SUPREME COURT OF QUEENSLAND

CITATION:	*R v Selu; ex parte Cth DPP* [2012] QCA 345
PARTIES:	**R** **v** **SELU, Niko** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 210 of 2012 SC No 298 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Cth DPP
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2012
JUDGES:	Margaret McMurdo P and Fraser JA and Boddice J Separate reasons for judgment of each member of the Court, Fraser JA and Boddice J concurring as to the orders made, Margaret McMurdo P dissenting
ORDER:	**Allow the appeal against sentence and vary the sentence imposed by substituting a non-parole period of four years for the non parole period of three years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to the offence of facilitating the bringing to Australia a group of five or more people who were non-citizens and did not have visas in effect – where the respondent was sentenced to six and a half years imprisonment with a non-parole period of three years – where the respondent had a prior conviction in Northern Territory for people smuggling in 2001 – whether the respondent's offence was a *repeat offence* under the (then) s 233C(4)(b) *Migration Act* 1958 (Cth) – whether the sentence was manifestly inadequate *Migration Act* 1958 (Cth), s 232A, s 233C

Atherden v The State of Western Australia [2010] WASCA 33, distinguished
Bahar v The Queen (2011) 255 FLR 80; [2011] WASCA 249, discussed
Hili v The Queen (2010) 242 CLR 520, [2010] HCA 45, cited
R v Djoni (unreported, McMann DCJ, WA District Court, 17 September 2010), considered
R v Karabi [2012] QCA 47, considered
R v Latif; ex parte Cth DPP [2012] QCA 278, considered
R v Nitu [2012] QCA 224, followed
R v Pot, Wetangky and Lande (unreported, Riley CJ, NTSC, 18 January 2010), discussed
R v Ruha, Ruha and Harris; ex parte Director of Public Prosecutions (Cth) [2011] 2 Qd R 456; [2010] QCA 10, discussed
R v Syukur (unreported, Riley CJ, NTSC, 15 March 2011), considered

COUNSEL: W J Abraham QC, with J N Hanna, for the appellant
J M McInnes for the respondent

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

[1] **MARGARET McMURDO P:** The respondent, Niko Selu, was charged with Kial Henuk and Kasim Magang with facilitating bringing a group of non-citizens to Australia between about 20 February and 3 March 2010 under s 232A(1) *Migration Act* 1958 (Cth). Selu and Henuk pleaded guilty at the Brisbane Supreme Court on 7 March 2012. Magang pleaded not guilty and was convicted on 14 March after a six day trial. On 23 July 2012, Selu was sentenced to six and a half years imprisonment with a non-parole period of three years. The 874 days of presentence custody was declared to be time served under the sentence so that he is eligible for parole in March 2013. The appellant, the Commonwealth Director of Public Prosecutions has appealed against that sentence, contending it is manifestly inadequate.

[2] The maximum penalty is 20 years imprisonment and/or a fine of $220,000. If the offender is aged 18 or more (Selu was 64 at the time of his offending), the minimum penalty is five years imprisonment with a non-parole period of three years.[1]

The statement of facts

[3] The circumstances of Selu's offending were set out in a statement of facts tendered at his sentence.[2]

[4] Selu, Henuk, Magang and the 17 year old Charles Dollu crewed an Indonesian vessel, the *Sumbar Alam* which brought 45 Afghan and one Iranian asylum seekers from Indonesia to Australia. Selu was the captain and Henuk the mechanic.

[5] An RAAF aircraft detected them near Hibernia Reef, north-east of Ashmore Reef off the northern coast of Western Australia at 1.26 pm on 3 March 2010. The RAN

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1 *Migration Act* 1958 (Cth) s 233C (as it was at the relevant time).
2 Exhibit 1.

patrol boat *HMAS Glenelg* encountered them 6.1 nautical miles inside the Australian Contiguous Zone, and a boarding party took control of the vessel. Selu told navy interrogators that he did not know the name of the vessel and that his boss was called "Duul" or "Nuul" and had paid the crew to undertake the journey. The vessel had embarked from somewhere on Bali. He identified Henuk, Magang and Dollu as his crew.

[6] Navy personnel worked with Henuk, as ship's mechanic, to manage a slow water leak in the ship's engine room. Henuk had a more intimate knowledge of the vessel than Selu and told police he had been a crew member on the *Sumbar Alam* for about a year. The rest of the crew were strangers when they boarded. Customs officers found 6,565,500 Indonesian rupiah, 350 Pakistani rupee, 6 Malaysian rupee and $US500 in Selu's possession (in all, a little less than $A1,200). A further 14,439,000 Indonesian rupiah were found in Henuk's possession.

