IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S 114 of 2013

BETWEEN:

BONANG DARIUS MAGAMING
Appellant

and

THE QUEEN
Respondent

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Appellant's Submissions.

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PART V: SUBMISSIONS

5. Western Australia intervenes to contend that none of the five bases upon which invalidity is asserted by the Appellant apply to the impugned legislation. This is so having regard to the following; *first,* the Appellant can only succeed if this Court over-rules *Fraser Henleins Pty Ltd v Cody*[1] and *Palling v Corfield*[2] and no sufficient reason to overrule these decisions has been demonstrated; *second,* decisions from other jurisdictions relied upon by the Appellant do not support his central contentions.

No *per se* challenge to the validity of mandatory minimum penalties

6. The Appellant does not contend in this matter that the Commonwealth Parliament lacks power to legislate, or is precluded from legislating, to provide for a minimum sentence following conviction for a crime. No issue of the power of a State Parliament to enact such legislation arises in this matter.

7. It is not in issue, and there is no doubt, that the Commonwealth Parliament can legislate for a maximum penalty following conviction, and can legislate to restrict or limit sentencing discretion in many ways[3].

8. So, the deficit of power, or constitutional impediment, contended for by the Appellant relates only to legislated minimum sentences, and is said to arise solely from Chapter III.

9. The validity of limitations upon judicial power, and the parameters of judicial power, are best approached having regard to Kitto J's observation in *R v Davison*[4]. In respect of legislated minimum sentences, history reveals a number of things.

10. As explained by Stewart, Powell and Stevens JJ in *Woodson v North Carolina*[5], the Common Law of crime, and early American criminal law statutes, provided for mandatory penalties, usually death. Some eighteenth and nineteenth century legislation provided for maximum terms of imprisonment without minima, the purpose of which was to exclude the mandatory death penalty for certain crimes. Put otherwise, the purpose was to limit discretion (or sentences) at the top end rather than at the bottom end. This history does not portend that any legislated mandatory minimum or maximum sentence is incompatible with, or an unwarranted restriction of, judicial power.

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[1] [1945] HCA 49; (1945) 70 CLR 100.
[2] [1970] HCA 53; (1970) 123 CLR 52.
[3] Sections 16A, 16B, 16BA, 16D, 16E, 17A, 17B and 19 of the *Crimes Act 1914* (Cth) illustrate this.
[4] [1954] HCA 46; (1954) 90 CLR 353 at 382 - "Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it." See also; *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at [105]; *Saraceni v Jones* [2012] HCA 38 at [2]; *MZXQT v Minister for Immigration and Citizenship* [2008] HCA 28; (2008) 233 CLR 601 at [94], [193]; *Albarran v Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23; (2007) 231 CLR 350 at [30]; *White v Director of Military Prosecutions* [2007] HCA 29; (2007) 231 CLR 570 at 594-595 [45]-[47]; *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [66].
[5] 428 US 280 (1976) at 289-293.

11. It is also instructive to recall that in the United States, the validity of mandatory death penalty legislation, legislation requiring mandatory life sentences and "three strikes" legislation providing for minimum penalties, has been considered solely within the rubric of the Eight Amendment (applied to the States by the Fourteenth Amendment)[6]. Although the Supreme Court in *Woodson v North Carolina,* held (by a majority) that the Eight Amendment's prescription of cruel and unusual punishments invalidated a mandatory death penalty regime, the majority justices made plain that the reasoning did not apply to mandatory "sentences of imprisonment, however long"[7]. Limitation upon imposition of mandatory or minimum sentences has not been advanced in the United States on the basis of separation of powers or incompatibility or interference with judicial power[8].

12. In England, much nineteenth century legislation imposing maximum penalties similarly emerged from a desire to limit mandatory capital punishment[9]. Absence of legislated minimum penalties is explained not by absence of power or incompatibility with judicial power, but by the purpose of such legislation being to preclude penalties beyond a maximum term of imprisonment.

13. The Common Law and common law jurisdictions have, from time immemorial, accepted that Parliament has power to legislate with respect to criminal sentences, and in this sense to limit judicial discretion in sentencing. Sir James Fitzjames Stephen observed[10], in respect of the consequence of the furtive period of legislative law reform of the mid nineteenth century in England, that "though the varieties of punishment are still considerable ... they are greatly diminished", though a "minimum punishment" was maintained for at least one crime[11]. The observations of Sir James Fitzjames Stephen are consistent with the rather more stark conclusion of Professor Ashworth:

> If one looks at the history, then one finds that wide judicial discretion has only been a characteristic feature of English sentencing for the last hundred years or so. In the first half of the nineteenth century, there were two factors that considerably restricted judicial discretion. There were maximum and minimum sentences for many offences, and several statutes provided a multiplicity of different offences with different graded maxima. For much of the nineteenth century, judges were left with less discretion than their twentieth and twenty-first century counterparts, and any claim that a wide sentencing discretion 'belongs' to the judiciary is without historical foundation. It gains its plausibility only from the legislature's

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[6] The Eighth Amendment of course reproduces a provision of the *Bill of Rights 1689.*

[7] *Woodson v North Carolina* 428 US 280 (1976) at 304-305.

[8] See also *Ewing v California* 538 US 11 (2003), upholding the validity of California "three strikes" legislation which required a minimum sentence (see p.16), which considered validity solely as arising under Eighth Amendment.

[9] See Radzinowicz and Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press, 1990) chapter 22; Stephen, *A History of the Criminal Law of England* (Macmillan & Co, 1883) volume 1 chapter XIII (happily entitled "A History of Legal Punishments"). See in particular, Sir James Fitzjames Stephen's discussion at pp.473-478 as to the statutes, commencing in the early nineteenth century in England, limiting the availability of capital punishment and the discussion at pp.480-482 relating to the legislative changes that limited the punishment of transportation, by imposing maximum and minimum terms of transportation.

