# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Nitu* [2012] QCA 224 |
| PARTIES: | **R**<br>**v**<br>**NITU, Ori**<br>(appellant/applicant) |
| FILE NO/S: | CA No 334 of 2011<br>DC No 842 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 24 August 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 April 2012 |
| JUDGES: | Holmes and Fraser JJA, Ann Lyons J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Appeal dismissed.**<br>**2. Application for leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON GUILTY PLEA – PARTICULAR CASES – where appellant convicted on plea of guilty for facilitating the bringing of non-citizens to Australia and sentenced to five years imprisonment with a three year non-parole period – where appellant appeals conviction on ground that primary judge erred in refusing to order permanent stay of proceedings as an abuse of process – where appellant contended that the proceedings should have been stayed as he was brought into the jurisdiction after being unlawfully detained – whether there was a miscarriage of justice<br><br>CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – EXAMINATION OF VALIDITY OF LEGISLATION BY COURTS – GENERALLY – where appellant contended that s 233C *Migration Act* 1958 (Cth) was not a valid law because it impermissibly interfered with the judicial sentencing discretion in a manner that distorted the institutional integrity |

guaranteed for all State courts by Chapter III of the Commonwealth Constitution – where the appellant contended that s 233C discriminated against "low level offenders" in favour of "higher level offenders" – whether s 233C was not a valid law

*Commonwealth Constitution* (Cth), Chapter III
*Migration Act* 1958 (Cth), s 232A, s 233C

*Atherden v The State of Western Australia* [2010] WASCA 33, considered
*Bahar v The Queen* (2011) 255 FLR 80; [2011] WASCA 249, considered
*Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6, cited
*Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [2006] HCA 44, distinguished
*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24, distinguished
*Moevao v Department of Labour* [1980] 1 NZLR 464, cited
*Palling v Corfield* (1970) 123 CLR 52; [1970] HCA 53, considered
*R v Karabi* [2012] QCA 47, considered
*R v Moti* (2010) 240 FLR 218; [2010] QCA 178, distinguished
*R v Mullen* [2000] QB 520; [2000] EWCA Crim 278, cited
*R v Pot, Wetangky and Lande* (unreported, NTSC, Riley CJ, 18 January 2011), not followed
*Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10, cited

COUNSEL: A J MacSporran SC, with M J McCarthy, for the appellant
W J Abraham QC, with J N Hanna, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** On 3 November 2011, the appellant was convicted on his plea of guilty in the District Court to an offence against s 232A(1) of the *Migration Act* 1958 (Cth) that he facilitated the bringing or coming to Australia of a group of five or more people who were non-citizens and who travelled to Australia without visas that were in effect, and he did so recklessly as to whether those people had a lawful right to come to Australia. On the following day the appellant was sentenced to the mandatory minimum penalty of five years imprisonment with a non-parole period of three years. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) it was declared that 604 days of pre-sentence custody between 11 March 2010 and 4 November 2011 were imprisonment already served under the sentence, which was ordered to commence from 11 March 2010.

[3] The appellant has appealed against his conviction on the ground that the primary judge erred in refusing to order a permanent stay of the proceedings as an abuse of process. He has also applied for leave to appeal against his sentence, on the grounds that s 233C of the *Migration Act* 1958 (Cth), which prescribes the mandatory minimum penalty for the offence, is not a valid law and that the sentence is manifestly excessive.

**Appeal against conviction**

[4] The indictment against the appellant charged the same offence against two alleged co-offenders who had pleaded guilty before the appellant applied for a stay of the proceedings against him. His application for a stay was heard together with an application for the same relief by a third alleged co-offender, Da Costa, who was charged with the same offence by a separate indictment. The applications were heard between 31 October and 3 November 2011. The primary judge ruled against the applications on 3 November 2011. The appellant then applied for and was granted a short adjournment to enable him to give instructions to his counsel. When the hearing resumed, the appellant and Da Costa were then arraigned and each entered pleas of guilty.

[5] The appellant did not give or call evidence in the stay application. The respondent called two Sri Lankan men, Messrs Perinbaraja and Thangarasa, who had travelled from Indonesia to Australia on a small fishing boat, the *Putri*, on which the appellant, an Indonesian, was a member of the crew. That fishing boat became known to the Royal Australian Navy as "SIEV 114". The respondent also called two naval officers who were onboard the patrol boat HMAS Glenelg when it intercepted the *Putri* on its way to Australia. Lieutenant Commander Williams was the commanding officer and Lieutenant Dallison was the officer who led the boarding party.

[6] The primary judge recorded some matters which became common ground between the parties:

> "• A small fishing vessel carrying eight Sri Lankan asylum seekers and four Indonesians, including the two defendants, said to be crew, was intercepted by the Australian Navy vessel HMAS Glenelg in the Australian Exclusion Economic Zone on the 11th of March 2010 at about 7 p.m.
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> • A boarding was carried out pursuant to powers under the Australian Fisheries Management Act 1991. Before the boarding the ship turned on its lights and identified itself with a series of siren blasts and loudspeaker announcements. The announcements identified the Glenelg as an Australian war ship and called upon the fishing vessel to stop.
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> • The boarding crew wore camouflage clothing and helmets with lights, and carried sidearms. There is no suggestion that weapons were presented. Upon inspection, the boarding officer, Lieutenant Dallisson quickly determined that the vessel was not being used for fishing and, consequently, any available powers under the Act were then exhausted.