[7] The asylum seekers commenced their journeys from either Afghanistan or Pakistan before waiting in Indonesia for their voyage to Australia. They left from remote locations at night and were ferried by small boats to the *Sumbar Alam*. They were directed to stay below deck during the day and allowed above in small groups at night. The engine broke down during the voyage and stopped for two nights and a day. Henuk managed to restart it and the voyage continued, taking in all about seven days. Selu as captain did most of the steering. Henuk acted as the ship's mechanic but also helped steer. Magang assisted Selu and Henuk and did some cooking. Dollu assisted Selu and did some cooking.

[8] During an interview with Australian Federal Police officers with the assistance of an interpreter, Selu and Henuk claimed they were taking the passengers to Komodo in Indonesia when the passengers hijacked the vessel. Selu said he left home with 2,500,000 rupiah to purchase some medicine for himself when a man called Jabbal asked him to work on his fishing boat. Jabbal flew him to Bali on a chartered aircraft and took him to the *Sumbar Alam*. Jabbal did not instruct him to take charge but, as the other crew knew nothing, he did. Jabbal told him to take the passengers to Komodo. When they arrived, the passengers would not leave and took control of the vessel, saying they wanted it for a three month sight-seeing trip. They paid the crew 10 million rupiah for the three months. At the sentence hearing, the prosecution accepted Selu's account that he had his own money when recruited for the voyage.

[9] Selu was a 66 year old fisherman. He had a prior conviction for people smuggling in 2001 in the Northern Territory when Mildren J, whose sentencing remarks were tendered,[3] ordered he serve four years imprisonment with release after two years. As in the present case, Selu was the captain of that vessel and pleaded guilty. Mildren J noted he came from a poor family but stated that because of his age and experience of life he should have known better; deterrence was an important sentencing factor. With the aid of an interpreter, his Honour presciently told Selu and his then co-offenders:

> "[T]here is presently a new law which is about to be passed by the Australian Parliament and which will soon come into effect, which will mean that in cases such as this the courts will have no choice but to impose minimum sentences of at least eight years' imprisonment

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3 Exhibit 5.

> for those people who break this law and have already broken it once before.
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> That means that if any of you come back here again for this offence, you could well end up spending somewhere between 8 to 10 years in prison, and possibly longer. This new law will mean that even for first offenders there must be at least five years' gaol. So please, when you are released from gaol and go back home, tell everybody you know that the prison terms are now very severe and it is not worth it."

[10] Henuk pleaded guilty following an unsuccessful pretrial application. He was aged about 30 at sentence. He, too, had a previous conviction for people smuggling. As his was a more recent conviction than Selu's, the statutory minimum sentence, which he received, was eight years imprisonment with a non-parole period of five years.[4] Magang was 20 at the time of the offending and had no previous convictions. He was sentenced to the statutory minimum sentence applicable to those without convictions, five years imprisonment with a non-parole period of three years. Dollu was not charged as he was under 18 years.

The prosecutor's submissions at sentence

[11] The prosecutor at sentence emphasised that the statutory maximum and minimum penalties form the range within which the sentencing discretion is to be exercised. A sentence must be imposed which is of a severity appropriate in all the circumstances of the offence: s 16A(1), *Crimes Act* 1914 (Cth). General deterrence was important: s 16A(2) *Crimes Act*. This offending has a significant detrimental impact on the Australian public as it threatens the administration of Australia's immigration laws, formulated to deal with the orderly migration of non-citizens and refugees. Illegal immigration can bring safety and health risks and may result in unfairness to other refugees waiting elsewhere for lawful processing. Selu as captain played a significant role and he was much older than his co-offenders. The vessel was seaworthy and had sufficient life jackets for all passengers and sufficient food and water for the voyage. Selu indicated at a relatively early stage that he would plead guilty, a mitigating feature: s 16(2)(g) *Crimes Act*. He had a prior conviction for people smuggling so that he was aware of Australian migration laws. This brings into play the principle of personal deterrence. He was 66 years old at sentence and his previous conviction suggests he may re-offend. As he made a deliberate choice to re-offend, little weight should be attached to the inevitability of him serving his sentence away from family or community.

