Nafi v The Queen [2012] NTCCA 13

PARTIES:	**NAFI, Edward**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	17 of 2011
DELIVERED:	3 AUGUST 2012
HEARING DATES:	20 JULY 2012
JUDGMENT OF:	RILEY CJ, BLOKLAND & BARR JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

STATUTES - Acts of Parliament - interpretation - particular words and phrases – "repeat offence" – whether the appellant had been convicted of a repeat offence – the operative date for a "repeat offence" is the date of conviction - *Migration Act 1958* (Cth) s 236B

STATUTES - Acts of Parliament - interpretation - particular words and phrases – "proceedings" – whether proceedings had commenced – proceedings had commenced prior to the commencement of the s 236B - proceedings commenced with the filing of an indictment in the Supreme Court - *Migration Act 1958* (Cth) s 236B

CRIMINAL LAW - Committal proceedings - powers of Magistrate – what power is a Magistrate exercising - Magistrate is exercising executive power at committal proceedings

Justices Act (NT), s 112 and Pt V; *The Border Protection (Validation and Enforcement Powers) Act* (2001) (Cth), s 3(2); *Criminal Code* (NT) s 1, s 3(2), s 298(1), s 305 and s 336

Mokbel v Director of Public Prosecutions (Vic) [2008] VSC 433; *R v His Honour Judge Noud ex parte MacNamara* [1991] 2 Qd R 86, applied
Birkeland-Corro v Tudor-Stack [2005] NTSC 23; *R v Elkedra and Corbett* [2010] NTSC 71, approved
Grassby v R (1989) 168 CLR 1, followed
Fisher v Hebburn Ltd (1960) 105 CLR 188 at 194; *Geraldton Building Co Ltd v May* (1977) 136 CLR 379; *Maxwell v Murphy* (1957) 96 CLR 261 at 267*; McMillan v Pryce* (1997) 115 NTR 19; *Nine Network Australia Pty Ltd v McGregor SM and Ors* (2004) 14 NTLR 24*; R v Horsham Justices, ex parte Farquahson* [1982] 2 WLR 430; *R v Kidman* (1915) 20 CLR 425; *The Queen v Studenikin* (2004) 147 A Crim R 1; *Trennery v Bradley* (1997) 115 NTR 1, referred to

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	G Rice SC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Nafi v The Queen [2012] NTCCA 13
No. 17 of 2011

BETWEEN:

EDWARD NAFI
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BLOKLAND & BARR JJ

REASONS FOR JUDGMENT

(Delivered 3 August 2012)

Riley CJ and Barr J:

[1] On 19 May 2011 the applicant was convicted of having facilitated the bringing to Australia of a group of 33 people who had no lawful right to come to Australia, being reckless as to whether they had a lawful right to come to Australia, contrary to section 233C of the *Migration Act* 1958 (Cth). The offending took place between 5 June 2010 and 15 June 2010.

[2] In the course of submissions in relation to sentence an issue arose as to whether the conviction was a "repeat offence" within the meaning of that expression in the *Migration Act*. The consequence of the offence being a repeat offence was that the applicant became liable to a mandatory minimum

term of imprisonment of eight years with a non-parole period of five years. The sentencing judge determined that the offence was a repeat offence and sentenced the applicant to imprisonment for the mandatory minimum term.

[3] The applicant sought leave to appeal and also sought an extension of time within which to appeal. Both applications were refused by a single judge of the Court and the applicant, pursuant to s 429(2) of the *Criminal Code* (NT), then applied for the matters to be determined by the Court of Criminal Appeal. The sole ground of appeal which the applicant sought to argue was that:

> The learned sentencing Judge erred in finding that the applicant's conviction was relevantly a "repeat offence" pursuant to s 236B(5)(b)(i) *Migration Act* 1958 (Cth), and accordingly held in error that the mandatory minimum term of imprisonment applicable was eight years imprisonment with a non-parole period of five years.