- The boarding officer was informed by the Master of the fishing vessel that the vessel had departed Indonesia and the intended destination was Australia.
- The Master of the fishing vessel requested assistance.
- There was no power to detain or arrest any person on the vessel.
- The boarding officer was ordered to transfer the persons on the fishing vessel to the Glenelg. The boarding officer told those on the vessel that they were being transferred to the Glenelg and the transfer was carried out.
- Those on the vessel were not informed that they had the choice of remaining on the fishing vessel and travelling on.
- The Glenelg travelled onto Australia, firstly, to Ashmore Reef and then onto Christmas Island. The eight Sri Lankans have been treated as asylum seekers and the four Indonesians have been prosecuted for the offence referred to."

[7] It was submitted to the primary judge on behalf of the appellant that the indictment against him should be stayed because he was brought into the jurisdiction otherwise than in accordance with the applicable laws as a result of serious breaches of his fundamental rights; that when that conduct was balanced against the seriousness of the offence alleged against the appellant, the proper conclusion was that the conduct of the authorities should not be tolerated and the indictment should be stayed. The alleged breaches of the appellant's fundamental rights were submitted to arise out of the circumstances in which the *Putri* was boarded. His consent to being transferred from the *Putri* to the *Glenelg* was required by law (as Lieutenant Commander Williams acknowledged in evidence) but was not obtained. It was submitted that, because the boarding officer directed all of the passengers on the *Putri* that they were being transferred out of it and into the *Glenelg* and those on the *Putri* were not told that they were free not to transfer to the *Glenelg*, the appellant must have understood that he had no choice but to comply.

[8] For the respondent, it was submitted that the evidence revealed that the naval officers acted properly in rescuing the occupants of the *Putri*. The *Putri* was in very poor condition, with water leaking in through cracks in the hull, and with termites and borers in the wood making it soft and crumbly. The boat was short of fuel, it was night time, and the wind was coming on to blow. The master of the *Putri* requested assistance, he consented to going onboard the *Glenelg*, and he subsequently consented to the destruction of the *Putri*. The naval officers believed that the condition of that boat posed a serious risk to all those on board. They believed that the direction to transfer to the *Glenelg* was appropriate in the interests of the safety of all of those onboard the *Putri*. No one sought to resist the direction to transfer to the *Glenelg* or indicated that they did not want to do so. It was submitted that it should be inferred that all of the occupants of the *Putri*, including the appellant, consented to being transferred to the *Glenelg*. Alternatively, it was submitted that, if the appellant did not consent, it should be inferred that the naval personnel believed that the appellant and the other occupants of the *Putri* consented to the transfer and believed that they were acting properly.

[9] The primary judge held that it was likely that the appellant believed that he had no choice but to transfer to the *Glenelg*. The primary judge accepted that the master of

the *Putri* asked for assistance from the naval vessel and that request was not a request for fuel or other provisions. All relevant naval personnel believed that none of the occupants of the *Putri* wanted to stay on that fishing vessel and all of them wanted to transfer to the *Glenelg*. All relevant naval personnel acted in what they thought were the best interests of all of the occupants of the *Putri*; from their perspective, this was a rescue from an unseaworthy vessel in circumstances in which the safety of the occupants was at real risk. The primary judge observed that any failure to inform the appellant of his choice to remain on the *Putri* was not deliberate and found as follows:

> "The failure occurred in the context of a rescue at sea at night with the conditions starting to blow up. Indeed, it seems to me that it occurred in the context that the relevant naval officers perceived it as plainly obvious that all on board the fishing vessel would want to escape the serious risk to life in continuing to travel on the fishing vessel.
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> It also occurred in the context that the vessel was destined for Australia. It also occurred in the context that the master of the fishing vessel had requested assistance. Indeed, it seems to me that the overall impression would have been that there was a general desire to get off the fishing vessel and travel on the Australian ship, inevitably, to Australia."

[10] The primary judge accepted the submission for the appellant that the naval officers' failure to dispel the notion that the appellant had no choice but to transfer to the *Glenelg* had serious consequences for him, in that he was consequently brought within the jurisdiction and was being prosecuted for a serious criminal offence. The primary judge found that the failure was not deliberate and that the circumstances in which the failure occurred reduced the degree of negligence in that failure. After referring to a passage in the judgment of Holmes JA in *R v Moti*[1] the primary judge held that the conduct complained of by the appellant did not amount to an abuse of the court's process.

[11] The appellant's argument in this Court was to the effect that his conviction should be set aside because the prosecution should have been stayed before he was called upon to plead. The appellant's senior counsel referred to a decision in which the Court left open the question whether the refusal of a stay may be pursued as a ground of appeal against conviction upon a subsequent plea of guilty.[2] He argued that the appellant had suffered a miscarriage of justice because the primary judge had erred in refusing the stay. The Court was also referred to a decision in which, on an appeal against conviction after a trial, it was held that the appellant's guilt of the offence did not preclude an order staying the proceedings as an abuse of process, since "certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice".[3]

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1 [2010] QCA 178.