[12] A crew member actively participating in the international transportation of illegal immigrants to Australia would rarely be in the lowest level of objective offending without significant mitigating features. There was not yet any clear established range for repeat offenders like Selu. His role as captain suggested he should be sentenced more severely than other crew. He was held in presentence immigration detention for a total of 874 days. This period should be declared as time served under the sentence in accordance with s 159A *Penalties and Sentences Act* 1992 (Qld), applicable to federal offenders by way of s 16E(2) *Crimes Act*.

[13] At issue was the timing of Selu's prior conviction. Under s 233C(4)(b) *Migration Act* (as it was at the relevant time):

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4 See *Migration Act* 1958 (Cth) s 233C(4)(b) (as it was at the relevant time).

> "[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;
> … ."

[14] Selu's previous offence was committed between 15 and 18 April 2001. On 21 September 2001, he pleaded guilty in the Northern Territory Supreme Court but was not sentenced until 27 September 2001. Northern Territory law does not provide for the administration of an allocutus. The Northern Territory Criminal Code refers to "findings of guilt" and "judgment" rather than "conviction" and "sentence".[5] The amending Act introducing s 233C received Royal Assent on 27 September 2001 so that it is taken to commence at the end of 26 September 2001: *Acts Interpretation Act* 1901 (Cth), s 3. Mildren J sentenced Selu on the basis that the amending Act had not come into effect and the sentence was not constrained by the mandatory minimum sentence. Whilst setting out the competing argument, the prosecutor submitted, with the concurrence of defence counsel, that, for the purpose of s 233C(4), Selu was convicted on 21 September when Mildren J accepted and recorded the plea of guilty. The primary judge ruled that Selu was convicted on 21 September 2001 so that the present offence is not a repeat offence for the purpose of s 233C.

[15] In light of that ruling, the prosecutor submitted that Selu must be sentenced in the range between the minimum (five years imprisonment with a three year non-parole period) and the maximum (20 years imprisonment). A sentence significantly above the mandatory minimum was required to take into account his previous conviction, mature age and his role as captain. Selu and his crew may have received but a very small proportion of the total money paid by the asylum seekers but their role was significant as they undertook the ultimate leg of the journey.

Defence counsel's submissions at sentence

[16] Defence counsel at sentence made the following submissions. Although the penalty must be somewhere between the statutory minimum and the statutory maximum, an offender may be sentenced at or near the statutory minimum notwithstanding that the offending could be less serious. The question is whether the offending looked at as a whole is within the least serious category.

[17] Selu supported his 59 year old wife and the four of their 12 children who survived infancy, two of whom were still students. A member of his wife's family also lived with them in a relative's house which was soon to be demolished. He was concerned for his family's welfare but his contact with them had been limited since his apprehension. He was a subsistence fisherman earning between $A2.50 and $A10.00 a night. He did not own a vessel, and was educated only to grade 4 standard. He has type 2 diabetes and a heart problem. Prison medical records showed that he was taken by ambulance to hospital on 18 September 2010 with chest pain and diagnosed with gastro-oesophageal reflux disease.

[18] Defence counsel submitted that, despite Selu's previous conviction and plea of guilty, he was not an enthusiastic participant in this offending. He was manipulated and taken advantage of by others. He stood to gain very little and actually gained

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[5] See *Criminal Code Act* (NT), s 387 and cf *Criminal Code* 1899 (Qld), s 649.

nothing. His plea of guilty had saved the court from having to consider the validity of his apprehension in the Contiguous Zone which is not part of Australia's territorial sea.

[19] The effect of general deterrence was minimised by the limited communication between prisoners in Australia and their associates in Indonesia and by the long delay before they can personally deliver the deterrent message. The increasing number of offenders suggested that deterrent sentences were not working. Personal deterrence was relevant in Selu's case but his prior offending occurred nine years earlier. He was not a recidivist. The average male life expectancy in Indonesia is between 68 and 69 years and he was now 66 years old. The minimum mandatory sentence in this case (five years with a three year non-parole period) was a substantial increase over the four year sentence with release after two years that he received in 2001.

[20] The present offending occurred during an upsurge in asylum-seeking related to wars in which Australia was involved. This increased activity fuelled a demand for crews made up of people like Selu who were the "cannon fodder" for this industry, the overwhelming profits from which go to those who are rarely caught. Typically, those like Selu were left on board when the vessel was apprehended in Australian waters after the more culpable had safely disembarked with the profits. There was nothing particularly egregious or morally offensive about Selu's conduct. He was not involved in the organisation of the venture and his role was at a very low level of culpability rendering him liable only to the mandatory minimum sentence.