The historical context

[4] The applicant was apprehended for an offence against s 232A of the *Migration Act* on 30 June 2001(the "first offence"). It was alleged that he had facilitated the bringing to Australia of a group of 108 people who had no lawful right to come to Australia. He was brought before the Court of Summary Jurisdiction in July 2001 and was committed to the Supreme Court on 28 August 2001

[5] On 27 September 2001 a new sentencing regime was introduced by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). The amending provision, inter alia, amended the *Migration Act* by including

s 233C which provided for the mandatory minimum penalties referred to above for a repeat offence.

[6] On 1 October 2001 an indictment was filed in the Supreme Court alleging an offence contrary to s 232A of the *Migration Act*. On 3 October 2001 the applicant was convicted and sentenced to imprisonment for a period of four years with a non-parole period of two years.

The issues

[7] As the applicant has submitted, the chronology of his offending places the first offence at a time prior to the introduction of s 233C of the *Migration Act*, with the indictment being filed and the sentence imposed a few days after commencement. The second offence occurred some nine years later, shortly after s 236B of the *Migration Act* was enacted. The issue for determination is whether the conviction of the applicant for the 2011 offence was a "conviction for a repeat offence" for the purposes of s 236B(5)(b)(i) of the Act.

[8] Section 236B was enacted in substitution for s 233C of the *Migration Act* with effect from 31 May 2010. The section provides as follows:

> **Mandatory minimum penalties for certain offences**
>
> (1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.

(2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

(3) The court must impose a sentence of imprisonment of at least:

(a) if the conviction is for an offence against section 233B - 8 years; or

(b) if the conviction is for a repeat offence - 8 years; or

(c) in any other case - 5 years.

(4) The court must also set a non-parole period of at least:

(a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies - 5 years; or

(b) in any other case - 3 years.

(5) A person's conviction for an offence is for a *repeat offence* if:

(a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:

(i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or

(ii) has found, without recording a conviction, that the person has committed another such offence; or

(b) in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* (whether in the same proceedings as the

proceedings relating to the offence, or in previous proceedings), a court:

(i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or

(ii) has found, without recording a conviction, that the person has committed another such offence.

"non-parole period" has the same meaning as it has in Part IB of the *Crimes Act 1914*.

[9] The applicant submitted that s 236B(5)(b) of the Act should be interpreted to apply only to proceedings commenced after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001*. It was submitted that the proceedings for the first offence commenced with the committal order made in the Court of Summary Jurisdiction on 28 August 2001, predating the mandatory penalty regime introduced by s 233C of the *Migration Act* and that, therefore, the new mandatory regime did not apply to the proceedings.

[10] There are at least two problems with the interpretation proposed by the applicant. The first is that addressed by the sentencing judge when her Honour observed that there was no ambiguity in the provision and went on to say:

> It seems to me that if there are proceedings on foot after the commencement of the Act and the accused was convicted of a relevant offence in those proceedings, then there is a repeat offence within the meaning of the Act. To construe the section in the manner

> contended for by the defence would be to impermissibly add the word "commenced" into the phrase "proceedings after the commencement of the Act". It would be to read it "in proceedings commenced after the commencement of the Act". If proceedings were in existence partially before and partially after the commencement of the Act, I can see no way that you can say that they were not proceedings after the commencement of the Act. They are both proceedings before the commencement of the Act and proceedings after the commencement of the Act and fall squarely within the definition.

[11] In the submission of the applicant, to achieve that result, her Honour must have fallen into error by inserting words into the provision as follows:

> If proceedings were in existence *partially before* and *partially after* the commencement of the Act I can see no way that you can say that they were not proceedings after the commencement of the Act. They are both *proceedings before* the commencement of the Act and *proceedings after* the commencement of the Act and fall squarely within the definition.

[12] Contrary to the submission, the approach adopted by her Honour did not require the addition of those words to the provision. The words were inserted by her Honour to make plain her approach to the question of interpretation. That approach reflects the plain meaning of the words of the section.