[10] Stephen, *A History of the Criminal Law of England* (Macmillan & Co, 1883) at p.482.

[11] See also Bingham, 'The Courts and the Constitution' (1997) 7 *King's College Law Journal* 12 at 24 and his Lordship's reference to the mandatory minimum sentence prescribed by the *Slave Trade Act 1824.*

> abandonment of minimum sentences in the late nineteenth and early twentieth century, and from the trend at one time to replace the plethora of narrowly defined offences, each with its separate maximum sentence, with a small number of 'broad band' offences with fairly high statutory maxima. ...
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> That belief, widely shared in the judiciary, is a belief that judicial discretion supervised by the Court of Appeal is more likely to produce fair sentencing outcomes than greater statutory restrictions. This is an arguable proposition.... But it is not the same as the principle of judicial independence, nor does it provide a basis for any principle that the legislature may not properly do more than set maximum sentences and introduce new forms of sentence.[12]

The authority of *Fraser Henleins Pty Ltd v Cody* and *Palling v Corfield*

14. The proposition that the Commonwealth can not legislate to impose a minimum sentence upon conviction is inconsistent with all judgments in *Fraser Henleins Pty Ltd v Cody*[13] and in *Palling v Corfield*[14]. The upholding of this appeal would require the overruling of *Fraser Henleins Pty Ltd v Cody* and *Palling v Corfield.*

15. French CJ in *Wurridjal v Commonwealth*[15] stated the matters that guide re-consideration of earlier authority. It can not be said, in respect of *Fraser Henleins Pty Ltd v Cody* and *Palling v Corfield,* that any error in the reasoning of either decision has been made manifest by later cases, or that either decision was in conflict with established principle, or that they were isolated decisions, or that there was significant dissent in either case. And clearly enough, all Australian Parliaments have proceeded on the basis of their correctness.

16. *Fraser Henleins Pty Ltd v Cody* and *Palling v Corfield* are not the only relevant decisions of this Court.

17. *Sillery v The Queen*[16] considered the construction and validity of s.8 of the *Crimes (Hijacking of Aircraft) Act 1972* (Cth). Gibbs CJ (with whom Aickin J agreed) construed the relevant provision as not providing for a mandatory minimum or mandated term of life imprisonment. Murphy J can be understood as coming to the same conclusion on the issue of construction[17]. Wilson J and Brennan J construed the provision as providing for a mandatory sentence of life imprisonment. Although, invalidity of the provision was not a ground of appeal, either before the High Court or the Queensland Court of Criminal Appeal[18], it might be thought that

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[12] Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) at pp.52-53.

[13] [1945] HCA 49; (1945) 70 CLR 100 at 119 (Latham CJ), 121-122 (Starke J), 124 (where Dixon J adopts the reasoning of the majority in *Coorey's Case* (1944) 45 SR (NSW) 287). In this respect, his Honour was doubtless referring to the reasoning of Davidson J at 314, and of Nicholas CJ in Eq. at 318-319). See also 131-132 (McTiernan J), 139 (Williams J).

[14] [1970] HCA 53; (1970) 123 CLR 52 at 58 (Barwick CJ), (likely) 62-63 (McTiernan J), 64-65 (Menzies J), 67 (Owen J), 68 (Walsh J). Windeyer and Gibbs JJ agreed with "all others", which itself demonstrates that there was no disagreement between those who delivered reasons.

[15] [2009] HCA 2; (2009) 237 CLR 309 at [65]-[72].

[16] [1981] HCA 34; (1981) 180 CLR 353.

[17] His Honour, in his judgment in *Sillery* and in later judgments, put the matter a little broader than this. None of this is relied in this appeal, and so it is sufficient simply to note his Honour's judgments in; *Barker v R* [1983] HCA 18; (1983) 153 CLR 338 at 350; *Gallagher v Durack* [1983] HCA 2; (1983) 152 CLR 238 at 249; *Pochi v Macphee* [1982] HCA 60; (1982) 151 CLR 101 at 114; *Miller v TCN Channel Nine Pty Ltd* [1986] HCA 60; (1986) 161 CLR 556 at 581.

[18] *R v Sillery* [1980] Qd R 374.

had it occurred to either of Wilson J or Brennan J that an issue of the invalidity of provisions of a Commonwealth statute that provided for mandatory life imprisonment existed, it might have been mentioned. This might be thought particularly so in light of the expansive judgment of Murphy J.

18. This Court in *Wynbyne v Marshall*[19] refused special leave to appeal from the decision of the Full Court of the Supreme Court of the Northern Territory[20] dismissing a challenge to the validity of a regime of mandatory minimum sentences.

19. Australian courts have not, when considering "people smuggling" type provisions in Commonwealth legislation imposing mandatory minimum penalties, considered such provisions to give rise to constitutional issues.

20. *Muller v Dalgety & Co Ltd*[21] considered s.9A(1) of the *Immigration Restriction Act 1901* (Cth), which provided that:

> If any vessel, having on board any stowaway, who is a prohibited immigrant, comes into any port in Australia, the master, owners, agents, and charterers of the vessel shall be jointly and severally liable on summary conviction to a penalty of One hundred pounds for each stowaway.[22]

21. All members of the Court construed the penalty as mandatory, upheld convictions and did not consider that a question of validity arose. The manner in which each of Griffiths CJ, Barton and O'Connor JJ concluded their respective reasons[23] is notable. The New South Court of Criminal Appeal in *R v Booth*[24] considered an identical provision[25] and similarly did not consider any question of validity.

Decisions from other jurisdictions relied upon by the Appellant

22. The Appellant refers to a number of decisions from other jurisdictions in support of his contentions[26]. Properly understood, none of them assist the Appellant.