2 *R v C* [2002] QCA 156 at [7], [30], with reference to s 592A(4) of the *Criminal Code* (see now s 590AA(4)).

3 *R v Mullen* [2000] QB 520 at 534, referring to Lord Lowry's speech in *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42 at 76. The question was whether a conviction after a trial which should have been stayed as an abuse of process of this character was "unsafe", within the meaning of that term in s 2 of the *Criminal Appeal Act* 1968.

[12] The appellant did not challenge the primary judge's findings that the relevant naval personnel believed both that no one wanted to stay on the *Putri* and that all wanted to transfer to the *Glenelg*, but the appellant argued that the naval officers had unlawfully detained the appellant in removing him from the *Putri* to the *Glenelg*. It was submitted that the detention was unlawful because the *Putri* was then beyond the outer limit of the Australian Contiguous Zone and those on the boat were entitled to navigate those waters in the absence of any breach of Australian law with respect to natural resources. Senior counsel for the appellant submitted that instead of detaining the appellant and taking him to Australia, the naval officers could have assisted the appellant to return to Indonesia. It was submitted that the appellant's transportation to Christmas Island was outside the procedures for the lawful arrests and extradition of persons alleged to have committed offences of the kind charged in the indictment, and for that reason the court should not tolerate any further proceedings.[4]

[13] The appellant submitted that the power to stay the proceedings for an abuse of process arose regardless whether the unlawful conduct of the naval officers in bringing the appellant within the jurisdiction was merely negligent or whether it was deliberate. For this submission a passage in the reasons of Kirby J in *Truong v The Queen*[5] was cited:

> "[a stay] extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of".

[14] Senior counsel for the appellant submitted that the primary judge placed too much weight on his findings that the naval officers' failures were not deliberate and erred by relying upon the decision of this Court in *R v Moti*.[6] That decision was overruled by the High Court, and the majority justices observed that authorities in relation to the question whether criminal proceedings in a country to which an accused person has been moved without resort to extradition procedures should be stayed should not be read "as confining attention to whether any act of an Australian Government official constituted participation in criminal wrongdoing, whether as an aider and abettor or as someone knowingly concerned in the wrongdoing. And the use of words like 'connivance', 'collusion' and 'participation' should not be permitted to confine attention in that way".[7] It was submitted that the primary judge placed too much weight on the fact that the passengers onboard the *Putri* were destined for Australia, wrongly took into account that, but for the impugned acts of the naval officers, the appellant would still have arrived in the jurisdiction and been detained (that was submitted to be contrary to *R v Mullen*[8]), and erred in failing to find that the negligent failures of the naval officers resulted in a serious breach of the appellant's fundamental rights which should not be sanctioned by the court.

[15] It was submitted for the respondent that the appellant did not fulfil his onus of proving the ground of his application for a stay that the relevant conduct of the

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4 The appellant cited *R v Horseferry Road Magistrates Court; Ex parte Bennett* [1994] 1 AC 42.
5 (2004) 223 CLR 122 at [135].
6 [2010] QCA 178.
7 *Moti v The Queen* [2011] HCA 50 at [60].
8 [2000] QB 520 at 536.

naval officers was unlawful. The respondent submitted that the transfer of the occupants of the *Putri* to the *Glenelg* was lawful under, and indeed required by, international law; that the transfer of the appellant to Christmas Island was not unlawful; that the appellant was not detained by the navy; and that the primary judge did not find that he was. The respondent submitted that there was no evidence that the appellant did not consent to being transferred to the *Glenelg* and that the primary judge's conclusion was to the contrary. (The primary judge found in that respect that "… all relevant naval personnel genuinely believed that no one wanted to stay on the fishing vessel and that all wanted to transfer to the *Glenelg*. There is ample support for this view.") The respondent contended that there was also no basis in the evidence for the submission that the appellant was brought within the jurisdiction as a consequence of the negligence of the naval officers in failing to dispel any notion that the appellant did not have a choice.

*Consideration*

[16] The submission for the appellant that steps could have been taken by the naval officers to assist the appellant to return to Indonesia was based upon Lieutenant Commander Williams' answer to a question in re-examination. He said that he had been involved in other boardings where the Indonesian crew had refused to leave their boat outside the contiguous zone and they had been left on their boat and given a safety escort back to Indonesian waters. This is a different case. The primary judge found that the appellant did not believe that he had any choice but to transfer to the *Glenelg* and that the naval officers failed to dispel that notion, but his Honour did not find that the appellant did not wish to leave the *Putri* or that he did not consent to being taken onboard the *Glenelg*. Nor is there any finding that the naval officers detained the appellant without his consent on the *Glenelg* whilst the appellant was brought into Australian waters on that ship.

