PARTIES:	RUTU and LADJILU v ROMOLO PIETRO DALLA COSTA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Justices Appeal
FILE NO:	JA71 and JA75 of 1996
DELIVERED:	20 June 1997
HEARING DATES:	26 March 1997
JUDGMENT OF:	Angel J

REPRESENTATION:

Counsel:

Appellant:	Mr A Wyvill
Respondent:	Mr T J Riley QC

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Australian Government Solicitor

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ang97010
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No JA71 of 1996
No JA75 of 1996

BETWEEN:

HAMID RUTU and
OMAR LADJILU
Appellants

AND:

ROMOLO PIETRO DALLA COSTA
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 20 June 1997)

These two Justices' Appeals were heard together.

On 13 September 1996 each appellant was found guilty of an offence contrary to s233(1)(a) of the *Migration Act* 1958 (Commonwealth) by the Darwin Court of Summary Jurisdiction constituted by Mr Lowndes SM. His Worship gave reasons for his findings on 24 September 1996.

The primary facts are not in dispute. The appellant Rutu and the appellant Ladjilu were respectively the captain and a crew member of an

Indonesian vessel that sailed from Kupang to Ashmore Reef in May 1996 carrying six Sri Lankans. The vessel, the Sumba Bukat, arrived at Ashmore Reef on Sunday 19 May 1996. An Australian vessel the Aurelia IV was stationed at Ashmore Reef having been contracted as a caretaker vessel for the Ashmore National Nature Reserve. The appellants' vessel approached the Aurelia IV and contact was made with the crew. The crew of the Aurelia IV contacted the Australian Navy and on 20 May 1996 HMAS Gawler arrived at Ashmore Reef and anchored there. At around 8.30am on Tuesday 21 May 1996 Naval and immigration authorities boarded the appellants' vessel. The appellants and the Sri Lankans were transported back to HMAS Gawler at 2.00pm that day. Whilst at Ashmore Reef the appellants were arrested "for bringing in non- citizens into Australia" (sic). HMAS Gawler departed Ashmore Reef for passage to Darwin with the appellants and the six Sri Lankans on board. Due to extremely rough weather conditions HMAS Gawler did not arrive in Darwin until 2.00pm on Thursday 23 May 1996. While the Sri Lankans and the appellants were travelling aboard HMAS Gawler, Department of Immigration and Multicultural Affairs officers checked the Sri Lankans' papers. None of the Sri Lankans had visas to enter Australia and they were detained pursuant to s189 of the *Migration Act*. They were detained when HMAS Gawler reached the outer arm of Darwin Harbour.

At the outset of the appeal counsel for the appellants abandoned certain grounds of appeal and by leave added further grounds of appeal. The grounds of appeal argued were as follows:

1. The Learned Magistrate erred in law in that he found that

s233(1)(a) of the *Migration Act* has extraterritorial application.

3. The Learned Magistrate erred in law by finding that in the circumstances of the case the appellant contravened s233(1)(a) of the *Migration Act*.

6. The Learned Magistrate erred in law in concluding that the evidence supported a contravention of s233(1)(a) of the *Migration Act*.

7. Given the Ashmore and Cartier Reef do not form part of the Migration Zone and within Australia for the purposes of the *Migration Act*, the learned Magistrate erred in concluding that, even if s233(1)(a) did not operate extra-territorially, once the appellant was at Ashmore and Cartier Reef, he was subject to s233(1)(a) as he was then "susceptible to the laws of the Commonwealth".

8. The learned Magistrate erred in failing to consider what reasonable inferences could have been drawn with respect to the intentions of the non-citizens, rather than the appellant, concerning entry into Australia.

9. The learned Magistrate erred in failing to conclude that *mens rea* on the part of either the appellants or the non-citizens or both was an element of an offence under s233(1)(a).

10. Given that the prosecution did not call evidence from any of the subject non-citizens, the learned Magistrate erred in not dismissing the information.

