

The Queen v Hatim & Others [2000] NTSC 53

PARTIES: THE QUEEN
v
ASRI HATIM
and
LASANI
and
NASRUDDIN KADIR
and
SARI BEY
and
YUNUS EN
and
IRGY RUDIANTO

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NOS: 20003243, 9929075, 9929076, 9929077,
9929078, 9929081

DELIVERED: 7 July 2000

HEARING DATES: 9, 10 and 11 May 2000

JUDGMENT OF: THOMAS J

CATCHWORDS:

CRIMINAL LAW -- JURISDICTION -- ONUS

Application on behalf of one of defendants – whether court has jurisdiction to hear indictment as an adult – whether juvenile at time of alleged offence – onus on Crown to establish was an adult at time of offence – honest belief that more than 16 years of age – whether x-ray can be used for purpose of identification – x-ray showed skeletally mature – admissibility of evidence – power to take an x-ray – definition of x-ray – definition of photograph – definition of photography – immigration officer does not have power to x-ray a person – consent obtained – voluntarily submitted to x-ray - x-ray is admissible - was an adult at date of alleged offence

Migration Act 1958 (Cth), s 189, s 232A, s 233(1)(a) and s 258
Juvenile Justices Act 1983 (NT)

REPRESENTATION:

Counsel:

Applicant: C Rozencwajg
Respondent: J Lawrence

Solicitors:

Applicant: Northern Territory Legal Aid Commission
Respondent: Commonwealth Department of Public
Prosecutions

Judgment category classification: C
Judgment ID Number: tho20010
Number of pages: 13

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Hatim & Others [2000] NTSC 53
Nos. 20003243, 9929075, 9929076, 9929077, 9929078, 9929081

BETWEEN:

THE QUEEN

AND:

ASRI HATIM

and

LASANI

and

NASRUDDIN KADIR

and

SARI BEY

and

YUNUS EN

and

IRGY RUDIANTO

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 July 2000)

- [1] The defendants in this matter are charged on indictment with the following offences:

“Between about 9 December 1999 and about 16 December 1999 at Ashmore Reef and elsewhere facilitated the bringing to Australia of a group of 5 or more people, namely 127 people, knowing the people would become, upon entry into Australia, unlawful non-citizens.

Contrary to section 232A of the *Migration Act* 1958

And the said Director of Public Prosecutions further charges in the alternative that

.....

Between about 9 December 1999 and about 16 December 1999 at Ashmore Reef and elsewhere did take part in the bringing 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 the *Migration Act 1958*, in that the accused were crew members of a vessel, the 'Sinar Mutiara', which was bringing 127 non-citizens to Australia in circumstances where these non-citizens did not have travel documents, or visas authorising entry to Australia, nor were they Australian citizens.

Contrary to sub-paragraph 233(1)(a) of the *Migration Act 1958*"

- [2] An application is made on behalf of one of the defendants, Nasruddin Kadir. The application is that the Court has no jurisdiction to hear the indictment with Mr Kadir included because at the time of the alleged offence Mr Kadir was a juvenile. Mr Kadir advised an officer from the Department of Immigration he was born on 10 October 1983. If this is correct it means at the time of the alleged offence he was 16 years of age. The Crown do not accept Mr Kadir was a juvenile at the time of the commission of the alleged offence and charged him on indictment with five other offenders.
- [3] This application is for the Court to determine whether the Court has jurisdiction to hear the charge on indictment against Mr Kadir as an adult.
- [4] I ruled that the onus was on the Crown to establish on the balance of probabilities that Mr Kadir was an adult at the time of the commission of the alleged offence.

- [5] On 20 December 1999, Mr Kadir was in the custody of the Darwin Immigration Authorities. Mr Kadir was processed by Ms Renfrey who is a compliance officer with the Immigration Office in Darwin. Ms Renfrey was charged with the responsibility of processing seven Indonesian nationals who had arrived in Australia a few days earlier at Ashmore Reef. Mr Kadir was one of the seven Indonesian nationals. Ms Renfrey was assisted by an interpreter in the Indonesian language, Ms Helen Aljufri.
- [6] Ms Renfrey identified herself to the group of seven persons, she then identified a spokesperson for the group. Ms Renfrey then read the detention notice, copy of which was tendered Exhibit P1. Ms Renfrey noted on this document that none of the persons had any documents, no visa, no identification card, that they were not Australian citizens and also noted there were no illnesses among the group.
- [7] The detention notice goes on to advise the defendants amongst other matters that they were to continue to be detained under s 189 of the *Migration Act 1958* (Cth) until the alleged breach of Australian law had been dealt with.
- [8] Ms Renfrey then went through the process of interviewing each of the seven persons with the assistance of the interpreter, Ms Helen Aljufri. Ms Renfrey completed a document titled “nominal roll”, copy of which was Exhibit P2. The first person interviewed was Asri Hatim who had identified himself as the spokesman for the group.