23. The dicta of the Supreme Court of Ireland in *Deaton v Attorney General*[27], extracted by the Appellant at [50] of his submissions, is to be understood having regard to the later decision of the Supreme Court of Ireland in *Lynch v Minister for*

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[19] [1998] HCATrans 191.
[20] *Wynbyne v Marshall* (1997) 7 NTLR 97.
[21] [1909] HCA 67; (1909) 9 CLR 693.
[22] Subsection (2) deemed every stowaway to be a prohibited immigrant unless they passed the dictation test or had prior permission to land without restriction.
[23] Griffiths CJ at 700; "The appeal must therefore be allowed and the conviction restored, although under the special circumstances of the case one would not be surprised if the whole or part of the penalty should be remitted by the Crown." Barton J at 706; " As the case seems to be one of some hardship, the circumstances may possibly receive favourable consideration at the hands of the Executive." O'Connor J at 712; "But I agree with my learned colleagues that the conduct of the master from the time when the suspicions of the immigration officer were communicated to him has been such as to render the case against both defendants a proper one for the consideration of the Executive."
[24] (1947) 48 SR (NSW) 16.
[25] Section 9A(1) of the *Immigration Act 1901-1949* (Cth).
[26] Appellant's Submissions at [49]-[55].
[27] *Deaton v Attorney General* [1963] IR 170.

Justice Equality and Law Reform[28]. In *Lynch,* the Supreme Court dismissed a challenge to the validity of a mandatory sentence of life imprisonment. Among the arguments dismissed was that the "imposition of the mandatory life sentence offended against the constitutional doctrine or principle of proportionality ... since the trial judge had no discretion to impose or tailor a sentence which reflected the particular circumstances in which the offence may have been committed."[29] The Court also rejected the contention that the imposition of a mandatory sentence of life was incompatible, or an interference, with judicial power[30]. In dealing with *Deaton v Attorney General*, the Court in *Lynch* observed[31]:

10 > The Court is satisfied, as O'Dalaigh C.J. explained in that case [*Deaton*], that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified.

24. As regards the position in Ireland, it is also instructive to have regard to the recent report of the Irish Law Reform Commission, *Mandatory Sentences*, Report No 108 (2013)[32].

20 25. *Liyanage v The Queen*[33] (relied upon by the Appellant) was an appeal from the Supreme Court of Ceylon considering the validity of legislation, the "pith and substance" of which was described as[34]:

> a legislative plan *ex post facto* to secure the conviction and enhance the punishment of ... particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained

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[28] [2010] IESC 34; [2012] 1 IR 1.

[29] *Lynch v Minister for Justice Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1 at [20], [53]–[55].

[30] *Lynch v Minister for Justice Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1 at [29]–[34], [46], [49]–[52].

[31] *Lynch v Minister for Justice Equality and Law Reform* [2010] IESC 34; [2012] 1 IR 1 at [49].

[32] After citing the development of mandatory sentencing in relation to murder, drug offences, firearm offences, and repeat offenders in Ireland, England and Wales, and the United States of America, the Commission noted at [2.220]: "[A]n alternative view [of the historical evolution of presumptive minimum sentences] is that these sentencing regimes are, when considered in a broader historical context, the product of a long-standing policy approach. As outlined above, presumptive minimum sentences are typically directed at high-risk forms of criminality that have a particularly grave societal impact. In modern times, drugs offences, firearms offences and gangland crime fit this mould. Historically, however, a similar threat was perceived to derive from 'habitual offenders' – career criminals who specialised in particular forms of crime. In the 19th century, such offenders attracted mandatory sentences under the *Habitual Offender Acts*. These regimes were essentially the precursors to contemporary 'three strike laws' and other sentencing practices directed at those considered to be a particular threat to public safety. In this light, presumptive and mandatory minimum sentences for first-time and repeat offenders may be viewed as the continuation of a long-standing penal policy."
Note also at [4.160]: "In Australia, mandatory sentencing has a long history. During the 18th and 19th centuries, mandatory sentencing was used for a wide variety of offences. However, during the 19th century, this approach was largely abandoned in favour of parliament setting the maximum penalty, with the sentencing judge responsible for determining the appropriate sentence for the individual offender. In recent years, it would appear that the use of mandatory and presumptive sentencing is again becoming increasingly commonplace."

[33] [1967] 1 AC 259.

[34] *Liyanage v The Queen* [1967] 1 AC 259 at 290.

> during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them.

26. The reasoning as to invalidity applied to the legislation as a whole. It is (with respect) incomplete to characterise the advice of the Privy Council as dealing centrally with legislation providing for a mandatory sentence and as incidentally suffering from "further vices".[35]

27. *Hinds v The Queen*[36] (also relied upon by the Appellant) was an appeal from the Court of Appeal of Jamaica involving the validity of legislation establishing a Court, distinct from the Supreme Court and comprising more junior judicial officers, to deal with crimes involving firearms. Section 8(2) of the *Gun Court Act 1974* (Jamaica) required that, upon conviction for certain offences involving the use of firearms, a mandatory sentence of detention "at hard labour during the Governor-General's pleasure" be imposed. Other legislation provided that the person convicted could only be released from prison on advice of an executive Review Board. In effect, for these offences, the sentence was determined by the executive. Lord Diplock (for the majority in the Privy Council) noted that the Parliament of Jamaica had, under the Constitution[37]:

> [power to] prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

28. The legislation in *Hinds v The Queen* was invalid because it rested the whole of the power to sentence on the executive[38].