The prosecutor's reply

[21] In reply, the prosecutor emphasised that Selu's previous conviction meant that he clearly knew that he was participating in an illegal episode of smuggling people into Australia. Selu did co-operate by giving a record of interview but he and Henuk put forward a self-serving account which suggested collaboration. In *R v Djoni*[6] and *R v Karabi*[7] sentences of six and a half years imprisonment with a non-parole period of four years were imposed. These cases were useful in determining the sentencing range here.

[22] In response, the primary judge noted that:

> "[i]t may be said they show a range of, perhaps, five and a half to six and a half years. I acknowledge immediately it's a fairly limited number of cases but, nevertheless, it's some guide. Given his age I'm considering a fair amount of leniency on the non-parole period, his age and his state of health. Do you want to make any particular submission on that?
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> [PROSECUTOR]: Your Honour, only to say that five and a half years would be below the sentence imposed in any of those case[s]. He was dealt with on the last occasion on the basis that he was a man of mature age and I accept that he's only older now.
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> …
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> HIS HONOUR: You might have understood, it's implicit in what I was raising with you, … , that I might consider something towards

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6 Unreported, WA District Court, McMann DCJ, 17 September 2010.

7 [2012] QCA 47.

> the upper end of what I think might be the range as a head sentence with some leniency in the non-parole period.
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> [PROSECUTOR]: I should address something that my learned friend said in that regard, and that is about the proportion of head sentence to non-parole period, and I think your Honour referred to the fact that it's simply a matter of discretion in individual cases, there's no fixed rule-----
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> …
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> -----that you should have about two-thirds or anything like that, other than that, those are the statutory, the rough statutory proportions in the statutory minimums, and if there is, there are factors that would increase the head sentence above the lowest category of offending, the non-parole period should also be increased significantly above the minimum non-parole period as well for the same reasons.
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> …
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> HIS HONOUR: But, you see, the head sentence might reflect the need for general deterrence-----
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> …
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> -----whereas the non-parole period might reflect personal circumstances.
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> [PROSECUTOR]: Yes, your Honour."

The judge's sentencing remarks

[23] After setting out the facts of the offending and Selu's role, his Honour made the following observations in sentencing. The role of captain was of some importance in the venture but it was significantly less than that of the organisers. Selu had a previous conviction in 2001 for a similar offence. This demonstrated that he knew the unlawfulness of bringing people to Australia and he knew that he was at risk of a heavy sentence if caught. This suggested that desperation led him to reoffend. His Honour adverted to Selu's personal circumstances, including his poverty, his lack of family contact since his apprehension, and his ill-health.

[24] The judge noted that the sentences imposed in *Karabi*, *Djoni* and, to a lesser extent, *R v Syukur*[8] suggested that a head sentence of six or six and a half years may be appropriate. Those cases did not, however, confine his Honour's sentencing discretion: *Hili v The Queen*.[9] General and personal deterrence were relevant sentencing considerations, especially because of the prior offence albeit committed nine years earlier. The minimum sentence was five years with a non-parole period of three years. In all the circumstances, a sentence of six years and six months with a minimum non-parole period of three years should be imposed.

The appellant's contentions

[25] The appellant's contentions were as follows. The sentence was manifestly inadequate, only insofar as the judge imposed the minimum mandatory non-parole period of three years. This flows from Selu's previous conviction for people smuggling in 2001 and his role as captain. Those two factors placed his offending

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8 Unreported, Northern Territory Supreme Court, Riley CJ, 15 March 2011.

9 (2010) 242 CLR 520, 535-537 [48]-[55].

outside the least serious category for which the mandatory minimum sentence was appropriate. General deterrence was important: *Karabi*.[10] Personal deterrence was also relevant because of Selu's prior conviction: *Veen v The Queen [No 2]*.[11] The fact that Selu has offended out of desperation and that others in his circumstances may be tempted to do likewise underlines the need for a deterrent sentence.

[26] There was nothing in his personal circumstances to reduce an otherwise appropriate non-parole period. As captain undertaking most of the steering and navigation, he took on a higher level of responsibility for the criminal enterprise than his co-offenders. Mildren J rightly recognised this fact in sentencing him in 2001 and warned him of the dire consequences of re-offending. It was unjust for Selu to receive the same non-parole period as his considerably less culpable co-offender, Magang.

