

THE SUPREME COURT OF

THE NORTHERN TERRITORY

SCC 20113091, 20113092,

20113095, 20113093

THE QUEEN

and

MARIO SURYA, FRUSH,

FERRI BALU and MANDRA ALI

(Sentence)

RILEY J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON FRIDAY 31 MAY 2002

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Court Recording Services (NT) Pty Ltd

HIS HONOUR: I have before me four prisoners for sentence in relation to offences against section 232A of the Migration Act. Those prisoners are from the vessel Usaha Muni.

On 20 August 2001, Australian Customs Services officers from Australian Customs Vessel Botany Bay intercepted the Usaha Muni north of Ashmore Island. That vessel was a motorised wooden Indonesian cargo vessel, approximately 30 metres in length. There was a large number of passengers on board, and four Indonesian crew, being the prisoners now before the court.

A Notice to Master and Crew was read to the prisoners in Indonesian. That document warned of penalties for people trafficking and advised the prisoners to consider immediately returning to Indonesia with their passengers.

The crew Usaha Muni failed to comply with the notice and dropped anchor in the inner lagoon of Ashmore Island. Customs officers reboarded the vessel and a Notice of Detention was read to passengers and crew. They were detained pursuant to the provisions of the Migration Act.

A roll was taken of the passengers. There were 225 passengers, mainly from Iran and Iraq. The passengers stated that they boarded the vessel from a small village situated on a river approximately one and a half hours from Surabaya. There were initially five Indonesian crew members aboard. They took turns to steer the vessel. The vessel was overcrowded. After travelling for about six days, one of the Indonesian crew members left the vessel. At that time he told the passengers it was a further 10 hours to Australia.

Mario Surya stated that the journey had been organised by a person named Ake and he was to have been paid 1 million rupiah. The crew members were arrested. After receiving legal advice, they exercised their right not to participate in a record of interview.

Mandra Ali stated that he was under the age of 18 and accordingly arrangements were made for him to undergo wrist X-rays. I have determined that he is in fact over the age of 18 years.

On 4 September 2001 analysis of the fingerprints of Mandra Ali identified him as being Koa Najar who is recorded as having a prior conviction under section 233(1)(a) of the Migration Act. He appeared in the Darwin Juvenile Court on 1 October 1999 for the offence of taking part in bringing 24 non-citizens to Australia. He was sentenced to six months' detention, suspended forthwith upon him entering into a good behaviour bond. There is doubt about the validity of that bond and the Crown does not seek any order in relation to the breach.

The other prisoners have no prior convictions in Australia.

No-one has been identified as the captain of the vessel.

All of the prisoners have been in custody since 20 August 2001.

On 27 April 2002, each of the prisoners provided signed statements to Australian Federal Police for use in the extradition and prosecution of one of the organisers of the voyage. Each of the prisoners described the involvement of that person and was able to identify him from a photo-board.

The Director of Public Prosecutions has decided not to include those statements in the extradition brief relating to the alleged organiser, nor to seek undertakings from the prisoners that they will give evidence against that person.

The prisoners have each co-operated with authorities beyond what has been seen in such matters in the past. They remain willing to co-operate although the Director of Public Prosecutions does not now rely upon their co-operation. They are entitled to credit for their co-operation as well as for the pleas of guilty.

There can be no doubt that these matters are serious and prevalent offences. Although the individuals involved are at the end of the chain of people who are involved in bringing unlawful non-citizens to Australia, they are a vital part of that process. They, and others like them, provide the means by which the final leg of the journey is completed. It is therefore necessary for this court to bear in mind the need for a strong message to be sent to people who contemplate involvement in the process, that they face substantial penalties if they do become involved.

Mr Read, who appeared on behalf of the prisoners, suggests that the reduced flow of such cases makes general deterrence less important than it once was. I disagree. I regard general deterrence as remaining as important as ever.

I bear in mind that none of these prisoners is said to be an organiser and their involvement in events was restricted to the matters that I have recounted. In this case as with others, the authorities provided a warning to the crew that to proceed would expose them to serious penalties. They were advised of the desirability of turning back. Notwithstanding the notice, they did not turn back.