[13] The second problem with the proposed interpretation is that, in the circumstances of this matter, proceedings against the applicant for the first offence were not in fact commenced until after the commencement of the amending legislation. The proceedings in the Supreme Court commenced with the filing of the indictment on 1 October 2001, after the commencement of the amending Act on 27 September 2001.

[14] Section 236B(5)(b) provides that a "person's conviction for an offence is for a repeat offence if … in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001*… a court … has convicted the person of another offence …". The relevant "proceedings" are the proceedings in which a court has convicted the offender. In the present case those proceedings were in the Supreme Court of the Northern Territory.

[15] The proceedings in the Supreme Court commenced with the filing of the indictment. Section 3(2) of the *Criminal Code* (NT) provides that a person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment. Section 298(1) of the *Code* then requires that, where it is intended to put a person on trial for a crime for which the person has been committed to trial, "the charge is to be reduced to writing in a document that is called an indictment". It is the indictment which "enlivens the court's jurisdiction to deal with the matter thereby brought before it".[1]

[16] Whilst the procedure for dealing with a person charged with an indictable offence commences with the preliminary examination held pursuant to the terms of the *Justices Act* (NT),[2] the magistrate who undertakes that examination is not exercising a judicial function but, rather, is exercising a non-judicial executive or ministerial function.[3] The magistrate is not sitting

[1] *R v His Honour Judge Noud ex parte MacNamara* [1991] 2 Qd R 86 at 99.
[2] Part V of the *Justices Act*.
[3] *Grassby v R* (1989) 168 CLR 1 at 11; see also *Mokbel v Director of Public Prosecutions (Vic)* [2008] VSC 433 at [25]-[27].

as a court exercising summary jurisdiction.[4] The role of the magistrate in holding a committal "is essentially inquisitorial and administrative".[5] Orders made by the magistrate on completion of the preliminary examination[6] are orders made in anticipation of the framing and filing of an indictment as contemplated by the *Criminal Code.*

[17] In the present case the proceedings against the applicant for the first offence commenced with the filing of the indictment on 1 October 2001. The legislation was amended with effect from 27 September 2001. It follows that the subject proceedings were commenced after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* for the purposes of s 236B of the *Migration Act* and the subsequent conviction falls within the ambit of a "repeat offence".

[18] In addition, as the respondent submitted, regardless of when the proceedings against the applicant commenced he was convicted of the first offence in proceedings "after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001"*.

[19] A further, and separate, argument presented on behalf of the applicant was that s 236B(5)(b) of the *Migration Act* applies only to proceedings for an offence committed after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* and that, in this case, the

[4] See the discussion by Martin (BR) CJ in *Birkeland-Corro v Tudor-Stack* [2005] NTSC 23 at [63]-[71] and also *R v Elkedra and Corbett* [2010] NTSC 71 per Mildren J.
[5] *Mokbel v Director of Public Prosecutions (Vic)* [2008] VSC 433 at [25]-[27].
[6] Such orders are made pursuant to s 112 of the *Justices Act*.

offence had been committed prior to that time. It was submitted that, in considering whether there is a "repeat offence" within the scope of s 236B(5)(b) of the *Migration Act*, the reference to "proceedings" in the expression “in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001*” should be interpreted as reading "in proceedings *for an offence committed* after the commencement” of that Act. It was contended that only those offences committed after the commencement date, 27 September 2001, would come within the meaning of the word "proceedings" within the section.

[20] By reference to the provision it can be seen that the date upon which the offence was committed is not a specified criterion to trigger the operation of the repeat offender penalty provision. That provision depends upon the existence of a prior conviction of another offence against s 232A or s 233A of the *Migration Act* after 27 September 2001 and not upon the date of the offending.

[21] In our opinion the proposed ground of appeal is without prospects of success. The application for an extension of time in which to appeal and the application for leave to appeal should be dismissed.