11. Having found that it was the intention of the appellant that the non-citizens would be brought to Australia from Ashmore and Cartier Reef by Australian Authorities, the learned Magistrate erred in concluding that it could reasonably be inferred that the entry was intended to be in contravention of the *Migration Act*.

12. The learned Magistrate erred in failing to conclude that, if a non-citizen enters the migration zone by being brought from outside the migration zone into the migration zone by, and in the custody and control of, the Royal Australian Navy and/or Federal Immigration Agents, that non-citizen has not entered in contravention of the *Migration Act*.

13. Alternatively, if, in the circumstances described in 11 above, the

> entry is in contravention of the *Migration Act*, given the involvement of the officers of the Crown in the commission of the subject offences, the learned Magistrate erred in failing to dismiss or stay the information.

These grounds of appeal and the arguments supporting them cover aspects of the matter that were not raised before or considered by the learned Magistrate.

S233(1)(a) of the *Migration Act* provides:

> (1) A person shall not take any part in:
>
> (a) the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.

It was submitted that there was nothing on the facts from which it might reasonably be inferred that the Sri Lankans intended to enter Australia in contravention of the Act. The Sri Lankans did not give evidence before the learned Magistrate for they had been deported or removed from Australia prior to the hearing. It was argued that the circumstances of the Indonesian vessel not appearing to have fuel to proceed from Ashmore Reef to Australia, that the appellants only intended to take the Sri Lankans to Ashmore Reef and no further, that the Sri Lankans only paid for a one way passage to Ashmore Reef, that the Sri Lankans deliberately approached the Australian authorities at Ashmore Reef and willingly placing themselves on board HMAS Gawler for transporting to Australia, all indicated, far from intending to enter Australia in

contravention of the Act, that their plain intention was lawfully to exhaust the possibilities of applying through the appropriate Government authorities for permission to stay in Australia, as refugees or otherwise. It was further argued that for the Sri Lankans to have been taken into Australia on board HMAS Gawler in the manner in which they were taken was not in contravention of the Act. In support of this submission it was said that there was not provision in the Act which makes it an offence to do what the Sri Lankans did. Alternatively it was said that even if it was in contravention of the Act, the detention provisions, ie ss188 to 199, constituted a specific regime which over-rode any other general provisions in the Act. Thus although a visa was required for a non-citizen to travel to Australia, s42(1), and that a non-citizen within the migration zone without a visa is an unlawful non-citizen who must be detained upon discovery, s189(1), short of deliberately avoiding the migration authorities or using false documents to gain entry - neither of which could be suggested here - the Sri Lankans, in placing themselves in the hands of the authorities, as they did, could not be said to have intended to enter Australia in contravention of the Act. Counsel for the appellants cited *R v Naillie* [1993] 2 All ER 782 in support of those submissions. In that case the House of Lords held that s3 of the *Immigration Act* 1971 UK made a distinction between arrival and entry into the United Kingdom and that a person was only "an illegal entrant" for the purposes of that Act if he sought to enter the United Kingdom by producing a forged passport or attempting to deceive an immigration officer in a material way and that if he presented himself to an immigration officer and asked for political asylum and did not produce a forged document or otherwise seek to deceive or in fact deceive an

immigration officer, he was not entering or seeking to enter in breach of the immigration laws and so was not "an illegal entrant".

It was further submitted that there was no guilty intent proven either on the part of the Sri Lankans or the appellants and that guilty intent is a necessary element of an offence under s233(1) of the *Migration Act*. It was also submitted that all else being against the appellants, that the involvement of the Australian authorities in bringing the Sri Lankans into Australia in breach of the *Migration Act* was so significant that there was an abuse of the process arising from the prosecution such that the proceedings should have been stayed or essential prosecution excluded such as to require a finding of not guilty. Counsel cited *Ridgeway v The* Queen (1995) 184 CLR 19 in this regard. The appellant finally submitted that s233(1)(a) of the *Migration Act* does not apply to actions outside the geographical boundaries of Australia. This latter point was unsuccessfully argued before the learned Magistrate.