[27] The sentence imposed was not of a "severity appropriate in all the circumstances of the offence": s 16A(1) *Crimes Act*.

The respondent's contentions

[28] Counsel for the respondent contended that the sentence was appropriate. The six and a half year head sentence provided for a long period of imprisonment if Selu's hopes of parole are not fulfilled. It also placed him at jeopardy of revocation of his parole should he venture illegally into Australian waters in the future. The head sentence at the high end of the range appropriately recognised Selu's role as captain, his previous conviction and the need for both personal and general deterrence. The judge did not consider the offending was in the lowest category of seriousness and did not sentence Selu on that basis. The generous parole eligibility appropriately recognised the numerous mitigating features.

Conclusion

[29] The regime under which Selu had to be punished required a sentence between the statutory maximum, 20 years imprisonment (appropriate for the worst category of offending), and the statutory minimum, five years imprisonment with a three year non-parole period (appropriate for the least serious category of offending): *Bahar v The Queen*[12] and *R v Karabi*.[13] The minimum penalty is not confined to low level offences in which all mitigating factors are present. It is for those offences which fall within the least serious category of offending. An offender may be sentenced at or near the statutory minimum, notwithstanding that the offending could be less serious. See *Bahar*.[14] One unfortunate consequence of a mandatory sentencing regime like this is that it results in a compression of sentences towards the lower end of the range, with offences at the very bottom of the range of culpability attracting penalties effectively the same as those in cases which are towards the lower end of culpability: *Atherden v Western Australia*[15] and *Bahar*.[16] It follows that in many cases the parity principle between co-offenders will not have its usual application. So much is demonstrated in the present case where

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10 [2012] QCA 47, [21].
11 (1988) 164 CLR 465, 477.
12 (2011) 255 FLR 80, 93 [58].
13 [2012] QCA 47, [35].
14 (2011) 255 FLR 80, 91 [43], 93 [55].
15 [2010] WASCA 33, [42]-[43] (Wheeler JA).
16 (2011) 255 FLR 80, 93 [56].

s 233C(4)(b) *Migration Act* and Henuk's previous conviction for people smuggling after 27 September 2001 required him to be sentenced to a minimum penalty of eight years imprisonment with a five year non-parole period. It also means that little weight can be placed on the appellant's contention that it was unjust for Selu to receive the same non-parole period as his less culpable co-offender, Magang. It should, however, be noted that whilst Magang was young with no prior convictions, he was convicted after a six day trial whereas Selu was cooperative with the authorities and pleaded guilty at a relatively early stage. Selu's offending, unlike Magang's, was not in the least serious category because of his role as captain and his like offending nine years earlier, but it was towards the lower end of the scale of seriousness.

[30] No empirical evidence was placed before this or the sentencing court to show that lengthy terms of imprisonment are an effective deterrent to the poor and desperate in developing countries who are importuned by relatively sophisticated entrepreneurs into crewing vessels bringing asylum seekers to Australia. The re-offending by Selu and Henuk suggests to the contrary. This Court, however, is required to impose a penalty which takes into account the need for deterrence: *R v Karabi*;[17] *R v Latif; ex parte Cth DPP*[18] and s 16A(2) *Crimes Act*. Selu's 2001 offence meant that principles of personal deterrence were particularly relevant.

[31] The question for determination in this appeal is whether the sentence, six and a half years imprisonment with parole release at the minimum statutory three years period, is outside the appropriate range. There can be no doubt that the non-parole period is an integral part of any offender's sentence and must be considered in determining whether the sentence is manifestly excessive or inadequate: *R v Ruha, Ruha and Harris; ex parte Director of Public Prosecutions (Cth)*.[19] The appropriate sentence reflecting the competing aggravating and mitigating features may be a head sentence exceeding the mandatory minimum term, coupled with the mandatory minimum non-parole period: *Latif*.[20] In determining whether the present case is in that category, I will briefly consider the principal decisions relied on as comparable, two first instance cases, *Djoni* and *R v Syukur*,[21] and two decisions of this court, *Karabi* and *Latif*.