29. *Ali v the Queen*[39] (also relied upon by the Appellant) concerned Mauritian legislation under which, for a particular offence, the prosecution could elect to have an accused tried before a judge alone in the Supreme Court, or in an intermediate court. A sentence of death was mandatory if the matter was heard in the Supreme Court and the accused convicted. If tried, for the same offence, in the intermediate court, there was no mandatory sentence. Central to the decision of the Privy Council was that the offence in both circumstances was the same, and so the prosecutor's choice of forum was in substance prosecutorial selection of sentence[40].

30. It might be added that, in the United States, a jurisdiction of the Common Law tradition with a constitutional proscription of cruel and unusual punishment, the

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[35] Appellant's Submissions at [51].
[36] [1977] AC 195.
[37] *Hinds v The Queen* [1977] AC 195 at 226.
[38] *Hinds v The Queen* [1977] AC 195 at 226.
[39] *Ali v the Queen* [1992] 2 AC 93.
[40] See *Ali v the Queen* [1992] 2 AC 93 at 104: "If in Mauritius importation of dangerous drugs by one found to be trafficking carried in all cases the mandatory death penalty and importation on its own a lesser penalty, the Director of Public Prosecution's discretion to charge importation either with or without an allegation of trafficking would be entirely valid. The vice of the present case is that the Director's discretion to prosecute importation with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment enables him in substance to select the penalty to be imposed in a particular case."

validity of legislated minimum terms of imprisonment has been upheld[41]. In Canada, with a similar constitutional proscription of cruel and unusual punishment[42], the Supreme Court upheld the validity of a four-year mandatory minimum penalty for criminal negligence causing death with a firearm[43] and a ten-year mandatory minimum for second-degree murder in the context of a "mercy killing"[44].

The Appellant's five contentions

31. The Appellant advances five propositions.

32. *First*; that the operation of the minimum sentence provision in s.236B(3)(c) is impermissibly arbitrary. The contention is that the Commonwealth Parliament lacks power to enact legislation that gives rise to such arbitrariness or that the imposition by the Court of a (mandatory?) sentence that is of such character of arbitrariness is not a valid exercise of judicial power[45], and so the legislation requiring such a sentence is invalid.

33. *Second*; that the exercise of judicial power requires that a criminal accused be accorded natural justice. An aspect of the process from indictment to sentence in this matter involved the making of decisions in respect of which the Appellant was not heard and, accordingly, the exercise of judicial power here was invalid[46].

34. *Third*; that an essential attribute of judicial power is "equality before the law". The impugned provisions are said to be incompatible with this by imposing different outcomes for co-offenders whose circumstances are relevantly identical (those charged under s.233A and those charged with an aggravated offence under s.233C), and that s.236B does not allow for differentiation in sentencing co-offenders whose circumstances differ[47].

35. *Fourth*; the exercise of judicial power requires the giving of reasons, including reason for the imposition of a sentence upon conviction. Here, the reasons given by the trial judge for the sentence imposed was, in effect, that he was required to do so, and that this does not accord with the obligation to give reasons[48].

36. *Fifth*; it is incompatible with the lawful exercise of judicial power to require a Court to impose a sentence that is not proportionate[49].

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[41] *Ewing v California* 538 US 11 (2003); *Lockyer v Andrade* 538 US 63 (2003). As noted above, although the Supreme Court in *Woodson v North Carolina* 428 US 280 (1976), held (by a majority) that the Eight Amendment invalidated a mandatory death penalty regime, the majority justices made plain at 304-305 that the reasoning did not apply to mandatory "sentences of imprisonment, however long".
[42] Section 12 of the *Canadian Charter of Rights and Freedoms.*
[43] *R v Morrisey* [2000] 2 SCR 90.
[44] *R v Latimer* [2001] 1 SCR 3. In *R v Smith* [1987] 1 SCR 1045 the Court declared invalid a seven-year mandatory minimum penalty for importing narcotics.
[45] This is the proposition dealt with in the Appellant's Submissions at [42]-[71].
[46] This is the proposition dealt with in the Appellant's Submissions at [75]-[78], and most directly at [77].
[47] This is the proposition dealt with in the Appellant's Submissions at [79]-[83].
[48] This is the proposition dealt with in the Appellant's Submissions at [84]-[86].
[49] This is the proposition dealt with in the Appellant's Submissions at [85]-[94].

37. The first, third and fifth propositions are plainly inconsistent with *Fraser Henleins Pty Ltd v Cody* and in *Palling v Corfield.* The first and fifth propositions apply equally to legislation imposing maximum penalties, and in this respect, as Starke J observed in *Fraser Henleins Pty Ltd v Cody*[50], "And, if a maximum penalty, why not a minimum penalty; that is a matter of policy and not of law".

Sections 233A and 223C of the *Migration Act 1958*

38. In respect of the Appellant's submissions relating to the operation of ss.233A and 223C of the *Migration Act 1958* (Cth)[51]; the provisions are of a genus commonly found in criminal statutes. Section 233C simply has an additional aggravating element. It is common that an aggravating element creates a separate offence. This can be illustrated by Chapter XXXI of the *Criminal Code (WA)* dealing with sexual offences[52]. Necessarily, an accused, if convicted of the aggravated offence, also commits the primary offence, and so primary offences are invariably "alternative offences" to the aggravated offence, and conviction on the alternative is open even if the accused is not charged with it[53]. There is nothing unusual in this; an aggravated offence necessarily subsumes the primary offence. Nor is it unusual that an aggravated offence carries a different, invariably greater, penalty to the primary offence.

39. It can not be doubted that the prosecution can (lawfully) charge with an offence that carries a greater penalty rather than another offence, which relates to the same conduct, that carries a lesser penalty. "Each way offences" are the classic example and their validity was upheld in *Fraser Henleins Pty Ltd v Cody*[54].