[9] Mr Kadir was the third person to be interviewed. Ms Renfrey asked him his date of birth and he sat silent for a while. Ms Renfrey asked him again and Mr Kadir said the “10th of the 10th 1983”. Ms Renfrey said “Is your date of birth the 10th of the 10th 1983?” and Mr Kadir replied “yes”. Ms Renfrey asked “how do you know that” and he said “my mother told me”. Ms Renfrey looked at him for a while as she thought he appeared older than that. Again she asked his date of birth and he replied “the 10th of the 10th 1983” and gave the same answer as previously.

[10] Ms Renfrey stressed that it was very important Mr Kadir give his correct date of birth and asked him to sit there and have a think about how old he was. It is Ms Renfrey’s evidence that it is important to have this information for the purpose of identification and because it makes a difference how a person may be prosecuted and where they would be detained.

[11] Ms Renfrey spoke to Mr Kadir through the interpreter, Ms Aljufri, and advised him she did not believe he was 16 years of age. Ms Renfrey asked him whether he had any objection to attending the Darwin Private Hospital for an x-ray of his wrist. Ms Renfrey explained this was to determine his identity and that he would have to lay his hand on an x-ray machine and a photo would be taken of it. Mr Kadir replied that he did not have any objection to doing that. Mr Peter Knobel took Mr Kadir to the Royal Darwin Hospital for the purpose of having an x-ray of his wrist. X-rays

were duly taken of Mr Kadir's left wrist. Later that day Mr Kadir was placed in the custody of Federal Agent John Curtis.

[12] Under cross examination, Ms Renfrey gave evidence she thought his reply to her as to his date of birth was given in parrot fashion. Ms Renfrey stated that she honestly believed Mr Kadir was not 16 years of age. This belief was on the basis of her observations of Mr Kadir, his physical structure, bones, arms and hair coupled with the way he answered her questions as to his age. Mr Knobel, who is the Deputy Director in charge of the Department of Immigration and Multicultural Affairs and in charge of the operation, also asked Mr Kadir his date of birth. This questioning took place because of doubts about Mr Kadir's age. It is Ms Renfrey's evidence that she was of the understanding that under s 258 of the *Migration Act* she could require Mr Kadir to have an x-ray. Section 258 of the *Migration Act* provides as follows:

“Where a person is in immigration detention by virtue of this Act, an authorized officer may do all such things as are reasonably necessary for photographing or measuring that person or otherwise recording matters in order to facilitate the person's present or future identification.”

[13] Ms Renfrey's evidence is that as a matter of courtesy and natural justice and to be fair and equitable, she asked Mr Kadir if he had any objections to going to Royal Darwin Hospital to undergo a wrist x-ray. The interpreter, Ms Aljufri, explained to Mr Kadir that it wasn't just a photo, it was an x-ray.

- [14] Ms Renfrey stated that she did not know at the time of processing these persons whether any of them would be prosecuted, she was just trying to identify each of them.
- [15] Ms Aljufri is the interpreter who assisted Ms Renfrey by interpreting into the Indonesian language. Ms Aljufri stated she had some recollection of interpreting for Ms Renfrey who questioned Mr Kadir as to his age for the purpose of completing the nominal roll. Mr Kadir had given his date of birth as the 10th of the 10th 1983 and when asked how he knew this, he replied that his mother had told him. It is Ms Aljufri's evidence that Ms Renfrey was not satisfied this was his age and asked Mr Kadir if he had any objections to having an x-ray done of his hand to determine his true identity. Mr Kadir had replied that he had no objections. Ms Aljufri interpreted Ms Renfrey's explanation to Mr Kadir that his left hand would be x-rayed and the purpose of the x-ray was to determine his identity.
- [16] Ms Aljufri gave evidence in cross examination that she was aware the Department of Immigration had now prepared a consent form relating to wrist x-rays. Copy of this consent form headed "Notice Regarding Identification Procedures" was tendered Exhibit P3. There are two sheets of paper in the notice, one in English and the other in Indonesian. This notice seeks the consent of a person to have an x-ray taken.
- [17] At about 2.50 in the afternoon of 20 December 1999, Federal Agent John Curtis, collected seven Indonesian nationals from the Pavillion, one of