[32] In *Djoni*, the offender pleaded guilty to people smuggling. In March 2001, he had been sentenced to four years imprisonment for a similar offence using a different family name. He was the captain of a vessel which sailed from Indonesia in 2009 with two juvenile crew and 49 asylum seekers. The vessel was small, with sufficient water and food but unsafe because of insufficient life jackets or fuel. His prior offence meant that he knew the serious consequences of his conduct under Australian law so that personal as well as general deterrence was apposite. The judge noted that these offences put lives at risk. The sentence must reflect both the seriousness of the offence and circumstances personal to Djoni. He was a vital cog without whom the voyage could not have taken place. He pleaded guilty at the earliest opportunity but the case against him was strong. The case was not in the worst category. He was a poor man from a disadvantaged country with family responsibilities which he found hard to meet. He would serve a long jail sentence

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17 [2012] QCA 47, [21].
18 [2012] QCA 278, [27].
19 [2011] 2 Qd R 456, 470 [45].
20 [2012] QCA 278, [28] (Fraser JA, Gotterson JA and Mullins J agreeing).
21 Unreported, Northern Territory Supreme Court, Riley CJ, 15 March 2011.

far from family and friends. The appropriate head sentence was in the range of six to seven and a half years imprisonment. The judge imposed a six and a half year sentence with a four year non-parole period which the judge noted was the minimum non-parole period he could impose for a second offender.

[33] In *R v Syukur*,[22] Naming, Ledang and Syukur each pleaded guilty to people smuggling. Syukur was sentenced to six years imprisonment with a non-parole period of four years. His Honour fixed that sentence on the basis established in *R v Pot, Wetangky and Lande*,[23] namely, determining the appropriate sentence and, if it is less than the statutory minimum, imposing a sentence at the statutory minimum. This approach was not followed by the Western Australian Court of Appeal in *Bahar v The Queen*.[24] The *Bahar* approach, which requires that only offenders in the least serious category of offending be sentenced to the statutory minimum, has been accepted in Queensland in *Karabi* and *Latif*. *Syukur* remains useful, however, in establishing the sentence range here. Syukur facilitated the bringing to Australia of 19 asylum seekers. He was the captain in name only, with those responsibilities shared equally with Naming and Ludang. Syukur had a prior like conviction in 2000 when he was a crew member on a vessel which brought 152 asylum seekers to Australia. He was sentenced then to three years imprisonment to be released after 18 months. The judge noted that his prior conviction resulted in a greater need for specific deterrence. He was 29 with four children aged from five to 11. He shared a two room house with nine family members and lived in poverty. He was educated to grade 6 standard. He and his crew were not ringleaders but he provided the vital final link in the asylum seekers' journey. The offences constituted a serious violation of Australian sovereignty. The judge imposed the mandatory minimum sentence on Naming and Ludang who had no prior convictions, but Suykur had to be sentenced more harshly because of his prior offending which meant that he undertook the voyage knowing that he was at risk of a long term of imprisonment.

[34] In *Karabi*, the offender pleaded guilty to people smuggling in 2011 and was sentenced to six and a half years imprisonment with a non-parole period of four years. He applied for leave to appeal to this Court contending that his sentence was manifestly excessive. He was a 47 year old Indonesian fisherman with eight children. He was convicted in August 2000 of a similar offence and sentenced to two years and eight months imprisonment. In 2003, he was convicted and sentenced for using a foreign boat for commercial fishing and fined $10,000. He had another unlawful fishing conviction in 1996 when he was placed on a three year good behaviour bond. The offence the subject of his application to this Court involved bringing six asylum seekers to Australia on a vessel of which he was captain. There were three crew including his 16 year old son. The vessel was seaworthy although it would have been unsuitable in heavy seas. There were six life jackets on board. He sought asylum in Australia but his application was rejected. After a review of relevant principles and cases, this Court refused his application, noting that his conduct did not fall within the least serious category of offending warranting imposition of the mandatory minimum sentence.

[35] In *Latif* the offender pleaded guilty to people smuggling on the first day of his trial and was sentenced to six years imprisonment with a non-parole period of three

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22 Unreported, Northern Territory Supreme Court, Riley CJ, 15 March 2011.