40. As French CJ, Hayne, Kiefel, Bell and Keane JJ observed in *Elias v The Queen*[55]:

> It may be accepted that the prosecutor's selection of the charge is capable of having a bearing on the sentence. Commonly this will be the case where the prosecution

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[50] [1945] HCA 49; (1945) 70 CLR 100 at 122. There are countless observations to the same effect. See *Coorey's Case* (1944) 45 SR (NSW) 287 at 319 (Nicholas CJ in Eq.) Perhaps the most direct is that of Lord Bingham; "There is room for rational argument whether it is desirable to restrict the judges' sentencing discretion .... But even this is not a constitutional argument. As Parliament can prescribe a maximum penalty without infringing the constitutional independence of the judges, so it can prescribe a minimum. This is, in the widest sense, a political question – a question of what is beneficial for the polity – not a constitutional question." - Bingham, 'The Courts and the Constitution' (1997) 7 *King's College Law Journal* 12 at 25. See also, Bagaric, 'What sort of mandatory penalties should we have?' (2002) 23 *Adelaide Law Review* 113 at 117, Manderson and Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process' (2000) 22 *Sydney Law Review* 585 at 618.

[51] Appellant's Submissions at [32]-[41].

[52] The relevant provisions, being for this purpose s 319(1) (definition of circumstances of aggravation), s.324 (aggravated indecent assault), s.326 (aggravated sexual penetration without consent) and s.328 (aggravated sexual coercion) and alternative offences stated therein, are annexed. This is not invariable – for some offences the circumstances of aggravation go only to sentence; this can be seen (for instance) in the robbery provisions of *Criminal Code (WA).* The relevant provisions, ss.391 and 392, are annexed. Some of the difficulties which these latter sort of provisions create, as opposed to the provisions in this appeal, are discussed in *Gillespie v State of Western Australia* [2013] WASCA 149.

[53] In this sense, such primary offences are, to use the Appellant's term, co-extensive with the aggravated offence – see Appellant's Submission [33]. Of course, the offences are not co-extensive; an offence against s.233C is not necessarily an offence against s.233A.

[54] [1945] HCA 49; (1945) 70 CLR 100 at 119-120 (Latham CJ), 121 (Starke J), 124-125 (Dixon J), 131-132 (McTiernan J) and 139-140 (Williams J). See also *Ali v The Queen* [1992] 2 AC 93 at 104.

[55] [2013] HCA 31 at [34].

> has a discretion in determining whether to proceed summarily or on indictment. However, the separation of functions does not permit the court to canvass the exercise of the prosecutor's discretion in a case in which it considers a less serious offence to be more appropriate any more than when the court considers a more serious charge to be more appropriate.

41. Other than the legislated mandatory minimum sentences required by s.236B, there is nothing in these provisions that is unusual or different from the myriad of aggravated each way offences that are common place in criminal statutes.

42. In respect of the Appellant's submissions at [56]-[63] as to involuntary detention; here the Appellant was convicted after a plea of guilty to a crime, and his sentence followed this plea. Had he not pleaded guilty he would have faced a trial and, if found guilty, sentenced. Nothing decided in cases such as *Fardon v Attorney-General (Qld)*[56] bears upon a sentence passed after a plea of guilty, or conviction after a trial. The assertion at [61] of his Submissions that the Appellant is now "involuntarily detained in custody unsupported by a sufficient constitutional factum, such as adjudication of criminal guilt" is (with respect) erroneous.

The Appellant's first contention - arbitrariness

43. This is the contention that the operation of the minimum sentence provision in s.236B(3)(c) is impermissibly arbitrary; that the Commonwealth Parliament lacks power to enact legislation that gives rise to such arbitrariness and that the imposition by the Court of a sentence that is of such character of arbitrariness is not a valid exercise of judicial power.

44. The authority cited by the Appellant for this proposition as to power is *W.R. Carpenter Holdings Pty Ltd v Commissioner of Taxation*[57]. No such proposition is stated or created in that case. The observation at [9][58] of the judgment stands for nothing more than that, for the purpose of s.51(ii) of the *Constitution,* an impost is not a law with respect to "taxation" if it is "an arbitrary exaction" or imposes a liability to pay in an arbitrary or capricious manner. Without a great deal more, this decision does not create a general restraint on Commonwealth legislative or judicial power precluding arbitrariness or caprice. Nothing in *Roy Morgan Research Pty Ltd v Commissioner of Taxation*[59], or in the judgment of Higgins J in *Federal Commissioner of Taxation v Hipsleys Ltd*[60], both of which are cited by the Appellant, come near to any such proposition.

45. The judgment of Gibbs CJ, Wilson, Deane and Dawson JJ in *MacCormick v Federal Commissioner of Taxation*[61] (relied upon by the Appellant in his submission at [67]) does not sustain the proposition for which it is enlisted[62]. That

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[56] [2004] HCA 46; (2004) 223 CLR 575.
[57] [2008] HCA 33; 237 CLR 198 at [9]. See Appellant's Submissions [64].
[58] Relied upon by the Appellant in his Submissions at [64] fn.65.
[59] [2011] HCA 35; 244 CLR 97 at [38], cited by the Appellant in his Submissions at [64] fn.66. [38] of *Roy Morgan Research Pty Ltd v Commissioner of Taxation* simply cites *MacCormick v Federal Commissioner of Taxation* [1984] HCA 20; (1984) 158 CLR 622 at 639. There is nothing to this effect there either.
[60] [1926] HCA 34; (1926) 38 CLR 219 at 236, cited by the Appellant in his Submissions at [64] fn.66.
[61] [1984] HCA 20; (1984) 158 CLR 622 at 639.
[62] *MacCormick v Federal Commissioner of Taxation* [1984] HCA 20; (1984) 158 CLR 622 at 639: "A further submission was made by the plaintiffs that recoupment tax under the relevant legislation is an incontestable

the Commonwealth Parliament "cannot determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power" is not a proposition which arises in this matter.