In my opinion the appeals should be dismissed and the convictions confirmed.

The learned Magistrate in the course of his reasons said:

> "In my opinion the overwhelming inference is that the defendants intended that the non-citizens would be brought to Australia by the following method: that they would be carried by vessel from Indonesia to Ashmore Reef, conveyed to a naval vessel at the Reef and subsequently brought into Australia by that vessel."

The learned Magistrate further said:

"In my opinion, it is not necessary that Mr Rutu actually knew that the Australian authorities would convey the foreign nationals to Darwin. All that is required is that Mr Rutu intended ..... that the foreign nationals would be brought to Australia by that method. The inference in that regard is overwhelming."

The learned Magistrate, in relation to Mr Ladjilu, said, inter alia,

"The inferences in relation to Mr Ladjilu's intention can be drawn from the record of interview. In that regard I accept the following submissions made by the Australian Government Solicitor:

'There are various questions put in relation to his knowledge of the purpose of the enterprise. It is open to infer that Mr Ladjilu was fully aware of the intention to bring the people all the way to Australia. There is evidence not just in the direct questions on that issue which enable you to draw that inference. There is other material which makes it a compelling inference that in fact Mr Ladjilu had a great deal more knowledge about what was going on than his direct answers in isolation suggest. This can be gauged from his answers to questions directed to what is in fact at Ashmore. In answer to question and answer to 68 he says that there is nothing else that they could do after they got to Ashmore. At question and answer 107 he is aware that there are no motels there. The Crown submits that Mr Ladjilu knew that once they got to Ashmore something more was in fact going to occur and that his intention was that these people would in fact be brought to Australia. He was taking part in enabling that ultimate 'bringing to Australia' to occur and he was taking part with full knowledge of the ultimate intention that they arrive in Australia.

Mr Ladjilu also waited at Ashmore Reef with the Captain and with the six Sri Lankan people aboard for two days from noon on the Sunday to the morning of the Tuesday. As he waited he acquired more knowledge about the purpose of the voyage and what was in fact going to occur if he continued to wait on board the vessel with the six Sri Lankans. At question and answer 119 he stated that they were waiting because he was already said there is a telex from Darwin saying that there is a vessel coming to collect them. Similarly at question and answer 124 he says a guy told them a vessel was in fact coming. He continued to remain there, which is part of the conduct which makes up the offence. At that point he is participating in actively waiting at

> Ashmore Reef with the non-citizens in the full knowledge and with the intention that these people would be brought to Australia. He was taking part in insuring that this in fact occurred.'."

Counsel for the appellants on the appeal did not dispute these findings. Counsel said "that's precisely what was occurring. The fact was that they were relying upon the Australian authorities to take them to Australia and we say that that was entirely lawful and proper and no offence was committed".

The object of the *Migration Act* is to regulate in the national interest the coming into and presence in Australia of non-citizens; see s4(1). A non-citizen means a person who is not an Australian citizen; see s5(1). To enter Australia means to enter the migration zone; see s5(1). The migration zone means the land mass of the Australian States and Territories at mean low water mark and includes, inter alia, the sea limits of a State or Territory and a port; see s5(1). An unlawful non-citizen is a non-citizen within the migration zone who is not a lawful citizen; s14. A lawful non-citizen means a non-citizen within the migration zone who holds a visa that is in effect. Section 7 provides that the Act extends to certain Territories, but they do not include the external territory of Ashmore Reef. Section 6 envisages the Act extending to parts of Australia outside the migration zone. Section 29(1) provides that a visa may be granted to a non-citizen to travel to and enter Australia or remain in Australia or both. A visa to remain in Australia by virtue of s30 may be either permanent or temporary. There are special category and special purpose