whom was Mr Kadir. They were subsequently taken to the Police Headquarters in Lindsay Street and interviewed. Federal Agent Curtis was given the x-rays and a report concerning Mr Kadir. He asked Mr Kadir his date of birth and was told by him 10 October 1983. Mr Kadir was interviewed in the presence of the Indonesian Consulate because Mr Kadir had stated he was a juvenile. Mr Kadir was subsequently charged in the juvenile jurisdiction. Federal Agent Curtis said he erred on the side of caution in treating Mr Kadir as a juvenile even though he was aware that the x-rays showed him to be older because the x-rays were taken for the purpose of identification and there was some dispute as to whether they could be used in a criminal prosecution. Mr Kadir maintained his date of birth was the 10th of the 10th 1983 even when told the x-rays of his left wrist showed him to be older. Subsequently, Mr Kadir was charged as an adult with the present offences.

[18] Dr Ross Keenan is a radiologist whose area of specialty is paediatric radiology. Dr Keenan is employed by Northern Territory Medical Imaging or Perrett Medical Imaging. Dr Keenan gave details of his qualifications and experience. He is involved in the area of radiology which is concerned with skeletal age or skeletal development. Dr Keenan described the method by which an x-ray of a person's left wrist can determine their level of maturity up to the time of fusion of their growth plates. In a male person these growth plates fuse at 19 years of age. Once the growth plates have fused the person is skeletally mature and it can be difficult to differentiate

between a 19 year old and a 29 year old. Dr Keenan gave very detailed evidence explaining the x-ray process and how to determine if a person is skeletally mature or if they are not skeletally mature how it is possible to determine their age from a viewing of the x-ray. Dr Keenan referred to the text books on this subject in particular the Radiographic Atlas of Skeletal Development of the Hand and Wrist, second edition. He gave evidence as to the standard deviations which apply and that the standard deviation in respect of a skeletally mature person is two standard deviations which would be two years which could bring a 19 year old person down to 17. Under cross examination Dr Keenan agreed this could be just below 17. Dr Keenan stated that the standard deviations for skeletally mature persons become irrelevant because they would be skewed as you can only have a standard deviation downwards and not upwards. Dr Keenan stated that the conclusion from the x-ray of Mr Kadir's left wrist is that he is skeletally mature which means he is at least 19 years old. The x-ray and report were tendered Exhibit P4. The effect of Dr Keenan's evidence is that the wrist x-ray shows Mr Kadir has a skeleton which is mature with a skeletal bone age assessed as at least 19 years of age. Dr Keenan gave evidence it is most unlikely that Mr Kadir was 16 years of age at the time of this x-ray.

[19] I accept the evidence given by Dr Keenan. I accept the evidence given by Ms Renfrey and in particular that she held an honest belief that Mr Kadir was more than 16 years of age. I infer from the evidence of Ms Renfrey that she has considerable experience in assessing the age of persons whom she

deals with in the course of her employment as an Immigration Officer. I have had the opportunity of observing Mr Kadir over the period of three days that this matter was being argued. From my observations I would assess Mr Kadir to be older than 16 years.

[20] I now deal with the admissibility of the evidence of Dr Keenan and the x-rays taken of Mr Kadir's left wrist.

[21] Mr Rozencwajg, counsel for the defence, challenges the admissibility of this evidence on a number of basis. The first argument is that s 258 of the *Migration Act* does not contain a power to require a person to undertake an x-ray.

[22] It is convenient to set out again the provisions of s 258 of the *Migration Act* which is as follows:

“Where a person is in immigration detention by virtue of this Act, an authorized officer may do all such things as are reasonably necessary for photographing or measuring that person or otherwise recording matters in order to facilitate the person's present or future identification.”

[23] The Shorter Oxford English Dictionary gives the meaning of “x-ray” as follows:

“... A form of radiation capable of penetrating many substances impervious to light, and of affecting a sensitized plate and producing shadow-photographs of objects enclosed within opaque bodies; they produce phosphorescence, fluorescence, and electrical effects, and have a curative effect in certain skin diseases; much used in recent surgical and medical practice. ...”

