance in the sentencing process. The purpose of the legislation is broadly to protect Australian fisheries as well as to assist in the protection of the fisheries on the high seas from unregulated over-fishing.

[14] The Australian Exclusive Economic Zone is over 11 million square kilometres. It is largely comparable to the Australian Fishing Zone. This is an area which is larger than the continent of Australia and, indeed, the nation of Australia including Tasmania ands all of the islands, which are in total only 7,692,024 square kilometres. The protection of this vast area requires huge resources and is very costly and difficult to police. The extent of the problem is made worse because the offences are very prevalent. In order to make some impact on the prevalence of this offence, in 1999, Parliament saw fit to increase the maximum penalties in order to help deter illegal, unregulated and unreported fishing.

[15] The size of the maximum penalties available against the individuals is a clear indication that the Parliament regards these offences as serious ones. Vessels of an overall length of 24 metres or more have been particularly targeted with even higher penalties because of the potential damage to the fisheries that such vessels can cause. Even though the consequences of breaching these provisions is the inevitable forfeiture of the vessel and its catch, large numbers of Indonesian fishing vessels continue to get caught in the Australian Fishing Zone. One can only draw the inference that there must be very significant profits to be made to make the risks worthwhile.

[16] Factors which are relevant to the sentencing discretion in this case include the following matters. First, the extent of the incursion into the Australian Fishing Zone. The extent of the incursion may give some idea of the length of time that the vessel must have been in the Australian Fishing Zone. In

this case the plot coordinates from the way points downloaded from the vessel's global positioning system show that the vessel was at positions between 17 nautical miles and 26 nautical miles south of the Australian Fishing Zone boundary on 7, 8, 9, 11, 12 and 13 September, as well as up to 3.5 nautical miles south on 14 September.

[17] I do not believe the submission made on behalf of the defendant that the vessel drifted across the Australian Fishing Zone boundary. I find beyond reasonable doubt that the vessel was deliberately navigated across the boundary and that on 14 September had been south of the Australian Fishing Zone boundary since a little after 7:00 am.

[18] It is clear that whether the incursion was deliberate or merely reckless is an important matter. Offences against the sections are created in either situation but are clearly more serious when they are committed deliberately. I find that the incursion was deliberate.

[19] The impecuniosity of the defendant is a relevant consideration. The defendant is aged 41, married with two children. He earns 300,000 rupiah in a month or about A$60 a month.

[20] Under s 16C(1) of the Crimes Act, I am required to take into account his financial circumstances. It is obvious that a fine of any consequence will be beyond his means to pay and he may be imprisoned for failure to pay the fine. Nevertheless, it is well established by authorities that the fine imposed

must reflect the gravity of the offending and it must be imposed even though the defendant will serve a period of default imprisonment.

[21] The defendant does not have any prior convictions and I bear in mind therefore that he is a first offender. Many Indonesian fishermen who face charges against the Fisheries Management Act have had prior convictions and are naturally dealt with more severely because of that fact.

[22] I bear in mind in this case that he has pleaded guilty to the offences and I take his pleas into account in his favour.

[23] So far as the offence against s 149.1 of the Criminal Code is concerned, I find that the pursuit of the defendant into Indonesian waters was lawful and was not a breach of Australian or International law. The resistance of the defendant was prolonged and deliberate. By his failure to stop, he added an element of risk to the boarders who were required to board the vessel whilst it was still underway.

[24] The defendant was initially held in detention pursuant to s 84(1)(i)(a) of the Fisheries Management Act. This provision enables an officer to detain a person for the purpose of determining during the period of detention, whether or not to charge the defendant with an offence against the Fisheries Management Act. Under s 84A(1) a person detained under s 84(1)(i)(a) must be released from detention at the end of 168 hours unless there has been a decision to charge and the defendant has been brought before a magistrate.

[25] This did not occur in this case and the defendant has been held in immigration detention, purportedly pursuant to s 250 of the Migration Act. The legality of that detention is not in question in these proceedings, and therefore I do not consider that.