23 Unreported, Northern Territory Supreme Court, Riley CJ, 18 January 2010.

24 (2011) 255 FLR 80.

years. In 2010, he navigated a vessel carrying 31 asylum seekers from Indonesia to Australia. He was the deputy captain for about four days of the journey and took charge of the vessel on the final day when the captain disembarked. Latif was to receive very little for his role with the bulk of the proceeds going to others higher up the chain of culpability. He was a poor fisherman about 58 years old with a relevant criminal history. In 1999, he was sentenced to six months imprisonment to be released after three months for a like offence. In 2000, he was sentenced to three years and four months imprisonment, suspended after one year and eight months for a like offence. In that instance, he was master of a vessel carrying 52 asylum seekers to Australia for which he received payment of about $1,000. As the primary judge wrongly followed the sentencing methodology adopted in *R v Pot, Wetangky and Lande*, rejected by the Western Australian Court of Appeal in *Bahar* and by this Court in *Karabi*, the sentencing discretion had miscarried. This Court allowed the appeal and re-exercised the sentencing discretion by increasing the non-parole period from three to four years.

[36] Unless the sentencing discretion is absolutely confined by statute, there is seldom only one precisely appropriate penalty. Comparable sentences are of assistance in determining the appropriate range but do not confine the sentencing discretion: *Hili v The Queen*.[25] The cases discussed above demonstrate that a sentence *in the range* of six years imprisonment with a non-parole period *in the range* of four years was appropriate to reflect the combination of the competing exacerbating and mitigating features. Offending of this kind breaches Australian Sovereignty and immigration laws. It can have serious health and quarantine consequences. Most importantly it exploits and puts at risk the lives of desperate asylum seekers, the vessel's crew and those who may be called on to rescue the vessel if it becomes endangered. At least the *Sumbar Alam* was seaworthy with sufficient food, water and life jackets for the passengers. Nevertheless, the engine failed for two nights and one day. The venture could so easily have ended in tragedy. The factor which took this case out of the least serious category was Selu's prior like offence and the need for personal and general deterrence. On the other hand, there were many mitigating features. He pleaded guilty at a relatively early stage and co-operated with the authorities. His personal circumstances were sufficiently desperate for him to place his freedom at jeopardy by committing this offence, well knowing he faced a lengthy term of imprisonment if caught. He was 66 years old, an age approaching the average Indonesian male life-expectancy. He was in ill-health. Imprisonment will be harder for him than for mainstream Australian prisoners because of his isolation from his homeland, family and friends.

[37] The sentencing judge gave careful consideration to the relevant competing factors. It is clear from his Honour's exchange with the prosecutor immediately before the sentencing[26] in combination with the sentencing reasons that his Honour determined to impose a head sentence at the higher end of the range to reflect the seriousness of the offending and the need for general and personal deterrence, but to combine this with the minimum non-parole period reflect the many mitigating factors. His Honour clearly considered that this sentence would best protect Australia from any future re-offending by Selu whilst appropriately reflecting the mitigating features. The judge plainly had in mind that if Selu re-offends his parole will be revoked and he will have to serve the balance of his substantial sentence, perhaps cumulatively on any new term of imprisonment.

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25 (2010) 242 CLR 520, 537 [54].

26 See [22] of these reasons.

[38] After careful consideration, I remain unpersuaded that, despite Selu's prior conviction, imposing the minimum non-parole period with a higher than mid-range head sentence brought the overall sentence outside the appropriate range. This case was in some ways slightly less serious than *Djoni*, *Syukur*, *Karabi* and *Latif*. In *Djoni*, the vessel was unsafe with insufficient life jackets and fuel. Karabi, Syukur and even the 58 year old Latif did not have the mitigating features of Selu's old age and ill-health. And the criminal history of Latif and Karabi was worse than Selu's. The present case falls within that category discussed in *Latif*[27] where a sentencing court could reflect the relevant deterrent and punitive features with a head sentence well exceeding the statutory minimum, but coupled with the mandatory minimum non-parole period to reflect the mitigating features. The sentence as a whole gave sufficient weight to the need for both general and personal deterrence in that the head sentence was towards the higher end of the appropriate range reflecting the seriousness of the offence and Selu's prior conviction, whilst the minimum non-parole period generously but appropriately reflected the many mitigating features.

[39] For these reasons, I would refuse the appeal against sentence.

[40] **FRASER JA:** I gratefully adopt and will not repeat the President's references to the applicable legislation, statement of the facts, submissions at the sentence hearing, sentencing remarks, and the parties' competing contentions in this appeal.

