Yusup v The Queen [2005] NTCCA 19

PARTIES:	YUSUP, Mohammad
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 2 of 2005 (20424685)
DELIVERED:	22 December 2005
HEARING DATE:	10 November 2005
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

COMMONWEALTH LAW – APPEAL – SENTENCE

Guilty plea to two offences pursuant to ss 100A(2) and 101A(2) *Fisheries Management Act 1991* (Cth) – whether sentence manifestly excessive – in the circumstances there was significant commonality between the offences – time spent in fisheries and immigration detention is a matter to be taken into account in determining an appropriate sentence.

Crimes Act 1914 (Cth), s 15A(3), s 15A(4), s 16A(2), s 16E(3)
Fisheries Management Act 1991 (Cth) s 84(1)(ia), s 84(A)(1)(d), s 100A(2), s 101A(2)
Migration Act 1958 (Cth), s 164B, s 189, s 250
Prisons (Correctional Services) Act (NT), s 5
Sentencing Act (NT) s 26(2), s 26(6)

Johnson v R (2004) 205 ALR 346, applied
Pearce v The Queen (1998) 194 CLR 610, applied
R v Zainudin & Ho (2005) 190 FLR 149, applied

United Nations Convention on the Law of the Sea, Article 73

REPRESENTATION:

Counsel:

Appellant:	S. Cox QC
Respondent:	P. Usher

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

Yusup v The Queen [2005] NTCCA 19
No CA 2 of 2005 (20424685)

BETWEEN:

YUSUP, Mohammad
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

MILDREN J:

[1] I agree with Riley J that the appeal in this matter should be allowed for the reasons which his Honour gives. I also agree with the sentencing orders which he proposes. I wish to add the following comments.

[2] In recent times, offences against the Fisheries Management Act in the north and north-western parts of the Australian Fishing Zone have become more and more prevalent. Offences against s 100A and s 101A of the Act presently carry only fines. Although the maximum fines which may be imposed are very significant, the deterrent effect of such a fine upon a poor Indonesian fisherman who could not possibly pay such a fine is minimal

because, unless time to pay is refused, the defendant will be deported before he can be imprisoned as a fine defaulter. In this jurisdiction, there is no power to refuse time to pay, every person is granted 28 days to pay and the maximum period of imprisonment for failure to pay a fine is only three months: see Sentencing Act s 19, s 26(2) and s 26(3)(c). The period of default imprisonment for non-payment of a fine varies widely amongst the several State jurisdictions. At one extreme, in Western Australia the court may fix a default period of up to two years (Sentencing Act 1995 (WA) s 58). At the other extreme, in South Australia there is no provision for imprisonment in default of payment of a fine. This is a matter which calls for uniformity of approach. It should not depend upon within which jurisdiction a fisherman is charged whether or not he might go to prison for non-payment of a fine or for how long.

[3] I understand that the reason why fines instead of imprisonment is all that the Parliament has enacted rests upon the fact that Australia is a signatory to the United Nations Convention on the Law of the Sea, Article 73 par 3 of which provides:

> "Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment."

[4] I recognise the political difficulties facing the Commonwealth in providing for effective deterrent measures. Of course, the ships themselves as well as the equipment on board and the catch are always forfeited automatically

pursuant to s 106A of the Fisheries Management Act. But, these vessels are not worth much and, as I said in *R v Zainudin & Ho* (2005) 190 FLR 149, one can only draw the inference that there must be very significant profits to be made to make the risks worthwhile. Of further concern is that fishermen taken in fisheries detention are not being charged or released within 168 hours as required by s 84A(1) of the Fisheries Management Act, but are being detained, after that period has expired, under s 250 of the Migration Act. The consequences of that further detention, assuming it be lawful, are referred to in *R v Zainudin & Ho* (supra) in a passage quoted by Riley J, and which I will not repeat. There is a danger that detention under s 250 may be abused by the tactical use of "go-slow" methods either as a means of imprisonment for deterrent purposes because the Fisheries Management Act fails to impose adequate penalties, or for other irrelevant reasons. Although sympathetic to the need to deter illegal fishing in the Australian Fishing Zone, the courts cannot close a blind eye to such tactics and judges and magistrates should closely monitor the time taken to lay charges for fisheries offences which, in my opinion, should always be laid within the time fixed by s 84A(1) of the Fisheries Management Act. The present failings of the Act to properly deter must be resolved by the Parliament.