[17] The appellant bore the onus of proving his contention that the conduct of the naval officers was unlawful.[9] He did not obtain any finding to that effect and the evidence did not justify any such finding. It is not open to serious dispute that the appellant, in common with the other occupants of the *Putri*, was in need of the rescue which the naval officers accomplished. That was the opinion of the naval officers, whose expertise on this topic was not challenged, and the bases of that opinion were clearly laid out in their evidence. The appellant found himself in a leaking boat short of fuel and a great distance from land, with the wind coming on to blow during the night. Lieutenant Dallison gave evidence that when he boarded the *Putri* they were about 138 nautical miles from the nearest land. He found only about 20 litres of diesel fuel, which would be consumed by the *Putri* in travelling a maximum of about 20 nautical miles. There were no lifejackets or any other safety equipment. There were only about five litres of water and there was also a shortage of food.

[18] Mr Perinbaraja gave evidence that he was willing to transfer from the *Putri* to the *Glenelg* because he wanted to go to another country and, more relevantly, because of the state of the *Putri*. He said that it "seemed to be quite damaged, seemed old, rickety and was constantly swaying, shaking, in fact, a lot of times I thought we'd drown. In fact, I remember crying a lot when I was on the boat." Similarly, Mr Thagarasa gave evidence that he decided to transfer to the *Glenelg*

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9 See *Truong v The Queen* (2004) 223 CLR 122at [96] (Gummow and Callinan JJ).

because "I was afraid of dying because…the seas were heavy and I thought I would be tossed over. I was sure I was not going to survive so I was very grateful to go with them on the big ship." Both witnesses also gave evidence that they did not see anyone indicate that they did not want to go onto the navy ship and that, when they were told they were to be taken to Christmas Island, they did not see anyone indicate that they did not want to stay on the navy boat.

[19] Lieutenant Dallison also gave evidence that he did not see any of the occupants of the *Putri* indicate in any way that they did not want to go with him to the *Glenelg* and no one asked to stay on the *Putri* or subsequently to return to it from the *Glenelg*. None of the crew of the *Putri* asked Lieutenant Dallison for fuel to continue their voyage and no one said they wanted to continue the voyage on that boat. No one expressed the desire to continue on the voyage with a fresh load of fuel. He gave evidence that when the occupants of the *Putri* were brought on board the *Glenelg* they were made comfortable and that they were not under any form of arrest or detention. Lieutenant Dallison himself made sure that they were comfortable and that their health and welfare were being looked after. None of the occupants of the *Putri* expressed any desire to stay on or return to the *Putri*.

[20] In cross-examination of Lieutenant Commander Williams, he disagreed with the suggestion that he was unaware whether individual Indonesian crew members had requested assistance from his vessel. He responded that:

> "They did. They stated they wanted to get to Australia and at no point did they express the desire to return to their vessel and indeed they were free to go back to their vessel at any time. As a matter of fact we went back to the vessel, the master of the vessel requested his toolbox and that request was passed on and his toolbox was retrieved from the vessel. ..."

[21] This evidence did not attribute any particular statement or state of mind to the appellant but it formed part of the evidence which compelled the conclusion that the naval officers both believed that they were rescuing, and in fact were rescuing, all of the occupants of the *Putri*, including the appellant, from their obviously dangerous predicament. There is no evidence that the appellant did not wish to be rescued, that he did not consent to being transferred to the *Glenelg*, or that he did not consent to be taken to Australia on the *Glenelg*. The primary judge's findings that the naval officers omitted to inform the appellant that he had a choice to stay on the *Putri* and that he believed that he had no choice in the matter do not justify a conclusion that the appellant did not consent to being transferred to the *Glenelg* or that he did not consent to being taken on that vessel to Australia.

[22] As was submitted for the appellant, he was legally entitled to remain on board the *Putri* unless and until the naval officers were empowered by law to detain him. The respondent did not challenge that proposition, but it was in issue whether the naval officers detained the appellant, rather than merely rescuing him and transferring him to a safe landfall within Australia with his consent. I accept the submission for the respondent that the naval officers acted to ensure compliance with international conventions which obliged Australia, as a member State, to render assistance to

vessels and persons in distress at sea.[10] The respondent also submitted that, having rescued the appellant and the other occupants of the *Putri*, the navy had an obligation to care for their ongoing needs and to deliver them to a port of safety.[11] That may be so, but in any event there is no finding, and the evidence does not justify any finding, that the appellant was detained on the *Glenelg* and taken to Christmas Island against his wishes or without his consent. There is no basis in the evidence for holding, and the primary judge did not hold, that the appellant was unlawfully brought within the jurisdiction.

[23] This case is unlike *R v Moti*[12], in which it was found that Australian officials had knowingly facilitated the deportation to Australia of an accused person when the deportation was unlawful and the Australian officials did not believe that it was lawful. There are no similar facts here. Nor did the primary judge's reference to this Court's decision in *Moti* evidence any error in approach. The primary judge referred only to the quotation by Holmes JA of the well known passage from the judgment of Richmond P in *Moevao v Department of Labour*,[13] which emphasised the importance of focussing upon the question whether the case was "truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of."