Blokland J:

Introduction

[22] This application concerns whether the applicant as a matter of law was correctly convicted of a “repeat offence” as defined by s 236B(5)(b)(i)

Migration Act (Cth). Following a plea of guilty to one count of people smuggling against s 233C *Migration Act,* the learned sentencing judge found the applicant's conviction met the criteria of a "repeat offence". On 19 May 2011 he was sentenced to the prescribed mandatory term being imprisonment for 8 years with a non parole period of five years.

Chronology of Events

[23] The argument on behalf of the applicant requires consideration of how s 236B(5)(b)(i) *Migration Act* applies in the light of the procedural history. It is useful to set out the history drawn from the materials provided by the parties:

Date	**Event**
The First Offence	
30 June 2001	Appellant apprehended for an offence against 232A Migration Act. (No mandatory sentencing regime applied).
9 July 2001(on or about)	Committal proceedings commenced in the Court of Summary Jurisdiction.
28 August 2001	Committed to the Supreme Court. (No mandatory sentencing regime applied).
27 September 2001	Mandatory Sentencing regime commenced through s 233C *Migration Act* and *The Border Protection (Validation and Enforcement Powers) Act* (2001) (Cth).
1 October 2001	Indictment filed in the Northern Territory Supreme Court.

3 October 2001	Appellant convicted and sentenced in the Northern Territory Supreme Court (Mandatory sentencing was not applied, the offence having been committed prior to its introduction). Appellant sentenced under the general sentencing discretion to 4 years imprisonment, non-parole period of 2 years.

The Second Offence

31 May 2010	Section 235(5)(b)(i) *Migration Act* commenced, in substitution of s 233C *Migration Act*. Continues Mandatory Sentencing regime of s 233C. Extends "repeat offence" to apply to a conviction for another offence in the same proceedings.
5 June - 15 June 2010	Date of offending alleged in the indictment.
2 March 2011	Indictment filed.
7 April 2011	Guilty plea entered.
17 May 2011	Submissions on sentence.
19 May 2011	Sentence passed.

Was the applicant exposed to a greater penalty through legislation being applied retrospectively?

[24] Underlying the applicant's arguments is the assertion that s 233C *Migration Act* and s 236B(5)(b)(i) *Migration Act* (Cth) have been construed in a manner that allowed partial retrospective application. Further, that the alleged retrospective application increased the applicant's exposure to future penalty, from a minimum term of five years imprisonment to the minimum

term of 8 years imprisonment, in the event of re-offending after the conviction for the first offence.

[25] The general construction principles are clear. A statute changing the law ought not, unless the intention appears with reasonable certainty, be understood as applying to facts or events that have already occurred in a way that affects rights and liabilities which the law had defined by reference to past events.[7] The presumption is that a statute is to be construed as having prospective operation only.[8] The presumption may be displaced by clear legislative expression.[9]

[26] Section 233C *Migration Act*, introduced by *The Border Protection (Validation and Enforcement Powers) Act* (2001) (Cth)[10] provides:

> **233C Mandatory penalties for certain offences:**
>
> (1) This section applies if a person is convicted of an offence under section 232A of 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
>
> (2) The court must impose a sentence of imprisonment of at least:
>
> (a) 8 years, if the conviction is for a repeat offence; or
>
> (b) 5 years, in any other case.

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7 *Maxwell v Murphy* (1957) 96 CLR 261 at 267*; McMillan v Pryce* (1997) 115 NTR 19 at 23, significantly in relation to mandatory sentencing for minimum terms for "property offences".

8 *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Geraldton Building Co Ltd v May* (1977) 136 CLR 379.

9 *R v Kidman* (1915) 20 CLR 425.

10 Commenced on September 27 2011.

(3) The court must also set a non-parole period of at least:

(a) 5 years, if the conviction is for a repeat offence; or

(b) 3 years, in any other case.