visas granted pursuant to ss32 and 33 respectively. Protection visas, where the applicant is a non-citizen in Australia to whom Australia has protective obligations under certain conventions, are provided for in s36. By virtue of s40(1) regulations may provide for visas of a specified class which may only be granted in specified circumstances, and by virtue of sub-s(2) a person may be granted a visa once the person is inside immigration clearance. Section 42(1) provides that a non-citizen must not travel to Australia without a visa in effect. By virtue of s42(3) regulations may permit a non-citizen (either a specified non-citizen or a citizen of a specified class) to travel to Australia without a visa. Immigration clearance is covered by Division 5 of the Act, viz ss165 and following. Section 166(a)(ii) provides that a non-citizen must show evidence of their identity and produce a visa that is in effect. That section is subject to s167(3) which provides that a person is taken to comply with s166 if they are on a boat and comply before entering Australia. Section 172 provides that immigration clearance occurs if, and only if, a non-citizen enters Australia at a port and complies with s166. Section 189 provides that unlawful non-citizens must be detained. Section 193 provides that s195 does not apply to a person detained under s189(1) on being refused immigration clearance or by passing immigration clearance. Section 195 provides that a detainee may apply for a visa to remain within Australia. Section 193 provides for the removal of Australia of unlawful non-citizens and s200 provides for deportation in certain circumstances.

In the present case the circumstances that occurred after the Sri Lankans were picked up at Ashmore Reef are relevant only in so far as they disclose their intentions at the time of travelling to and at Ashmore Reef. As already related, those intentions are not really in dispute. They intended to travel to Australia from Ashmore Reef via a naval vessel. This they intended to do as non-citizens. They intended to enter Australia by entering the migration zone. They intended to so enter without a visa. Thus they intended to enter in contravention of the *Migration Act*, not in the sense of being in breach of an express prohibition to do so - I note s42 relates to travelling to Australia without a visa rather than entering Australia without a visa - but in the sense of disregarding the visa requirements of the Act. The Sri Lankans did not in fact commit any offence created by the Act, nor did they intend to commit any offence created by the Act. They nonetheless intended to contravene the Act in the sense I have mentioned, ie, to enter in disregard of the visa requirements of the Act. I am unable to agree with the submission that entry means in effect presenting oneself at immigration clearance. Section 234 speaks of entry, a proposed entry or immigration clearance. Enter Australia means, as s5(1) provides, entry into the migration zone. The Sri Lankans entered the migration zone aboard upon HMAS Gawler when they sailed into the outer reach of Darwin harbour. Upon entry into the migration zone the Sri Lankans became unlawful non-citizens liable to detention pursuant to s189(1).

The offence against s233(1) was committed by each appellant in conveying the Sri Lankans to Ashmore Reef and at Ashmore Reef. The Indonesians took a part in the bringing or coming to Australia of the Sri Lankans. I agree with the learned Magistrate when he said:

> "In the context of s233(1)(a) the particular event is the bringing or coming to Australia of non-citizens. The role performed by the person must be accompanied by an intention that non-citizens will reach Australia. I agree with the submission made by the Australian Government Solicitor that the words 'bringing or coming to Australia' are to read subject to the rest of the phrase 'take any part'. I also agree that it is not essential that the person himself physically achieve that result; but in fact that has to have been his intention throughout his actions, ie, that his actions would in fact result in the non-citizens reaching Australia. The person must have the intention that non-citizens will ultimately end up in Australia. Nor is it essential that the non-citizen actually reaches Australia. In this case, however, the non-citizens did in fact reach Australia.".

I fully agree with the learned Magistrate that a non-citizen need not actually reach Australia for an offence contrary to s233 of the *Migration Act* to have been completed.

I also agree with the learned Magistrate that although the prosecution must prove that the appellants knew that the persons they were bringing or were assisting to be brought to Australia were non-citizens, it is not incumbent upon the prosecution to prove that the appellants had knowledge, subjective knowledge, that the intention of the non-citizens was to enter Australia in contravention of the *Migration Act*. I agree that the phrase "under circumstances from which it may reasonably be inferred" imports an objective

test. As the learned Magistrate said, in the present case, the particular contravention of s233 is in respect of ss166 and 167 of the Act and is particularised as "in circumstances where the non-citizens did not have travel documents or visas authorising the entry to Australia nor were they Australian citizens". In that regard those circumstances were proven here.