[24] If, contrary to my own opinion, it is assumed that unlawful or negligent conduct of the naval officers resulted in the appellant being brought within the jurisdiction, the absence of deliberate unlawfulness and gross negligence by the naval officers were relevant considerations in the disposition of the stay application. Nothing to the contrary is suggested by the passage from the judgment of Kirby J in *Truong v The Queen* upon which the appellant relied. On that assumption, I am not persuaded that the appellant had established any error in the primary judge's approach to the exercise of the discretion such as justifies appellate intervention. However, I consider that the challenge to the primary judge's ruling fails for the more fundamental reason that the evidence does not support a finding that the appellant was brought within the jurisdiction as a result of any unlawful or improper conduct of the naval officers.

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10 The respondent referred to United Nations Convention on the Law of the Sea ("UNCLOS") (Australian Treaty Series 1994, No 31) Article 98 which relevantly provides that: " 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost….2. Every coastal State shall promote the establishment, operation, and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose"; the 1974 International Convention on the Safety of Lift at Sea ("SOLAS") (Australian treaty Series 1983 No. 22) Annex, Chapter V, Regulation 15(a) relevantly provides "Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts."; the International Convention on Maritime Search and Rescue 1979 (Australian Treaty Series 1986 No. 29) relevantly provides "2.1.1 Parties shall ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts ... 2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found".

11 The respondent cited UNHCR Executive Committee Conclusion No. 23 (XXXII) – Problems Related to the Rescue of Asylum-Seekers in Distress at Sea.

12 [2010] QCA 178 at [28].

13 [1980] 1 NZLR 464 at 470-471.

[25] Even if, contrary to my opinion, the stay should have been granted, there is a substantial argument that the appeal against conviction should nevertheless fail because the conviction was soundly based upon the appellant's plea of guilty. A pre-trial ruling, including the refusal of a stay, "…may be raised as a ground of appeal against conviction or sentence".[14] It was not submitted that a successful challenge to the refusal of any interlocutory ruling necessarily justifies the setting aside of a conviction, but a conviction will be set aside on appeal if there has been a miscarriage of justice in terms of s 668E(1) of the *Criminal Code* (Qld). An appeal against conviction on that ground may be pursued despite the appellant having pleaded guilty if such a miscarriage of justice has occurred, but the appeal will succeed only in unusual circumstances.[15] That was not contentious in this appeal, and it was also not contentious that, in order to decide whether there has been a miscarriage of justice it is necessary to examine all of the relevant circumstances of the particular case.[16]

[26] In this case, the appellant was represented by counsel throughout. The record demonstrates that he elected to plead guilty after he availed himself of the opportunity to obtain legal advice once his application for a stay was refused. It was not suggested that the appellant was not of full age and of sound mind and understanding. The onus lay upon him to establish the miscarriage of justice for which he contended,[17] but he did not give evidence in his application for a stay or in his appeal. There is no evidence that his plea of guilty was other than voluntary and fully informed, and entered in the exercise of his own free choice. That is so whether or not his decision to plead guilty was influenced by any perceived practical consequences of pleading not guilty, such as the prospect that otherwise he might not be given the mandatory minimum sentence. There is no evidence whether that or any other consideration influenced the appellant's thinking.

[27] The ability of courts to proceed to conviction and sentence upon the faith of apparently voluntary and informed pleas of guilty entered in open court by accused persons of full age and sound mind and understanding in the exercise of a free choice is important to the due administration of justice.[18] There is a substantial case for holding that it would unduly undermine that aspect of the administration of justice to find that the mere refusal of a permanent stay of proceedings before a plea of guilty is entered itself constitutes a miscarriage of justice which requires the conviction to be set aside. However it is not necessary to reach a conclusion upon that issue.

**Sentence**

[28] In order to consider the appellant's application for leave to appeal against his sentence it is necessary to refer to relevant provisions of the *Migration Act* 1958 (Cth) in the form in which they were in when he committed the offence. Section 232A(1) provided:

> "232A Organising bringing groups of non-citizens into Australia
> (1) A person who:

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14 *Criminal Code* (Qld), s 590AA(2)(a), (3), (4).

15 *R v Wade* [2011] QCA 289; *R v Carkeet* [2009] 1 Qd R 190; *Borsa v The Queen* [2003] WASCA 254 at [20].

16 *R v Wade* at [52].

17 *R v Wade* [2011] QCA 289 at [42]; *R v Gadaloff* [1999] QCA 286 at [4].

18 See *Meissner v The Queen* (1995) 184 CLR 132, especially at 148 per Deane J.

(a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
(b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;

is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both."

[29] Section 233B precluded the court from making an order for the discharge of an offender without proceeding to conviction for an offence against s 232A, unless it is established on the balance of probabilities that the person charged was under 18 years of age when the offence was alleged to have been committed. Section 233C provided:

"233C Mandatory penalties for certain offences

(1) This section applies if a person is convicted of an offence under section 232A or 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.

(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 IB 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."

[30] Because the appellant's offence was not a "repeat offence", the effect of s 233C(2) and (3) was that the court was obliged to sentence the appellant to a sentence of imprisonment of at least five years with a non-parole period of at least three years. Accordingly, the effect of these provisions was that the range of permissible sentences for the appellant's offence against s 232A(1) was between five years

imprisonment, with a non-parole period of three years, and 20 years imprisonment together with a fine of 2,000 penalty units.