(4) In this section:

(a) ***non parole period*** has the same meaning as it has in Part 1B of the *Crimes Act* 1914; and

(b) a person's conviction for an offence is for a ***repeat offence*** if, on a previous occasion after the commencement of this section, a court:

(i) has convicted the person of another offence, being an offence against section 232A or 233A; or

(ii) has found, without recording a conviction, that the person had committed another such offence.

[27] The applicant's assertion that he was not liable to the greater penalty of eight years in the event of future offending cannot with respect be correct as at the time of his *conviction* for the first offence (3 October 2001), s 233C *Migration Act* (Cth) had commenced. Although the first offence was *committed* prior to the commencement of the section, and the *conviction* post dated its commencement, mandatory sentencing on usual principles did not apply to him for the first offence. This was because there was no indication in the section that conviction triggers mandatory sentencing for a pre-commencement offence. The position was different for a subsequent offence.

[28] By virtue of the choice of the phrase "after the commencement of [the] section", and "convicted", in s 233C(4)(b) the section has expressly provided that a person convicted on a second occasion after its commencement, (27 September 2011), would be liable to the 8 year minimum. By the terms of the section it is the timing of the subsequent *conviction* that is the trigger for the greater mandatory term, even though the first offence may have been committed prior to the commencement of s 233C. There is no other way to read the section without significant distortion. I conclude that at the time of his *conviction* for the first offence under the law as it then stood, the applicant was properly sentenced under the general discretion for the first offence, however he also became liable to a penalty of 8 years imprisonment should he again be *convicted* for any of the prescribed offences in the future.

[29] A number of authorities deal with the construction of the previous mandatory sentencing provisions in the Northern Territory.[11] In those cases, (as considered particularly in *McMillan v Pryce)*[12], it was held Parliament had not clearly and unambiguously made it plain that offences committed prior to the commencement of that regime were to be treated as previous findings of guilt.[13] By contrast, in the *Migration Act,* the event that enlivens the subsequent mandatory penalty has been made clear. Parliament has chosen the date (commencement of the section), from which a *conviction*

11 *McMillan v Pryce* (1997) 115 NTR 19; *Trennery v Bradley* (1997) 115 NTR 1.
12 Cited above.
13 There, Parliament had simply provided that under s 78A(2) and (3) *Sentencing Act* (NT) certain minimum terms would apply to a person who had "once before been found guilty" and "two times or more been found guilty".

for, (as distinguished from the *commission of*), an offence will count for the purpose of progression to the 8 year minimum term. On my reading of the section a first pre-commencement offence does not attract the minimum 5 year term even though the conviction was imposed after the commencement of the section, but a second conviction after the commencement of the section constitutes a "repeat offence".

Section 236B Migration Act

[30] Although my conclusion is that under s 233C the applicant was already exposed to a liability of 8 years for any future conviction after the imposition of the first conviction, by the time of his second conviction, s 236B *Migration Act* had commenced. Like its predecessor, the section imposes severe mandatory terms. Section 236B *Migration Act* expanded "repeat offence" to include convictions imposed in the same proceedings. That expansion did not as far as I can ascertain impose any further liability on the applicant. If there is any ambiguity in the language, the ambiguity is resolved by benevolent construction in favour of the applicant.[14] The section provides as follows:

> **236B Mandatory minimum penalties for certain offences**
>
> (1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.

[14] *The Queen v Studenikin* (2004) 147 A Crim R 1.

(2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.

(3) The court must impose a sentence of imprisonment of at least:

(a) if the conviction is for an offence against section 233B—8 years; or

(b) if the conviction is for a repeat offence—8 years; or

(c) in any other case—5 years.

(4) The court must also set a non-parole period of at least:

(a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or

(b) in any other case—3 years.

(5) A person's conviction for an offence is for a ***repeat offence*** if:

(a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:

(i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or

(ii) has found, without recording a conviction, that the person has committed another such offence; or

(b) in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act* 2001 (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:

(i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or

(ii) has found, without recording a conviction, that the person has committed another such offence.