[26] For the purposes of this sentence and the sentence of Ho, I treat the holding of the prisoners under s 250 of the Migration Act as lawful. Under that provision, there is no time limit beyond which a person may not be held in immigration detention and there is no requirement to bring a charge against the detainee within any particular time.

[27] The potential for abuse is obvious. The Parliament has used a very heavy hand in enacting legislation which enables the potential for this abuse to occur. The opportunity for abuse is all the more evident in that by virtue of s 84A(2), the defendant is required to be held in circumstances where Div 2 of Pt IC of the Crimes Act does not apply, so that there is no obligation to bring such a person detained before a justice. Not even a person arrested for a terrorism offence can be held indefinitely as this defendant could be.

[28] The defendant was not charged until 20 October 2004, some ten weeks and three days after he was first held in detention. Under the common law a person cannot be detained unless charged with an offence and the law requires a person so charged to be brought before a court as soon as is reasonably practicable, see *Williams v R* (1986) 161 CLR 278 at 283, 292 and 293.

[29] At page 292 of that decision Mason and Brennan JJ said this:

> The right to personal liberty is, as Fullagar J. described it, "the most elementary and important of all common law rights": *Trobridge v Hardy* (43). Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause": *Commentaries on the Laws of England* (Oxford, 1765), Bk. 1, pp. 120-121, 130-131. He warned:
>
> > "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities."
>
> That warning has been recently echoed. In *Cleland v The Queen*, Deane J said:
>
> > "It is of critical importance to the existence and protection o personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."
>
> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.

[30] Having regard to those remarks, it is important to carefully consider the consequences of the detention provisions in relation to the sentencing process. The defendant, after he was charged, was brought before a magistrate on 21 October 2004. He was not remanded in custody and remained in immigration detention. For most of the period of immigration detention he has been held at Berrimah Prison in the remand section.

[31] A detainee held at Berrimah Prison is a "prisoner" as defined by s 5 of the Prisons (Correctional Services) Act with the consequence that they are treated exactly the same as remand prisoners. Section 5 of the Migration Act

defines “immigration detention” to include being held by or on behalf of an officer in a prison or remand centre of the Commonwealth or a State or Territory. So the reality of being held in Berrimah Prison is that whilst it is perfectly lawful and whilst it is indeed immigration detention under the provisions of the Migration Act, the prisoner is treated as if he were a remand prisoner already charged.

[32] The defendant was not remanded in custody until 29 November, although the prosecutor did apply to have him remanded in the Court of Summary Jurisdiction. So all in all the defendant has spent almost 11 weeks in detention in one form or another.

[33] The importance of this is whether or not I should take this period into account either in imposing fines or when considering whether to backdate any sentence of imprisonment which I might impose in respect of count 3.

[34] The Crown’s position is that I cannot backdate the sentence beyond the date that the prisoner was remanded into custody, but that I can take into account the period of detention in fixing any head sentence, but not when deciding on the amount of a fine. So far as the backdating of sentence is concerned the Crown’s position is consistent with previous authority in this Court, where on each occasion that I have been able to discover, a judge of this Court has not backdated the sentence beyond the date on which the person has been remanded in custody.

[35] On each occasion where the matter has been reported and has been brought to my attention the relevant judge has said that he has taken into account the period of detention in fixing the period of the sentence.

[36] The Crown's position in relation to the relevance of it for the purposes of fixing a fine has the support of the authority of a decision of this Court.

[37] In the case of *R v Muhammad Yusup* a decision (sentencing remarks) of Angel J on 20 January this year, his Honour said that he would not take into account any period of detention in fixing a fine because it:

> … is not punishment, but rather it is attributable to his unlawful presence in Australia, not to his offending.

[38] With great respect I am unable to agree with his Honour.

[39] Clearly being held in detention is the same, for all practical purposes, as being held in remand so far as the detainee is concerned. Considerations of justice require that it be taken into account in a proper case. However, I accept that if it is to be taken into account in fixing a sentence of imprisonment, whether or not the sentence is backdated, it would be wrong to take it into account again when fixing the amount of any fine.