[31] It was submitted for the appellant that s 233C was not a valid law because it impermissibly interfered with the judicial sentencing discretion in a manner that distorted the institutional integrity guaranteed for all State courts by Chapter III of the Commonwealth Constitution. Reference was made to *Kable v Director of Public Prosecutions (NSW)*[19] and *Forge v Australian Securities and Investments Commission*.[20] Those decisions, which relevantly concern the validity of State legislation, do not bear upon the validity of the Commonwealth legislation in issue in this case. It is not easy to see how s 233C in any way undermines the institutional integrity of the State courts, and the appellant's senior counsel did not develop an argument to explain how it might do so.

[32] The appellant's senior counsel submitted that an inconsistency between s 233C and Chapter III arose because s 233C discriminated against "low level offenders" in favour of "higher level offenders". The vice in s 233C was said to be that the mandatory minimum penalty results in low level offenders' sentences being increased whereas sentences for higher levels of offending were not increased or were increased less significantly. In support of the proposition that this produced an inconsistency with Chapter III of the *Constitution*, the Court was referred to a variety of judicial statements about discriminatory laws in very different contexts, including statements by Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v Australia*[21] and by Gaudron J in *Street v Queensland Bar Association*.[22] The first described discrimination as involving "the unequal treatment of equals and the equal treatment of unequals", and the second identified a law as discriminatory if it operates "by reference to a distinction which is in fact irrelevant to the object to be attained…[or]…the different treatment…is not appropriate and adapted to the difference or differences which support that distinction…". Similarly, in *Cameron v The Queen*,[23] Gaudron, Gummow and Callinan JJ referred to the differential treatment of persons who pleaded guilty and those who did not plead guilty as "the product of a distinction which is appropriate and adapted to the attainment of a proper objective…the facilitation of the course of justice…" The respondent contested the proposition that the mandatory minimum provisions resulted in increases in low level offenders' sentences which were disproportionately high compared to the sentences for higher level offenders and the proposition that s 233C might be held to be invalid on that account.

[33] It is necessary first to consider whether the legislation does produce the "discrimination" for which the appellant contended. That depends upon its proper construction.

[34] In *R v Pot, Wetangky and Lande*,[24] Riley CJ held that the correct approach was to determine the appropriate penalty in accordance with general sentencing principles and, if that produced a sentence which was less severe than the minimum mandatory penalty, to impose the mandatory minimum. That decision was not followed in

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19 (1996) 189 CLR 51.
20 (2006) 228 CLR 45 at [63].
21 (1990) 169 CLR 436 at 478-479.
22 (1989) 88 ALR 321 at 395-396.
23 (2002) 209 CLR 339.
24 Unreported, Northern Territory Supreme Court, 18 January 2011 (Riley CJ).

*Bahar v The Queen*,[25] in which McLure P, with whose reasons Martin CJ and Mazza J agreed, formulated the following principles:[26]

> "The statutory language makes it unequivocally clear that the Commonwealth Parliament intended to deprive a judicial officer sentencing an offender for a breach of s 232A of both the power to impose a non-custodial sentence and the power to impose a sentence of less than 5 years. Thus, s 233C is positively inconsistent with s 17A of the *Crimes Act* which requires that consideration be given to different types of sentence. However, the later, specific provision (s 233C) must prevail.
>
> Otherwise, there is no positive inconsistency in terms between s 233C and the general sentencing principles in the *Crimes Act* as supplemented by common law principles. In particular, the sentencing principles are intentionally framed at a level of generality for application within the boundaries of power established not only by the maximum statutory penalty but also the minimum statutory penalty. The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1). It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the 'just and appropriate' sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a 'just and appropriate' sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. The statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied.
>
> The suggestion by the Crown to the sentencing judge that the mandatory minimum is for a low level offence in which all mitigating factors are present reflects a lack of understanding of the sentencing process. First, the minimum penalty is for offences within the least serious category of offending and the maximum penalty is for offences within the worst category of offending. I emphasise 'category' of offending. There is no single instance at either extreme. Secondly, whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender. As I have explained above, a sentencing outcome (the ' bottom line') is not dictated by the presence or absence of one or more mitigating factors.
>
> Thirdly, as this court has previously recognised, a mandatory minimum term of imprisonment can create complications for reductions in sentence for mitigatory factors. For example, on occasions it will not be possible to allow a usual discount for a mitigatory factor, such as a plea of guilty: *Teakle v The State of Western Australia* (2007) 33 WAR 188 [19]. As Wheeler JA

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25 [2011] WASCA 249 at [56].

26 [2011] WASCA 249 at [53] – [58].

explained in *Atherden v The State of Western Australia* [2010] WASCA 33:

> [I]n relation to at least some offences which fall towards the lower end of the range of culpability, the presence of a minimum term makes it impossible for a sentencing judge to apply the quantum of discount for a plea of guilty which he or she would ordinarily apply, because to do so would mean that the sentence imposed would fall below the statutory minimum. Where an offence is right at the bottom of the range of culpability, it may be that no discount at all can be given, for the same reason.
>
> However, I do not think it follows that the principles governing the awarding of a discount for a plea of guilty cease to apply in cases where there is a statutory minimum term. Rather, the result will be that there is a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability.