RILEY J:

[5] On 19 January 2005 the appellant pleaded guilty to two offences under the Fisheries Management Act 1991 (Cth). The offences arose out of events that

took place on 27 September 2004. At that time the appellant was the captain of the Indonesian Type III iceboat "Setia Kawan" which was apprehended by the crew of the Royal Australian Navy vessel HMAS Geelong whilst fishing some 10 to 16 nautical miles within the Australian Fishing Zone.

[6] When the vessel was apprehended it had 10 crew on board, there were approximately 700 kilograms of fish in the holds and there were 40 kilograms of shark fin on ice. The learned sentencing judge found that the vessel was equipped with sophisticated navigational and radio equipment and that the appellant clearly knew that his vessel was illegally within the Australian Fishing Zone.

[7] The first offence to which the appellant pleaded guilty was that he intentionally used a foreign boat with a length in excess of 24 metres, reckless to the fact that the boat was a foreign boat, that the boat was used for commercial fishing and that the boat was at a place in the Australian Fishing Zone contrary to s 100A(2) of the Fisheries Management Act. The maximum penalty for the offence is a fine of $825,000. He was fined $70,000. The second offence to which he pleaded guilty was that he intentionally had in his possession or charge a foreign boat, reckless to the fact that the boat was a foreign boat, that the boat was equipped with nets, traps or other equipment for fishing, and that the boat was at a place in the Australian Fishing Zone contrary to s 101A(2) of the Act. The maximum penalty for that offence is a fine of $550,000. He was fined $50,000. In relation to each count the fine was directed to be paid within 28 days

pursuant to the provisions of s 26(2) of the Sentencing Act and the learned sentencing judge declined to make any orders displacing the provisions of s 26(6) of that Act which, in effect, meant that any default period would be served cumulatively upon any other default period. The learned sentencing judge summed up his conclusions as follows:

> "The net result therefore is a fine in respect of the first count of $70,000, in respect of the second count $50,000, 28 days to pay, in default imprisonment. Should he return to Australia following his repatriation to Indonesia he will automatically serve a sentence of six months imprisonment."

Grounds of appeal

[8] The appellant appeals against the sentence on five grounds. Four of those grounds were argued together and came under the umbrella of the principal ground, namely that the sentence was, in all the circumstances, manifestly excessive. In support it was submitted that the learned sentencing judge failed to give sufficient weight to the full period of time for which the appellant was detained and held in custody or detention; that he erred in failing to give any weight to the period of time spent in immigration detention; and that he failed to give sufficient weight to the appellant's lack of prior convictions and lack of experience. The fifth ground of appeal was that the learned sentencing judge failed to give sufficient weight to the principle of totality.

(a) The role of the appellant

[9] In support of grounds 1 to 4 of the grounds of appeal the appellant referred to the fact that at the time of the offending he was 31 years of age and was a first offender. He had been fishing for approximately 12 months and was an inexperienced fisherman. Although he identified himself as the captain he was in reality only the nominal master of the vessel. The information placed before the learned sentencing judge revealed that the appellant had been recruited to captain the vessel by the younger brother of the owner of the vessel. The younger brother was in fact a crew member of the vessel and was responsible for paying the crew and providing direction as to the management of the vessel. Whilst the appellant was nominally the captain and had indicated that he did not wish to fish in Australian waters, when pressed, he followed the direction of the brother. It seems that ultimate authority over the vessel rested with the younger brother of the owner. The brother had been repatriated to Indonesia without being prosecuted at a time when authorities were not fully aware of the extent of his involvement.

(b) The relationship between the offences

[10] The appellant referred to the offences created by s 100A(2) and s 101A(2) of the Fisheries Management Act and submitted that there was a significant overlap of elements in relation to each of the offences and, in those circumstances, submitted that there should be "no doubling-up of the

penalty". Reference was made to *Pearce v The Queen* (1998) 194 CLR 610 where McHugh, Hayne and Callinan JJ said (at 623):

> "To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts."

[11] *Pearce v The Queen* (supra) was applied by Gummow, Callinan and Heydon JJ in *Johnson v R* (2004) 205 ALR 346 where their Honours said (at par [33]):

> "It is true that the appellant pleaded guilty to two offences, but they had much in common: one inducement, one payment for performance, one occasion, one package and one receipt of it by the appellant. This commonality did require that careful regard be had, in deciding the appellant's appeal, to the totality principle. The error in relation to the number of packages and the failure to refer to the numerous common elements strongly suggests that this did not occur."