[41] The effect of the mandatory sentencing regime applicable in this case was discussed in *R v Karabi*,[28] *R v Nitu*,[29] and *R v Latif*; *ex parte Cth DPP*[30]. In this appeal neither party challenged the following analysis in *R v Nitu*:[31]

> "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', [*Bahar v The Queen* [2011] WASCA 249 at [54]] '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', [*Bahar v The Queen* [2011] WASCA 249 at [55]] 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.' [*Bahar v The Queen* [2011] WASCA 249 at [55]]
>
> In *Veen v The Queen [No 2]*, [(1988) 164 CLR 465 at 478] 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*

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27 [2012] QCA 278, [28].
28 [2012] QCA 47.
29 [2012] QCA 224.
30 [2012] QCA 278.
31 [2012] QCA 224 at [37]-[38], adopted in *R v Latif; ex parte Cth DPP* at [20].

> *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 sentence comprehend a plea of guilty, insofar as the plea reflects a willingness to facilitate the course of justice, remorse, and acceptance of responsibility. [*Cameron v The Queen* (2002) 209 CLR 339 at 343[13] per Gaudron, Gummow and Callinan JJ.] 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."

[42] I therefore respectfully disagree with the statement by the President that the applicable sentencing regime results in a compression of sentences towards the lower end of the range. That analysis was adopted in relation to different statutory provisions in *Atherden v Western Australia*[32] and quoted in *Bahar v The Queen*,[33] but it was not adopted in any of *R v Karabi*, *R v Nitu*, and *R v Latif*; *ex parte Cth DPP*.

[43] Applying the sentencing principles in Part 1B of the *Crimes Act*, and those summarised in *R v Nitu*, the sentence of six and a half years imprisonment with a non-parole period of three years was made inappropriately lenient by imposing the mandatory minimum three year non-parole period upon a mature man with a directly relevant and significant prior conviction who captained a boat carrying 46 non-citizens to Australia from Indonesia. The respondent is old by Indonesian standards, but that is not a substantial mitigating factor in circumstances in which he embarked upon his offence for personal profit and knowing both that it was an offence against Australian law and that he must be imprisoned if he were apprehended. The respondent's health defects were not submitted to be serious and there was no suggestion that his health care in prison would not be adequate or would be worse than in the Indonesian community. In light of the importance of general deterrence and (having regard to the respondent's previous conviction) personal deterrence, a non-parole period substantially in excess of the mandatory minimum was required.

[44] The term of six and a half years imprisonment was not challenged. That term is not so lengthy or effective as a deterrent, general or special, as to justify the imposition of the mandatory minimum non-parole period. Viewed as a whole, the sentence

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32 [2010] WASCA 33 at [42]-[43] (Wheeler JA).

33 (2011) 255 FLR 80 at 93[56].

imposed upon the respondent fell so short of the severity appropriate in all of the circumstances that it was manifestly inadequate.

[45] At the sentence hearing and again on appeal the prosecutor contended for a non-parole period of four years. The sentence which is of the appropriate severity in all of the circumstances will be achieved by allowing the appeal against sentence, and varying the sentence imposed on the respondent by substituting a non-parole period of four years for the non-parole period of three years. I would make those orders.

[46] **BODDICE J:** I agree with Fraser JA that the sentence imposed on the respondent was manifestly inadequate in all of the circumstances.

[47] The respondent is a mature man. He was significantly older than the other crew members, and was captain of the vessel. He had previously engaged in similar offending behaviour for which he had been sentenced to a significant period of imprisonment. At the time of that sentence, he was expressly warned as to the consequences of committing a similar offence in the future. Despite that warning, he committed this offence.

[48] Against that background, the need for deterrence, both personal and general, far outweighed any consideration of the respondent's personal circumstances. That need necessitated the imposition of a non-parole period substantially greater than the minimum provided for by the legislation.

[49] This Court recently considered the relevant authorities when allowing an appeal in *R v Latif; ex parte Cth DPP*.[34] Latif was aged 58 years. He had previous convictions for similar offences. A sentence of six years imprisonment with a non-parole period of three years was set aside with the non-parole period being increased to four years.

[50] Whilst Latif pleaded guilty on the first day of his trial, and had not one but two prior similar convictions, the respondent's prior conviction was more recent and, most importantly, occurred in circumstances where he was expressly warned as to the consequence of reoffending. That was a significantly aggravating feature.

[51] In imposing the minimum non-parole period, the sentencing judge failed to impose a sentence of a severity appropriate in all of the circumstances. There was nothing in the respondent's other circumstances and offending behaviour which so distinguished him as to justify the imposition of the minimum non-parole period. Such a sentence fell outside the sentencing discretion.

[52] I agree with the orders proposed by Fraser JA.

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[34] [2012] QCA 278.