46. A like contention as to arbitrariness was considered by the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648. That case involved a mandatory death sentence for trafficking 15 grams or more of heroin. One argument put was that the provision offended against the equality principle of Article 12(1) of the Singapore Constitution in that it required the court to sentence to death an addict who gratuitously supplied an addict friend with 15 grams of heroin, while permitting a lesser sentence on a dealer selling 14.99 grams. Lord Diplock observed[63]:

> The question whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and if so, what are the appropriate punishments for each class are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1).

47. In this sense; as 15 grams is not arbitrary, neither is five people.

The Appellant's second contention - natural justice

48. This is the contention that a valid exercise of judicial power requires that a criminal accused be accorded natural justice, and here the process from indictment to sentence involved the making of decisions in respect of which the Appellant was not heard.

49. Those investigated for crimes do not have a right to be heard in respect of charges that might be brought against them. This is so whether or not there is a range of offences for which the accused might be charged carrying differing sentences[64].

The Appellant's third contention - equality

50. This is the contention that the impugned provisions are incompatible with an essential attribute of judicial power, being "equality before the law" or "equal justice". The impugned provisions are said to be incompatible because they

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tax and for this reason is beyond the power of the Parliament. Recognition is to be found in the cases of the doctrine that the incontestability of a tax may go to its validity. The principle which lies behind the doctrine is a more general one of elementary constitutional law. It is simply that the legislature cannot determine conclusively for itself its power to enact legislation by putting beyond examination compliance with the constitutional limits upon that power."

[63] *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 673-674. See the discussion in Sir Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7 *Australian Journal of Human Rights* 21 at 26-27, where Sir Anthony, in discussing this decision, noted that the, "'equal protection' provision did not forbid discrimination in punitive treatment based on some difference in the circumstances of the offence which had been committed, the relevant difference being in the quantity of the drug involved, that difference not being a purely arbitrary one".

[64] See *Elias v The Queen* [2013] HCA 31 at [34].

mandate different outcomes for co-offenders charged under s.233A and those charged with an aggravated offence under s.233C. Further, it is said that s.236B does not allow for differentiation in sentencing co-offenders whose circumstances differ[65].

51. As observed in *R v Nitu*[66], the judgments of the majority in *Leeth v Commonwealth*[67]do not support the proposition that Australian law incorporates any "general doctrine of legal equality"[68]. Nothing equivalent to the vice asserted in *Leeth*[69] arises in this matter[70].

52. Whatever the status in Australian law of a "general doctrine of legal equality" – whether it informs that like cases are to be treated alike and that different outcomes emerge from cases that are different in relevant respects[71], or whether it underlies a principle that in sentencing offenders it is desirable that like offenders should be treated in a like manner[72] – nothing in this matter engages such issues. Any norm of equality, however, abstractly or diffusely stated, is not offended by applying a different penalty to those who commit an offence under s.233A and those who commit the offence in circumstances of aggravation under s.233C. To the extent that it is relevant to validity, there is a rational evident basis for the circumstance of aggravation in s.233C. Persons charged under ss.233A, B or C are invariably involved in bringing people to Australia by boat. The inherently risky enterprise of shipping people to Australia from another country by boat is exacerbated by number. The consequences of a single unseaworthy boat are greater depending upon the number of passengers. The fiscal consequences (to the Commonwealth) of a ship arriving in Australia carrying one person is less than the fiscal consequence of a ship arriving carrying more than five.

The Appellant's fourth contention - reasons

53. This is the contention that the exercise of judicial power in a criminal matter requires the giving of reasons for the imposition of a sentence upon conviction.

54. This much can be accepted. Here, the reason why the Appellant was sentenced as he was is that it was the minimum penalty required by law. Unless a sentencing judge was to give a penalty greater than the minimum, this is the reason.

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[65] This is the proposition dealt with in the Appellant's Submissions at [79]-[83].
[66] [2012] QCA 224; (2012) 268 FLR 216 at [32]–[42] (Fraser JA, Holmes JA and Ann Lyons J agreeing).
[67] [1992] HCA 29; (1992) 174 CLR 455.
[68] *R v Nitu* [2012] QCA 224; (2012) 268 FLR 216 at [41]. The submission also confronted *Kruger v Commonwealth* where a similar argument as to equality in the operation of laws administered by Courts was rejected; *Kruger v Commonwealth* [1997] HCA 27; (1997) 190 CLR 1, 65–68 (Dawson J, McHugh J agreeing at 141–142), 112–114 (Gaudron J) and 153–155 (Gummow J).
[69] That in respect of s.4(1) of the *Commonwealth Prisoners Act 1967* (Cth) differing sentencing legislation in each State and Territory could result in different non-parole periods in different jurisdictions.
[70] *R v Nitu* [2012] QCA 224; (2012) 268 FLR 216 at [39] – [41].
[71] *Green v The Queen* [2011] HCA 49; (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).
[72] *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

The Appellant's fifth contention - proportionality

55. This is the contention that the minimum sentence provision in s.236B inevitably involves the imposition of grossly disproportionate sentences having regard to the nature of the offending, and that the imposition of such sentences is incompatible with the lawful exercise of judicial power.

56. Clearly enough, it is a "basic principle of sentencing law... that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances"[73]. But, as was made clear by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen (No. 2)*[74], the "principle of proportionality" is a "sentencing principle"[75].

57. The contention advanced by the Appellant is that this sentencing principle of proportionality is now an essential aspect of judicial power. (With respect) the reasoning of Allsop P below[76] as to this is compelling and the Appellant's contention is unsupported by authority[77].