[31] The applicant argues the substituted s 236B(5)(b)(i) *Migration Act* (commencing 31 May 2010), does not apply to the second conviction as s 236B5(b) requires the previous conviction to have been imposed "in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act* 2001", signifying it is said, the necessity of proceedings to have been commenced after commencement of the section.

[32] The learned sentencing judge was content to resolve that issue on the basis that "the proceedings were arguably, at least, commenced before the commencement of the Act". Her Honour found no relevant ambiguity, finding that if there are proceedings on foot after the commencement of the Act and the accused was convicted of a relevant offence in those proceedings, there is a "repeat offence" within the meaning of the Act.

[33] Her Honour found that to accept the construction argued on behalf of the applicant would entail impermissibly adding the word "commenced" into the phrase "Proceedings after the commencement of the Act" – it would instead be read as "in proceedings commenced after the commencement of the Act".

[34] There is nothing in the context of the section or its operation that indicates "Proceedings after the commencement" should be construed as excluding

proceedings that have already commenced. Section 236B5(b) does not operate in a manner to affect the outcome of the previous proceedings. It prescribes the statutory conditions under which future offending would attract the higher mandatory term. In terms of this particular applicant, his status as being exposed to liability to the greater mandatory term was the same as his position was under the former s 233C(4)(b)(i). It would not be permissible in my view to confine the operation of the section to proceedings that commenced after the commencement of the section.

[35] Criminal proceedings commence in the Supreme Court on the filing of an indictment.[15] The timing of the commencement of a trial is deemed to commence upon a plea to the indictment,[16] but proceedings in the Supreme Court as opposed to the trial commence with the indictment. Filing of the indictment occurred in relation to the applicant on 1 October 2001, shortly after the mandatory sentencing regime commenced. The first conviction was entered on 3 October 2001. The conviction for the second offence in May 2011 therefore meant it fulfilled the criteria of a "repeat offence".

[36] The applicant argued "proceedings" within s 236B(5)(b) was capable of referring to the committal; in particular, the order committing the applicant to the Supreme Court on 28 August 2001.

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15 S 3(2) *Criminal Code* (NT); read with ss 298(1*)* and 305*; R v His Honour Judge Noud ex parte McNamara* [1990] 2 Qd R 86 at 90 – 91.

16 S 336 *Criminal Code* (NT).

[37] Section 339 *Criminal Code* (NT) was raised in aid of this argument but that section refers to quashing an indictment before plea. If committal proceedings are to be quashed or stayed, that involves invoking the Supreme Court's inherent or supervisory jurisdiction, not reliance on s 339 *Criminal Code*. If anything s 339 supports the position that relevantly, 'proceedings' commence with the indictment being filed.

[38] I accept "proceedings", depending on the context may refer to committal proceedings.[17] In *Nine Network Australia Pty Ltd v McGregor SM and Ors*,[18] the Full Court had no difficulty accepting the phrase 'in the course of any proceedings before any court' in s 58 *Evidence Act* (NT), (relating to suppression orders), was intended to apply to committal proceedings. The heading of Section 296 *Criminal Code* refers to 'Preliminary proceedings'. The problem with the applicant's argument is the meaning of "proceedings" must be determined in the context of s 236B *Migration Act*. It can only there refer to proceedings in a court capable of entering a conviction. Committal proceedings are for certain purposes 'judicial proceedings',[19] but are not a proceeding capable of determining guilt or imposing a conviction.

[39] At the time of being sentenced before the learned sentencing judge the applicant had been previously convicted by a court (3 October 2001) after the commencement of the *Border Protection (Validation and Enforcement*

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17 *R v Horsham Justices, ex parte Farquahson*, [1982] 2 WLR 430, referring to contempt of court accepted committals were "proceedings"..

18 (2004) 14 NTLR 24.

19 S 1 *Criminal Code*.

Powers) Act (27 September 2001). He was therefore correctly convicted of a "repeat offence" and sentenced accordingly.

[40] I would dismiss the application for the extension of time and the application for leave to appeal.