These considerations will have a flow on effect on the application of the parity principle.

Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate. The sentencing judge in this case did not err in refusing to identify a starting point at some level above the mandatory minimum so as to enable discounts for common mitigating factors. The sentencing judge was correct to reject the Crown's submission that he should do so. To choose a starting point at a sufficiently high level solely for the purpose of accommodating reductions for all potential mitigating factors offends the proportionality principle and treats the mere absence of mitigating factors as having an aggravating effect. In any event, the two-stage approach to sentencing is not supported by the High Court: *Markarian* (378); *Muldrock* [26]."

[35] The submission for the appellant that s 233C results in a "compression of sentences" in a way which inappropriately discriminates against low level offenders was ultimately based upon three paragraphs in Wheeler JA's reasons in *Atherden v The State of Western Australia*.[27] The first two paragraphs were incorporated in

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[27] [2010] WASCA 33 at [42] – [44]. The case concerned the sentencing principles relating to a discount for a plea of guilty to an offence of murder under s 279(4) of the *Criminal Code* (WA). Section 90 of the *Sentencing Act* 1995 (WA) required, for a sentence of life imprisonment, that the court either set a minimum period of at least ten years to be served by the offender before being eligible for release on parole or that the court order that the offender must never be released.

McLure P's reasons in *Bahar* in the passage just quoted. In the third paragraph, Wheeler JA observed:

> "While such compression may engender some feeling of grievance in those offenders whose culpability is at the bottom end of the range, and who receive no discount for even the earliest plea of guilty, the result does not seem to me to be so unreasonable as to implicitly require departure from the general principles governing discounts for pleas of guilty. Sentencing is not an exact science, and there is not, in every case, a smooth, linear progression of sentence, with sentences gradually increasing in a manner which is proportionate to the gravity of the crime: see, for example, *The State of Western Australia v BLM* [2009] WASCA 88; (2009) 256 ALR 129."

[36] In *R v Karabi*[28] this Court held that the correct approach to sentencing for an offence against s 232A(1) was as set out in [53] – [55] of McLure P's reasons in *Bahar v The Queen*, but the Court did not refer to [56], in which McLure P quoted paragraphs from *Atherden v The State of Western Australia* upon which the appellant's argument was based.

[37] To summarise the position, *R v Karabi* adopted the principles expressed in *Bahar v The Queen* that "the statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied",[29] "the minimum penalty is for offences within the least serious category of offending and the maximum penalty is for offences within the worst category of offending"[30], and "whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender."[31]

[38] In *Veen v The Queen [No 2]*,[32] Mason CJ, Brennan, Dawson and Toohey JJ referred to the principle that a prescribed maximum penalty is intended for the "worst category of cases for which that penalty is prescribed", observing that a sentence which imposes the maximum penalty offends that principle only if the case is "recognizably outside the worst category". It follows that, within the "worst category", one offender might be given the same penalty for offending which is more or less serious than offending by a different offender. The sentencing principles expressed in *Bahar v The Queen* and adopted in *R v Karabi* treat statutory maximum and minimum penalties as being alike in this respect. Perhaps the "compression of sentences towards the lower end of the range" to which Wheeler JA referred in *Atherden v The State of Western Australia* should merely be regarded as a reflection of that conventional categorisation of offences. But whether or not that is so, I respectfully observe that the application of those sentencing principles should not produce a range of sentences which involves any significant "compression" attributable to a difficulty in allowing for a discount for a plea of guilty. Matters which are "personal to the offender" and justify a discount in the

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28 [2012] QCA 47 at [34] – [36] per Muir JA, myself and Chesterman JA agreeing.
29 *Bahar v The Queen* [2011] WASCA 249 at [54].
30 *Bahar v The Queen* [2011] WASCA 249 at [55].
31 *Bahar v The Queen* [2011] WASCA 249 at [55].
32 (1988) 164 CLR 465 at 478.

sentence comprehend a plea of guilty, insofar as the plea reflects a willingness to facilitate the course of justice, remorse, and acceptance of responsibility.[33] If the significance of a plea might be thought to extend beyond matters personal to the offender, for example if it is treated as having a purely utilitarian value which justifies a discount in the sentence, the principle expressed in *Bahar v The Queen* that all relevant sentencing considerations are to be taken into account in deciding whether an offence falls within the least serious category allows reference to a plea of guilty, just as it allows reference to all other relevant considerations.