The evidence is that both defendants were at Ashmore Reef on the Indonesian fishing vessel with the six Sri Lankans. The six Sri Lankans were non-citizens. The six Sri Lankans did not have and never had visas authorising their entry to Australia. The Sri Lankans intended to travel to Australia from Ashmore Reef. I agree with the Magistrate that it can properly be inferred from all these circumstances that the defendants well knew that the persons aboard were non-citizens. As already related, it can also clearly be inferred that the defendants intended that the non-citizens would be brought to Australia from Ashmore Reef by a naval vessel.

I do not consider it is to the point that, upon entering the migration zone and becoming unlawful non-citizens and thereafter being detained, as detainees, the Sri Lankans had a right to apply for a visa to remain within Australia. Even if all this be the case the subsequent applying for a visa to remain within Australia does not alter the fact that the Sri Lankans in fact entered Australia in contravention of the provisions of the *Migration Act*, but

more importantly that they had the intention to so enter at the time the appellants assisted their passage from Kupang to Ashmore Reef and thereafter.

Counsel for the appellants also relied on the submission that the *Migration Act* had no extraterritorial operation. I agree with the learned Magistrate that this submission has no substance. It is clear from s51(xviv) and (xxvii) of the Australian *Constitution*, that the Commonwealth Government has power to legislate in regard to naturalisation and aliens and immigration and emigration. This power includes power to legislate extraterritorially; see *McDonald v Bojkovic* [1987] VR 387 at 391; *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 294. The Ashmore and Cartier Reef is not part of Australia for the purposes of the *Migration Act* 1958. The conduct said to constitute a breach of s233 occurred from Kupang in Indonesia to Ashmore and at Ashmore. Section 233 of the *Migration Act* in its terms clearly operates extraterritorially. That section relates to the bringing of non-citizens into Australia and it clearly has an external operation. In order for there to be an intent to enter Australia, the offender must be outside Australia to commit the offence. The very subject matter of s233(1)(a) requires it to have extraterritorial operation both to give it full effect and to fulfil the objectives of the Act. The fact the section prohibits people "taking any part in the bringing or coming to Australia" provides a clear indication that the sub-section applies to each person involved in each step taken to bring a non-citizen to Australia and includes persons acting outside Australia. To

restrict the meaning of the sub-section to apply only to those persons within Australia who are involved in the process of bringing a non-citizen to Australia does not accord with the clear wording and intention of s233, nor does it accord with the overall objectives of the Act. I am of the opinion that s233 encompasses within it all people who are involved in the movement of people towards Australia, which necessarily includes persons outside Australia. Thus the conduct from Indonesia to Ashmore and Cartier Reef and at the Reef is susceptible to the *Migration Act,* and, as the learned Magistrate pointed out, in any event, once Mr Rutu and Mr Ladjilu got to Ashmore and Cartier Reef (an external Territory of Australia), they were susceptible to the laws of the Commonwealth even though, for the purposes of *Migration Act*, Ashmore and Cartier Reef does not form part of the migration zone, and hence, does not form part of Australia.

So far as the appellants' submission that the Sri Lankans were taken into the migration Zone in immigration detention by the Australian authorities and thus by virtue of the authorities' participation, the entire evidence ought to have been excluded, or alternatively, the proceedings ought to have been stayed as an abuse of power, I am of the view that there is no substance in this submission. The evidence is clear that the Sri Lankans were not detained until they were within the migration zone, that is, in the outer reach of Darwin harbour. In any event, these circumstances were after the commission of the s233 offence which as I have said previously, occurred back at Ashmore Reef

and between Indonesia and Ashmore Reef. I am of the view that there is no substance in this submission. Although immigration detention may commence outside the migration zone, see s189, such did not occur here, but in any event, as I have said, whether there was in fact an entry in contravention of the Act or not, is irrelevant to the present offences.

The appeals are dismissed.
