MAGAMING v THE QUEEN (S114/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2013] NSWCCA 23

Date of judgment: 15 February 2013

Special leave granted: 7 June 2013

Mr Bomang Magaming is an Indonesian citizen who was recruited to help maintain and steer a boat carrying asylum seekers towards Australia. On 6 September 2010 that boat was intercepted near Ashmore Reef. Mr Magaming later pleaded guilty to a charge of aggravated people smuggling under s 233C of the *Migration Act* 1958 (Cth) ("the Act"), which carries a maximum sentence of 20 years imprisonment. Section 236B of the Act prescribes a mandatory minimum penalty for that offence (if a first offence) of five years imprisonment with a non-parole period of three years ("the minimum sentence").

On 9 September 2011 Chief Judge Blanch imposed the minimum sentence on Mr Magaming. His Honour found that Mr Magaming was a simple fisherman whose part in the offence was at the very bottom of the scale of seriousness. The Chief Judge commented that normal sentencing principles would not require a sentence as heavy as the minimum sentence.

Mr Magaming appealed against his sentence, challenging the constitutional validity of s 236B of the Act. That challenge compared the sentencing range for an offence under s 233C (smuggling a group of at least five people) with that under s 233A (smuggling a person). Although the elements of each offence are almost identical, s 233A carries a maximum sentence of 10 years imprisonment without any minimum term whereas s 233C carries the minimum sentence and has a maximum of 20 years.

On 15 February 2013 the Court of Criminal Appeal ("CCA") (Bathurst CJ, Allsop P, McClellan CJ at CL, Hall and Bellew JJ) unanimously dismissed Mr Magaming's appeal. Their Honours held that it was open to Parliament to create overlapping offences with different sentences, even if such provisions operated with gross injustice. The CCA found that although a prosecutor could then choose which offence to rely upon, the relevant provisions in the Act did not amount to a vesting of judicial power in the Executive. Their Honours held that such a prosecutorial choice could not be characterised as impairing the independent function of courts in sentencing offenders.

On 20 June 2013 a Notice of Constitutional Matter was filed in this Court by Mr Magaming's lawyers. The Attorneys-General for the Commonwealth, New South Wales, Western Australia, South Australia and Queensland have all advised the Court that they will be intervening in this matter.

In addition, on 26 June 2013 the Australian Human Rights Commission filed a summons seeking leave to appear at the appeal as amicus curiae.

The grounds of appeal are:

- The CCA erred in holding that the legislative power of the Commonwealth extends to the enactment of section 236B of the Act.

- The CCA erred in failing to hold that section 236B(3) of the Act requires the exercise of the judicial power of the Commonwealth in a manner inconsistent with its nature.

- The CCA erred in refusing to set aside the sentence imposed on Mr Magaming by the primary judge on 9 September 2011.
- udge on 9 September 2011.