[39] The appellant's senior counsel referred to Mason CJ, Dawson and McHugh JJ's observation in *Leeth v The Queen*[34] that, "[t]he sentencing of offenders, including in modern times the fixing of a minimum term of imprisonment, is as clear an example of the exercise of judicial power as is possible." This statement supplies no support for the appellant's proposition that s 233C is invalid. The law in issue was s 4(1)(a) of the *Commonwealth Prisoners Act* 1967 (Cth). It required Federal and State/Territory Courts sentencing offenders to imprisonment for federal offences to fix, as the non-parole period, such lesser term during which the offender would not be eligible to be released on parole if the offender was instead being sentenced to a like term of imprisonment under the law of the State or Territory where the offender was convicted. The quoted statement immediately followed a statement that s 4 did not require the sentencing Court to perform a function which could be described as non-judicial. Mason CJ, Dawson and McHugh JJ went on to observe that, whilst it was desirable that like offenders should be treated in a like manner, the application of that principle could not be expressed in absolute terms but "requires the determination of the categories within which equal treatment is to be measured." Their Honours concluded that there was "…no departure from the judicial function if a court within our federal system is required, in fixing the minimum term of imprisonment of a federal offender, to have regard to those matters to which it would have regard if the law of the State in which the offender was convicted were applicable."[35] Brennan J similarly found that s 4 "…exhibits no incompatibility with the vesting of judicial power to be exercised in passing a sentence which fixes a minimum term."[36] Those conclusions are not readily reconcilable with the appellant's argument.

[40] The appellant particularly relied upon statements in the joint reasons of Deane and Toohey JJ and in Gaudron J's reasons. Deane and Toohey JJ considered that s 4(1) was invalid, not because it infringed Ch III of the Constitution, but because the subsection "…discriminated in a way which was inconsistent with the doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts."[37] Their Honours said that the doctrine was not infringed by a law which discriminated on grounds which were "reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment".[38] Gaudron J referred to the concept that all are "equal before the law" and to the concept of "equal justice" as requiring both "the like treatment of like persons in like circumstances" and that genuine differences be treated as such. Her Honour considered that s 4(1) was invalid because, since it varied in nature and content

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33 *Cameron v The Queen* (2002) 209 CLR 339 at 343[13] per Gaudron, Gummow and Callinan JJ.
34 (1992) 174 CLR 455 at 470.
35 (1992) 174 CLR 455 at 471.
36 (1992) 174 CLR 455 at 479.
37 (1992) 174 CLR 455 at 492.
38 (1992) 174 CLR 455 at 488.

according to the place of conviction rather than according to the nature of the offence or the circumstances of its commission, its exercise involved "a failure to treat like offences against the laws of the Commonwealth in a like manner and also a failure to give proper account to genuine differences" so that it was discriminatory and inconsistent with the judicial process.[39]

[41] However s 233C of the *Migration Act* does not contain any feature which is analogous to the aspects of s 4(1) of the *Commonwealth Prisoners Act* 1967 to which Deane, Toohey and Gaudron JJ referred. Furthermore, their Honours were in dissent in *Leeth*. It was submitted that their observations about discriminatory laws were consistent with views expressed by Brennan J, but his Honour's reasons are consistent only with the conclusion that a federal law which prescribes a maximum penalty for an offence against that law is not invalid on the ground relied upon by the appellant in this case. In addition to the observation quoted earlier, Brennan J observed that "[t]he maximum penalties prescribed for offences determine the extent of the judicial power to send an offender to prison and the corresponding liability of an offender to be sent to prison" [40] and that "[t]he legislative power to enact ss 4 and 5 of the C*ommonwealth Prisoners Act* is an aspect of a power to create offences and to prescribe penalties for their commission and the means by which those penalties should be borne and discharged…is to be found in the respective heads of power under which offences against the laws of the Commonwealth can be created…" [41] And the appellant's argument also encounters the rather significant obstacle that in *Kruger v The Commonwealth*[42] the High Court rejected an argument, similar to that now advanced for the appellant, that there is a constitutional implication of equality in the operation of laws administered by courts created by or under Chapter III of the *Constitution*.

[42] In any case, even if, contrary to my own opinion, s 233C of the *Migration Act* is apt to produce a "compression" of sentences at the lower end of the range of sentences which results in significant discrimination between "low level" and "higher level offenders", it is not open to an intermediate appellate court to hold that it is beyond the legislative power of the Commonwealth on that account. In *Palling v Corfield*[43] the High Court found no substance in a proposition that legislation which fixed a penalty for a federal offence and left no judicial discretion at all in the matter of punishment was beyond the power of the Parliament.[44] That legislation obviously produced much more significant "discrimination" between "low level" and "higher level" offenders than might result from the application of s 233C.

[43] The proposed appeal against sentence must fail because the appellant was given the minimum sentence permitted by law.

**Proposed orders**

[44] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

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39 (1992) 174 CLR 455 at 502 – 503.

40 (1992) 174 CLR 455 at 475.

41 (1992) 174 CLR 455 at 479.

42 (1997) 190 CLR 1 at 68 (Dawson J), 112 (Gaudron J), 141 – 142 (McHugh J), 153 – 155 (Gummow J).

43 (1970) 123 CLR 52.

44 See per Barwick CJ at 58, per Menzies J at 64 – 65, per Owen J at 67, and per Walsh J at 68. See also *Wynbyne v Marshall* (1997) 117 NTR 11 (special leave refused: [1998] HCA Trans 191), *R v Ironside* (2009) 104 SASR 54, and *R v Barnett* (2009) 198 A Crim R 251.

[45] **ANN LYONS J:** I agree with the reasons of Fraser JA and with the proposed orders.