58. The contention is also inconsistent with the reasoning in decisions of this Court. In *Elias v The Queen*[78], French CJ, Hayne, Kiefel, Bell and Keane JJ observed that:

> It may be accepted that, subject to statutory intention, common law principles such as proportionality, totality and parity apply in the sentencing of offenders under Victorian law.

59. This observation is to be understood as accepting that the common law principle of proportionality (in sentencing) can be legislatively abrogated[79].

60. Even in the absence of authority, there are a number of intuitive responses to the Appellant's contention. *First*, the contention applies equally to maximum penalties and would require that they too be invalid. *Second*, it applies equally to countless forms of legislated truncation of untrammelled judicial "discretion" in sentencing, all of which would also be invalid. *Third*, it proceeds on an unstated premise that only the judicial arm of government can determine what is proportionate; that is, only the judiciary can determine the "gravity of the crime considered in the light of its objective circumstances". This proposition is ahistorical. As noted above, Common Law jurisdictions' Parliaments have, for centuries, legislated in respect of criminal sentencing. *Fourth*, the contention invites the question - what is the

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[73] *Hoare v The Queen* (1989) 167 CLR 348 at 354, citing *Veen v The Queen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465, at 472, 485-486, 490-491, 496. See also *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 468, 490, 497; *Chester v The Queen* (1988) 165 CLR 611 at 618; *Bugmy v The Queen* (1990) 169 CLR 525 at 532, 537; *Ryan v The Queen* (2001) 206 CLR 267 at 283, 287, 305, 320; *Elias v The Queen* [2013] HCA 31 at [25].

[74] *Veen v The Queen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465, at 472, 485-486, 490-491, 496.

[75] *Veen v The Queen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465, at 472.

[76] *Karim v R* [2013] NSWCCA 23 at [105] (**Appeal Book** p.73). See also, Hon Sir Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7(2) *Australian Journal of Human Rights* 21 at 28.

[77] Appellant's Submissions at [93].

[78] [2013] HCA 31 at [25].

[79] At least (it must be supposed) in non-federal jurisdiction.

juristic basis upon which the sentencing principle of proportionality is "constitutionalised", yet other sentencing principles, or aspects of criminal procedure, not? For instance, could it credibly be contended that (say) the sentencing principle recognised by this Court in *Muldrock v The Queen*[80] is an essential aspect of judicial power; or that imposing a sentence that does not have regard to this principle is incompatible with judicial power as opposed to an error of law? *Fifth*, the contention understates the fact that the penalty is not mandatory, but minimum and that the sentencing principle of proportionality applies, but within a narrower band than a discretionary sentence without a minimum[81].

61. In *Graham v Florida*[82] the United States Supreme Court considered the validity (in terms of the Eighth Amendment) of Florida legislation that provided that children could be sentenced to life in prison without parole for non-capital crimes. The concurring judgment of Roberts CJ (in particular) illustrates that Eighth Amendment jurisprudence recognises a notion of "narrow proportionality" when considering validity of sentencing legislation, but this notion is entirely different to constitutionalising the sentencing principle of proportionality recognised in Australian law, as contended for by the Appellant here.

PART VI: LENGTH OF ORAL ARGUMENT

62. It is estimated that the oral argument for the Attorney General for Western Australia will take 10 minutes.

Dated: 8 August 2013

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[80] [2011] HCA 39 at [53]-[55] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) - that general deterrence should be given little weight in sentencing an offender suffering from mental illness or an intellectual handicap.

[81] *Bahar v R* [2011] WASCA 249; (2011) 255 FLR 80 at [54] (McLure P, Martin CJ and Mazza J agreeing).

[82] 560 US ___ (2010); 130 S. Ct. 2011. See also Bessler, *Cruel and Unusual: The American Death Penalty and the Founders Eighth Amendment* (Northeastern University Press, 2012) at pp.202-203.

Western Australia

Criminal Code Act Compilation Act 1913

318A. Assault on aircraft's crew

Any person who unlawfully assaults a member of the crew of an aircraft or threatens with violence a member of the crew of an aircraft so as to interfere with the performance by the member of his functions or duties connected with the operation of the aircraft or so as to lessen his ability to perform those functions or duties, is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offence: s. 294A, 297, 304, 313, 317 or 317A.

[Section 318A inserted by No. 53 of 1964 s. 6; amended by No. 51 of 1992 s. 16(2); No. 70 of 2004 s. 36(3); No. 44 of 2009 s. 7.]

Chapter XXXI — Sexual offences

[Heading inserted by No. 14 of 1992 s. 6(1).]

319. Terms used

(1) In this Chapter —

circumstances of aggravation, without limiting the definition of that expression in section 221, includes circumstances in which —

(a) at or immediately before or immediately after the commission of the offence —

(i) the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or

(ii) the offender is in company with another person or persons; or

(iii) the offender does bodily harm to any person; or

(iv) the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or

(v) the offender threatens to kill the victim;

or

(b) the victim is of or over the age of 13 years and under the age of 16 years;

deals with includes doing any act which, if done without consent, would constitute an assault;

indecent act means an indecent act which is —

(a) committed in the presence of or viewed by any person; or

(b) photographed, videotaped, or recorded in any manner;

to indecently record means to take, or permit to be taken, or make, or permit to be made, an indecent photograph, film, video tape, or other recording (including a sound recording);

to sexually penetrate means —

(a) to penetrate the vagina (which term includes the *labia majora*), the anus, or the urethra of any person with —

(i) any part of the body of another person; or

(ii) an object manipulated by another person,

except where the penetration is carried out for proper medical purposes; or

(b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the *labia majora*), the anus, or the urethra of the offender by part of the other person's body; or

(c) to introduce any part of the penis of a person into the mouth of another person; or

(d) to engage in cunnilingus or fellatio; or

(e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).