[40] The other question is whether the sentence can be backdated. There is no doubt s 63(5) of the Sentencing Act applies to Commonwealth offences. That provision provides:

> Where an offender has been in custody on account of his or her arrest for an offence and the offender is convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment

> shall be regarded as having commenced on the day on which the offender was arrested or on any other day between that day and the day on which the court passes sentence.

[41] The submission of Mr Berkley for the defendant is that that section applies in this case, having regard to the purposes of the section (which I think is to ensure that justice is done and that sentences are properly enunciated) and also having regard to the position of common law and the scrutiny under which detention is held or should be held by the courts. I interpret Mr Berkley's submission as being one where I should give s 63(5) as broad an interpretation as possible.

[42] There can be no doubt that the defendant was in custody when he was held in detention. Now whether the detention was under the Fisheries Management Act or the Immigration Act, he was not free to go and he would have committed an offence if he had escaped. This kind of detention is difference from the kind of immigration detention used to hold illegal immigrants because they have the right under s 198 of the Immigration Act to ask the Minister to remove them from Australia and then they must be removed as soon as is reasonably practicable. Section 198 does not apply to prisoners held under and detained under s 250.

[43] In my opinion there is no doubt that the prisoner was arrested for an offence within the meaning of s 63(5). An arrest occurs whenever it is made plain by what is said or done that a person is not free to go. In *Donaldson v Broomby* (1982) 60 FLR 124 at 126 Deane J said:

> Arrest is the deprivation of freedom. The ultimate instrument of arrest is force.

[44] Here the arrest, in my opinion, occurred no later than the moment the defendant was handcuffed. It is not to the point whether or not the arrest was lawful. In my opinion s 63(5) does not distinguish between lawful and unlawful arrests. Nor is the fact that no formal arrest was made by the officer concerned, in the sense that he at no stage apparently told the defendant that he was being arrested or charged with an offence, relevant.

[45] The officer had the power to arrest the defendant under s 84(1)(j) of the Fisheries Management Act. He could hardly say he held no belief that the defendant had not committed an offence against the Act because in order to lawfully board the vessel, the officer must have held a reasonable belief that the vessel was used, or intended to be used, for fishing in the Australian Fishing Zone, which is in itself an offence unless the vessel is licensed: see s 84(1)(a) and s 100(1) of the Fisheries Management Act.

[46] I therefore conclude that the offender was arrested for an offence or offences, but the question is for what offence or offences. The answer to that seems to me to be that he was arrested for offences against s 100A(1) and s 101A(1) of the Fisheries Management Act. However, I am not persuaded that he was arrested for a breach of s 149.1 of the Criminal Code. The officer's powers of arrest under s 84(1)(j) relate only to arrests for offences against the Fisheries Management Act. The power to detain under s 84(1)(ai)

of the Fisheries Management Act does not include a power to detain for a breach of s 149.1.

[47] The conclusion I reach, reluctantly, is that the power to backdate a sentence of imprisonment in this case cannot be used in respect of the offence against s 149.1, but nevertheless considerations of justice require that I take into account the time already spent in detention.

[48] I record that I have taken into account all of the matters required to be taken into account by s 16A of the Crimes Act.

[49] In relation to counts 1 and 2, the defendant is convicted and there will be an aggregate fine of $100,000. An aggregate fine is permitted, in my opinion, by s 18 of the Sentencing Act and this power applies to Commonwealth offences: see *Putland v R* (2004) 204 ALR 455.

[50] In deciding whether or not to fix an aggregate fine, I have borne in mind that in most cases persons who are fined for breaches of the Fisheries Management Act in the Northern Territory are deported and do not in fact spend any time in custody for non-payment of the fine and that only those who are charged with an offence against s 149.1 and sentenced to imprisonment end up having to spend some time in custody. Partly in order to alleviate the consequences of that consideration I have decided it was appropriate to aggregate the fines.