The practice of providing such a warning is one that has been in operation for some time and I have on numerous occasions observed that it is a sensible and fair procedure. However, the giving of such warnings does not in many cases provide the crew with a realistic opportunity to desist. Time and again the circumstances reveal that the passengers are people who are desperate to arrive in Australia and have endured much to get to Australia. They are unlikely to agree to the crew returning with them to Indonesia. In this case the passengers numbered 225 and the crew numbered four.

As has been observed in relation to other cases of this kind, the prisoners were not involved in a people-smuggling exercise and there was nothing covert about the operation. They were transporting the non-citizens to Australia for presentation to Australian authorities. There was no attempt to hide from the authorities or disguise what they had done. Nevertheless the offences are both serious and prevalent.

In September 2001 amendments to the legislation were effected to ensure increased penalties were imposed. Those amendments do not have application to this matter.

The offences amount to a serious violation of Australian sovereignty. They also create quarantine risks, although those risks are less than if the vessel were to land on the mainland. The offences impose substantial costs upon Australia in relation to the detection and enforcement of the law in remote locations.

Whilst these particular offences are serious, they are far from the most serious contemplated by section 232A of the Migration Act. In imposing sentence, I am bound to consider a range of matters provided for in the Crimes Act. I must make an order that is of severity appropriate to the circumstances of the offence. By virtue of section 16A of the Crimes Act, I am required to consider a range of matters there specified, and I have done so.

It is necessary for me to consider other sentencing options before I pass a sentence of imprisonment. The circumstances of these matters call for a term of actual imprisonment. The matters are serious and deterrence is important. No alternative sentencing regime, which would adequately meet the needs of the case, has been suggested. No other sentence is appropriate in the circumstances.

Of significance for these cases is the requirement found in section 16G of the Crimes Act, which provides that where a Federal sentence is to be served in a Territory prison, and is therefore not subject to remissions or reductions, the court must take that into account in determining the length of the sentence and must adjust the sentence accordingly.

In the Northern Territory, the previously existing system of remissions has been legislatively removed. Section 16G therefore has application. Historically, the reduction of custodial sentences for remissions has been about one-third of the sentence, and I take that into account.

I turn to deal with the circumstances of the individual crew members.

Mandra Ali is a young adult man. His father is deceased. He has been caring for his grandfather. There are no siblings. His mother sells cakes or snacks at the market in Alor. He works as a local fisherman. He was educated only to grade 3.

Frush is also a young man. His mother recently died. His father works on cargo vessels. He has a younger sister. He lives with his grandmother. He is largely unemployed, but sometimes works as a local fisherman.

Ferri Balu is in his early 20s. His mother is deceased. His father is a farmer. He reached year 9 in school. He sometimes works as a local fisherman. His brother is at university. The money he earns contributes to the expenses of the brother.

Mario Surya is a young man. His parents were caught up in the conflict in East Timor. He does not now know where they are. He grew up in Dili but was then sent to Kupang, where he lives with another family. He does whatever work is available.

I turn to sentence the prisoners. All will be convicted.

Mandra Ali is a second offender. I bear in mind that his last offence occurred as a juvenile. Nevertheless, he has not been deterred by the experience. Unlike his fellow prisoners, he is not entitled to the leniency that is extended to a first offender. He offers no satisfactory explanation for re-offending. He did it for the money.

Mandra Ali will be sentenced to imprisonment for five years. I direct that he be released after serving a period of imprisonment of two years and six months. That release will be upon the prisoner giving security by personal recognizance in the sum of \$500 that he will be of good behaviour for a period of three years from the date of his release. The period of imprisonment and the pre-release period will date from 20 August 2001.

Frush, Mario Surya and Ferri Balu will each be sentenced to imprisonment for three years and six months. I direct that they each be released after serving a period of imprisonment of one year and nine months. That release will be upon the prisoner giving security by personal recognizance in the sum of \$500 that he will be of good behaviour for a period of two years from the date of release. The period of imprisonment and the pre-release period will date from 20 August 2001.