[12] A consideration of the elements of s 100A and s 101A reveals that there are areas of overlap. In each case the offending involves a foreign boat at a place inside the Australian Fishing Zone. In relation to the offence under s 100A the offender is required to be "using" the boat "for commercial fishing". In relation to s 101A the offender is required to "have in his possession" the foreign boat whilst it is equipped with nets, traps or other

equipment for fishing. For present purposes the degree of overlap can be seen from an examination of the circumstances of the appellant. As the captain of the vessel he was using a boat for commercial fishing and, by that very same conduct, he had in his possession a boat that was equipped for fishing. The conduct which exposes him to liability under s 101A is, to a large extent, the same conduct which exposes him to liability under s 100A. Whilst two discrete offences are created by those sections, in the circumstances of this matter there is significant commonality and that commonality should have been considered in determining the appropriate sentence. It was not considered.

(c) The period in detention or custody

[13] In sentencing the appellant the learned sentencing judge took into account the time the appellant had spent in custody but declined to take into account the period of immigration detention.

[14] As has been observed, the appellant was detained on 27 September 2004 at a place in the Australian Fishing Zone. He was immediately placed in fisheries detention pursuant to s 84(1)(ia) of the Fisheries Management Act 1991 (Cth). An enforcement visa pursuant to s 164B of the Migration Act 1958 (Cth) was automatically granted to the appellant and this enabled fisheries officers to bring him into the migration zone for the purposes of investigating the suspected offence. He remained in fisheries detention for a period of 168 hours as provided for in s 84(A)(1)(d) of the Fisheries

Management Act. During this period he was on the "Setia Kawan" in Nhulunbuy. Upon expiry of the fisheries detention, on 4 October 2004, the enforcement visa automatically ceased and the appellant assumed the status of an unlawful non-citizen. He was removed to Berrimah Prison on 13 October 2004. He was detained pursuant to s 189 of the Migration Act in immigration detention and he remained in that state until 17 November 2004 when, at the request of his solicitors, he was remanded in custody. In accordance with s 250 of the Migration Act, when the appellant was kept in immigration detention that was for the purpose of making a decision whether he should be prosecuted for offences pursuant to the Fisheries Management Act.

[15] The reality is that the appellant was detained in one form of detention or another from 27 September 2004 through to the date of sentence. The changing nature of his detention was as a consequence of different legislative regimes taking effect and not as a result of any conduct on his part. His physical circumstances did not change with his change in status. He was at first detained on the vessel and thereafter in the remand section of the Berrimah Prison. Whilst he was in Berrimah Prison the appellant was a "prisoner" as defined by s 5 of the Prisons (Correctional Services) Act (NT) and was therefore treated as if he was a remand prisoner. He was only taken into custody when he came before the Court of Summary Jurisdiction on 17 November 2004. He then became an actual remand prisoner. He was in

fisheries detention and then immigration detention for the period between 27 September 2004 and 17 November 2004, a total of 51 days.

[16] In dealing with the submission made on behalf of the appellant that account should be taken of his time in fisheries detention and immigration detention, his Honour said:

> "I was asked to take account of the period of immigration detention pending disposition as a relevant sentencing factor. In my view it is not. It is not mentioned, as counsel for the prosecution said, in s 16A of the Crimes Act 1914 (Cth), although that is not all embracing relating as it also does to matters other than those specifically mentioned. But in any event it seems to me that the period of immigration detention is not punishment, rather it is attributable to his unlawful presence in Australia, not his offending."

[17] Section 16E(3) of the Crimes Act 1914 (Cth) provides that a court that imposes a federal sentence on a person must take into account any period that the person has spent in custody in relation to the offence concerned. His Honour acknowledged this requirement and expressly took the period in custody into account. Section 16A(2) of the same Act provides that "in addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court …" and thereafter a series of matters is set out. Neither time spent in fisheries detention nor immigration detention are matters referred to. However it is necessary to consider whether a period of some seven weeks spent in such detention, which arose out of the fact that the appellant was to be charged with the offences to which he subsequently pleaded guilty and whilst he was awaiting

that process to be undertaken, is a matter which should be considered "in addition to" the matters set out in s 16A(2).