[51] In fixing the amount of the aggregate fine, I have borne in mind that the maximum penalty for count 2 is less that the maximum penalty for count 1, the fact that there are some common elements to s 100A and s 101A and that in accordance with the decision of the High Court in *Pearce v R* (1998) 194 CLR 610 there should be no doubling up of penalty in cases where there are overlapping elements.

[52] I order pursuant to s 26(2) of the Sentencing Act that if the fine is not paid within 28 days the prisoner is to be imprisoned until his liability to pay the fine is discharged.

[53] In relation to count 3, the defendant is convicted. I consider that no other sentence than a sentence of imprisonment is appropriate. Taking into account that the prisoner has been held in detention for 11 weeks, I impose a sentence of imprisonment of four months, backdated to 29 November 2004.

[54] As to the defendant Lei Jan Ho, he has pleaded guilty to the same offences as the defendant Zainudin.

[55] The facts in his case are that on 27 September 2004, the *HMAS Geelong* detected by radar a group of eight fishing vessels approximately 10 to 16 nautical miles inside the Australian Fishing Zone. As the *Geelong* approached, the vessels scattered in a northerly direction.

[56] The defendant's vessel, the *KM Horizon 3,* was one of those vessels. Initially it was located 14.7 nautical miles inside the Australian Fishing

Zone. Ultimately it was intercepted 4.7 nautical miles inside the Australian Fishing Zone, some 70 nautical miles from Cape Wessell. The *KM Horizon 3* is a wooden Type III ice boat, 26.7 metres in overall length and valued at $34,000.

[57] So far as the apprehension of the vessel is concerned, the defendant ignored warnings, including flags, rounds being fired across the bows, verbal requests by loud hailer, long blasts from the ship's siren and even a machine gun burst. Eventually a snatch party was put into the water in order to board her and when one of the party ordered the defendant to stop he did so. It was not therefore necessary for the snatch party to board the vessel whilst it was still underway. The snatch party boarded the vessel and interviewed the defendant, who said that the vessel had sailed from Probolinggo.

[58] The vessel was well equipped with GPS and a magnetic compass. The vessel held 700 kilograms of assorted reef fish, as well as 5 kilograms of fresh shark fins.

[59] The vessel was escorted to Gove. The defendant was held in detention and has been in detention between 27 September and 29 November 2004 when he was remanded in custody for a total of nine weeks.

[60] For the same reasons as I gave in the matter of Zainudin, I will take into account the period of his detention, but it will not be backdated to the time that he was first taken into custody or apprehended or whatever word you would like to use.

[61] The defendant is a first offender. He has pleaded guilty at the first opportunity and he will get the full benefit of his plea.

[62] The way points in his case indicate that for the most part, the defendant was in an area very close to the Australian Fishing Zone, but still in Indonesian waters. The defendant's instructions were that he entered the area because of a generator breakdown, but I do not accept this explanation. In speaking to the officers, he admitted catching about 700 kilograms of fish in the area. I have no doubt that the incursion was deliberate.

[63] The prisoner is from Indonesia and is a Hokkien speaker. I do not know his exact age but he appears to be in his 30s. He is married with five children and he has also an adopted child. He also supports his mother-in-law who is 60 years of age. He lives in a three bedroom home in Probolinggo, Sumatra. He earns approximately 90,000 rupees per week or about A$15 per week.

[64] In relation to the relevant sentencing considerations, I repeat the matters to which I referred in the matter of Zainudin.

[65] In relation to counts 1 and 2, the defendant is convicted on both counts and there will be an aggregate fine of $100,000. I order that pursuant to s 26(2) of the Sentencing Act, if the fine is not paid within 28 days the prisoner is to be imprisoned until his liability to pay the fine is discharged.

[66] In relation to count 3, I consider that no other sentence is warranted other than the sentence of imprisonment. I record that I haven taken into account

all of the matters I am required to take into account under s 16A of the Crimes Act. Taking into account that the prisoner has been in detention for nine weeks and allowing for the fact that he did ultimately stop his boat, I impose a sentence of imprisonment for three months, backdated to 29 November 2004.