(2) For the purposes of this Chapter —

(a) ***consent*** means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;

(b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;

(c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

(3) For the purposes of this Chapter, a reference to a person indecently dealing with a child or an incapable person includes a reference to the person —

(a) procuring or permitting the child or incapable person to deal indecently with the person; or

(b) procuring the child or incapable person to deal indecently with another person; or

(c) committing an indecent act in the presence of the child or incapable person.

(4) For the purposes of this Chapter, a person is said to engage in sexual behaviour if the person —

(a) sexually penetrates any person; or

(b) has carnal knowledge of an animal; or

(c) penetrates the person's own vagina (which term includes the *labia majora*), anus, or urethra with any object or any part of the person's body for other than proper medical purposes.

[Section 319 inserted by No. 14 of 1992 s. 6(1); amended by No. 38 of 2004 s. 70.]

(8) It is a defence to a charge under this section to prove the accused person was lawfully married to the child.

[Section 322 inserted by No. 14 of 1992 s. 6(1); amended by No. 3 of 2002 s. 40; No. 70 of 2004 s. 36(3).]

[322A. Deleted by No. 3 of 2002 s. 41(1).]

323. Indecent assault

A person who unlawfully and indecently assaults another person is guilty of a crime and liable to imprisonment for 5 years.

Summary conviction penalty: imprisonment for 2 years and a fine of $24 000.

[Section 323 inserted by No. 14 of 1992 s. 6(1); amended by No. 36 of 1996 s. 17; No. 70 of 2004 s. 35(2).]

324. Aggravated indecent assault

A person who unlawfully and indecently assaults another person in circumstances of aggravation is guilty of a crime and is liable to imprisonment for 7 years.

Alternative offence: s. 321(4), 322(4) or 323.

Summary conviction penalty: imprisonment for 3 years and a fine of $36 000.

[Section 324 inserted by No. 14 of 1992 s. 6(1); amended by No. 36 of 1996 s. 18; No. 70 of 2004 s. 35(3) and 36(3).]

325. Sexual penetration without consent

A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offence: s. 322(2) or (4), 323 or 324.

[Section 325 inserted by No. 14 of 1992 s. 6(1); amended by No. 70 of 2004 s. 36(3).]

326. Aggravated sexual penetration without consent

A person who sexually penetrates another person without the consent of that person in circumstances of aggravation is guilty of a crime and liable to imprisonment for 20 years.

Alternative offence: s. 321(2) or (4), 322(2) or (4), 323, 324 or 325.

[Section 326 inserted by No. 14 of 1992 s. 6(1); amended by No. 70 of 2004 s. 36(3).]

327. Sexual coercion

A person who compels another person to engage in sexual behaviour is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offence: s. 322(3), (4) or (5).

[Section 327 inserted by No. 14 of 1992 s. 6(1); amended by No. 70 of 2004 s. 36(3).]

328. Aggravated sexual coercion

A person who compels another person to engage in sexual behaviour in circumstances of aggravation is guilty of a crime and is liable to imprisonment for 20 years.

Alternative offence: s. 321(3), (4) or (5), 322(3), (4) or (5) or 327.

[Section 328 inserted by No. 14 of 1992 s. 6(1); amended by No. 70 of 2004 s. 36(3).]

329. Relatives and the like, sexual offences by

(1) In this section —

de facto child means a step-child of the offender or a child or step-child of a de facto partner of the offender;

lineal relative means a person who is a lineal ancestor, lineal descendant, brother, or sister, whether the relationship is of the whole blood or half-blood, whether or not the relationship is traced through, or to, a person whose parents were not married

(2) A person who unlawfully uses a conveyance without the consent of the owner or the person in charge of it is guilty of a crime and is liable —

(a) if during the commission of the offence, a person who is not an accomplice of the offender is in the conveyance, to imprisonment for 10 years;

(b) if immediately before or during or immediately after the commission of the offence, the offender —

(i) is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or

(ii) is in company with another person or persons; or

(iii) does bodily harm to any person,

to imprisonment for 10 years;

(c) in any other case, to imprisonment for 7 years.

Summary conviction penalty in a case to which paragraph (c) applies: imprisonment for 3 years and a fine of $36 000.

[Section 390A inserted by No. 70 of 2004 s. 25.]

*[**390B.** Deleted by No. 70 of 2004 s. 26.]*

Chapter XXXVIII — Robbery: Extortion by threats

[Heading amended by No. 23 of 2001 s. 8.]

391. Term used: circumstances of aggravation

In sections 392 and 393 —

circumstances of aggravation means circumstances in which —

(a) immediately before or at or immediately after the commission of the offence —

(i) the offender is in company with another person or persons; or

(ii) the offender does bodily harm to any person; or

(iii) the offender threatens to kill any person;

or

(b) the person to whom violence is used or threatened is of or over the age of 60 years.

[Section 391 inserted by No. 23 of 2001 s. 9.]

392. Robbery

A person who steals a thing and, immediately before or at the time of or immediately after doing so, uses or threatens to use violence to any person or property in order —

(a) to obtain the thing stolen; or

(b) to prevent or overcome resistance to its being stolen,

is guilty of a crime and is liable —

(c) if immediately before or at or immediately after the commission of the offence the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed, to imprisonment for life; or

(d) if the offence is committed in circumstances of aggravation, to imprisonment for 20 years; or

(e) in any other case, to imprisonment for 14 years.

Alternative offence: s. 68, 297, 313, 317, 317A, 378 or 393.

[Section 392 inserted by No. 23 of 2001 s. 9; amended by No. 70 of 2004 s. 36(3).]

393. Assault with intent to rob

A person who, with intent to steal a thing, uses or threatens to use violence to any person or property in order —

(a) to obtain the thing intended to be stolen; or