[18] With respect I am unable to agree with the observation of his Honour that the period of immigration detention is attributable to the unlawful presence in Australia of the appellant, not his offending. There was never any suggestion that the appellant wished to enter the migration zone of Australia. He was apprehended in the Australian Fishing Zone and then taken by the authorities into the migration zone for the purposes of investigating the suspected offences under the Fisheries Management Act. His presence in Australia was lawful. Section 164B(1) of the Migration Act provides as follows:

> "A non-citizen on a foreign boat outside the migration zone is granted an enforcement visa when, because a fisheries officer has reasonable grounds to believe that the boat has been used, is being used or is intended to be used in the commission of a fisheries detention offence, a fisheries officer:
>
> (a) makes requirement of the boat's master under subparagraph 84(1)(k)(ii) or paragraph 84(1)(l) of the Fisheries Management Act 1991; or
>
> (b) exercises his or her power under paragraph 84(1)(m) of that Act in relation to the boat;
>
> whichever occurs first."

[19] The enforcement visa is not a visa sought by the non-citizen. It is a mechanism that enables the authorities to lawfully bring him into the

migration zone and continues to be in effect for a period of time related to the making of the decision whether or not to prosecute the non-citizen.

[20] In my view the fact that the appellant was held against his will, albeit lawfully, for such a lengthy period whilst the authorities determined how best to deal with him is a matter to be taken into account in determining an appropriate sentence. The learned sentencing judge declined to exercise his discretion to take that matter into account but did so on a misunderstanding of the status of the appellant. It was an error to fail to take this matter into account.

[21] A similar view to that which I have expressed was adopted by Mildren J in *R v Zainudin & Ho* (supra). His Honour pointed out that the holding of a person under s 250 of the Migration Act is not subject to any time limit. There is no requirement to bring a charge within any particular time and there is no obligation to bring such a person detained before a justice. As his Honour observed, the potential for abuse is obvious. Mildren J went on to say (par [39] and [42]):

> "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. … 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 different 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."

[22] In this case the appellant was detained for a period of almost four months in relation to the prosecution of offences which themselves do not carry a penalty of imprisonment save as a default provision in respect of non-payment of any fine imposed. In the event of a fine being imposed and there being a failure to pay, the maximum period of imprisonment in default in this jurisdiction is three months.

[23] It was the submission of the appellant that his lengthy period in detention (however described) should have been taken into account in a number of ways. Firstly, it should have been taken into account in deciding whether to impose a fine at all. Secondly, if fines were to be imposed, then the period in custody should have been taken into account in deciding whether to impose an aggregate fine rather than separate cumulative fines. Thirdly, if separate fines were to be imposed, then the period in custody should have been taken into account in deciding whether to make the default periods of imprisonment concurrent. The learned sentencing judged failed to consider any of these approaches.

[24] The learned sentencing judge imposed cumulative fines and directed that the periods to be served in custody for default of payment were to be served cumulatively in respect of the two fines he imposed. As is acknowledged by the respondent, s 15A(3) and (4) of the Crimes Act (Cth) provide that periods to be served in custody in such circumstances are to be served

concurrently unless the court determines that there are circumstances that warrant that any periods to be served in custody should be cumulative. The starting point is one of concurrency. In this case the attention of the learned sentencing judge was not drawn to those provisions and he did not advert to those requirements of the Crimes Act (Cth) but, rather, referred to s 26(6) of the Sentencing Act (NT). Under that section there is an assumption of cumulation unless the court orders otherwise. To that extent the provision is inconsistent with the provision of the Crimes Act and the Crimes Act provision should have been applied. It was not.

[25] In my opinion, for the reasons set out above, the appeal should be allowed and the sentences set aside. It falls to this Court to re-sentence the appellant. The sentence should reflect the fact that the offences have common elements and, in accordance with the observations of the High Court in *Pearce v The Queen* (supra), the appellant should not be punished twice where conduct falls into an area of overlap between offences. Further, the whole of the time spent in detention, being the period from 27 September 2004 through to 20 January 2005, should be taken into account in assessing the appropriate penalty. However, notwithstanding that lengthy period of detention, it is appropriate to impose a substantial fine. Such a penalty is appropriate to reflect the seriousness of the offending, the need for general deterrence and the other matters addressed by the learned sentencing judge. In light of the overlapping nature of the offending and the period of detention served, I regard it as appropriate that an aggregate fine be imposed with the

consequence that there be one period of imprisonment in the event of default in payment. In my opinion the appellant should be convicted on both counts and an aggregate fine of $100,000 imposed. I would order pursuant to s 26(2) of the Sentencing Act that if the fine is not paid within 28 days the appellant is to be imprisoned until his liability to pay the fine is discharged.

[26] I would order accordingly.

SOUTHWOOD J:

[27] I agree with the reasons for decision of Riley J and the orders that he proposes.