The Macquarie Dictionary defines “x-ray” as follows:

“.... electromagnetic radiation of shorter wavelength than light which are able to penetrate solids, ionise gases, and expose photographic plates; roentgen ray. an examination of the interior of a person or an opaque substance by means of an apparatus using X-rays.”

and the Chambers 20th Century Dictionary defines “x-ray” as follows:

“.... electromagnetic rays of very short wavelength which can penetrate matter opaque to light-rays, produced when cathode rays impinge on matter – discovered by Rontgen in 1895”

[24] The definition of the word “photograph” in the Shorter Oxford English Dictionary is as follows:

“... To take a photograph of To ‘take’ (well or badly) ... To portray vividly in words; to fix on the mind or memory”

and “photography” as follows:

“.... The process or art of producing pictures by means of the chemical action of light on a sensitive film on a basis of paper, glass, metal, etc.; the business of producing and printing such pictures. ...

The Macquarie Dictionary defines “photograph” as follows:

“....a picture produced by photography to take a photograph of practise photography.”

and “photography” as follows:

“.... the process or art of producing images of objects on sensitised surfaces by the chemical action of light or of other forms of radiant energy, as X-rays, gamma rays, cosmic rays, etc.”

The definition of the word “photograph” in the Chambers 20th Century

Dictionary is as follows:

“.... an image so produced ... to make a picture of by means of photography to take photographs: to be capable of being photographed.”

and “photography” as follows:

“.... the art or process of producing permanent and visible images by the action of light, or other radiant energy, on chemically prepared surfaces.”

[25] I agree with the submission made by counsel for the defence that s 258 does not give the Immigration Officer the power to x-ray a person. I do not accept that a “photograph” includes an x-ray in normal parlance. A reading of s 258 makes reference to superficial means of obtaining identification by photograph or measurements that can be done by external observation of the Immigration Officer and under the control of that officer without the use of any intrusive procedures. An x-ray is an intrusive procedure that is carried out by a radiographer and subject to interpretation by a radiologist.

[26] I am however, satisfied that Ms Renfrey did obtain the consent of Mr Kadir to an x-ray being taken. Ms Renfrey asked Mr Kadir if he had any objection to undertaking an x-ray and Mr Kadir stated he had no objection. The request and consent were made and given through an interpreter, Ms Aljufri, who explained that an x-ray was more than a photograph. I am satisfied on the evidence that Mr Kadir understood the request and that he indicated he had no objection. I am satisfied that his will was not overborne on this

matter. There is no evidence Ms Renfrey was threatening or intimidating in her manner. Mr Kadir voluntarily participated in the taking of the x-ray. I am satisfied that Ms Renfrey requested an x-ray essentially for the purpose of identification. Ms Renfrey gave evidence she was aware that there may be a prosecution that followed. In her position as a compliance officer with the Immigration Department, Ms Renfrey must have been aware that with respect to some of the persons processed by her a prosecution may follow. Ms Renfrey made reference to a subsequent prosecution in her evidence. However, I am satisfied on a consideration of the totality of her evidence on this point, that the effect of her evidence is that at the time she sought an x-ray the essential purpose was to establish the identification of Mr Kadir. I find that Mr Kadir voluntarily submitted himself for an x-ray of his left wrist and that there was no threat or inducement placed upon him to do so. I do not consider that there is a reason to exercise a discretion on the grounds that the admission of the result of the x-ray into evidence on this application is unfair to Mr Kadir.

[27] I am satisfied that the x-ray taken of Mr Kadir's wrist is admissible for the purpose of this application.

[28] I was also addressed, with respect to the recent amendments, to the *Juvenile Justice Act 1983* (NT) which raises the age of a person who is in law an adult from 17 to 18 years. These amendments are to come into effect from 1 June 2000.

[29] The evidence given in this matter occurred prior to this amendment taking effect. At the time the Court heard evidence the crucial age was 17 years.

[30] I accept that the amendment to the *Juvenile Justice Act 1983* (NT) should be applied to Mr Kadir and that for the purpose of this case the Crown have to establish on the balance of probabilities that Mr Kadir was 18 years or older at the time of the alleged offence.

[31] I take into account that Mr Kadir has consistently maintained that he was born on 10 October 1983. Dr Keenan gave evidence that it was unlikely Mr Kadir was 16 years old. Ms Renfrey from her observations believed Mr Kadir to be older than 16 years. I have already stated that from my own observation of Mr Kadir, I believe him to be older than 16 years. I should also indicate that from my own observation I would assess Mr Kadir to be older than 17 years. Dr Keenan concluded Nasruddin Kadir was at least 19 years old.

[32] On all the evidence I am satisfied on the balance of probabilities that Mr Kadir was an adult at the date of the alleged offence.
