Federal Crime and Sentencing Conference

Sentencing Issues in People Smuggling Cases

by

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11 February 2012
ANU, Canberra

Introduction

A few weeks ago, on 26 January 2012, a national public holiday marked the 224th anniversary of the arrival in Botany Bay of a fleet of ships carrying passengers (some voluntary, many involuntary) who intended to settle permanently on this continent. Descendants of the Aboriginal people who then inhabited this continent reminded us that day, some more politely than others, that those boat arrivals, and the many which followed, were not authorised by the lawful inhabitants. It seems unlikely that those on the first fleet thought they were doing anything improper, let alone committing a crime. Many on board were there as punishment for crimes they had committed in England.

Recent decades have seen a resurgence in the unauthorised arrival in Australian waters of boats carrying passengers intent on permanent settlement in Australia. The descendants of those who arrived on the first fleet and the countless subsequent arrivals have, through their government, responded by creating a variety of offences described in the statutes and in ordinary speech as "people smuggling". This paper will address some of the issues that have arisen in relation to the imposition of sentences for those offences.

Smuggling

The expression "people smuggling" is now well established within Australian idiom as describing the unauthorised arrival of boats carrying asylum seekers in the waters to the north and west of our continent. However, the expression is perhaps not the most appropriate, as the

activities to which it is commonly applied have none of the characteristics of secrecy or surreptitious or covert entry commonly associated with smuggling. To the contrary, the general practice has been for the boats to present themselves to the Australian territory nearest their port of embarkation - usually either Christmas Island or Ashmore Reef. Occasionally the vessels make it all the way to mainland Australia. But the usual practice is for the vessels to attract the attention of the authorities once they have arrived within Australian waters so that the paying passengers can assert their claim to refugee status. A significant majority of those passengers eventually succeed in their claims, and are given the right to reside in Australia permanently.

This terminological observation is not driven by pedantry. The fact that the boats set out for destinations where apprehension by Australian authorities is highly likely, probably inevitable, and indeed the objective of the voyage is relevant to an assessment of the likely deterrent effect of penalties imposed on the crew aboard the vessel at the time it is apprehended - a matter to which I will return.

A pernicious trade

My facetious reference to the unauthorised arrival of the first fleet should not be seen as an attempt to diminish the seriousness of people smuggling. It has many pernicious aspects including association with organised crime, the cynical exploitation of vulnerable people, significant loss of life (including many children) and disruption to the orderly processing of applicants for asylum.

In an Australian context, it is clear that hundreds of lives have been lost at sea in the course of people smuggling activities. The boats used are

generally dilapidated and unseaworthy because they are seized and forfeited upon arrival in Australian waters. The boats are often overloaded in order to maximise profits to the organisers. The crew on board at the time of apprehension are often inexperienced and/or incompetent, because it is almost certain that they will be arrested, convicted and imprisoned following apprehension if they are adults. It has been argued that the policy of returning minors to Indonesia without charge has also encouraged organisers to use very young and inexperienced men as crew members. These factors combine to make the journeys extremely hazardous. Those hazards have eventuated into the tragic loss of life on a number of occasions.

An international problem

People smuggling has understandably attracted significant public and political attention in Australia. However, it would be a mistake to think that these problems are somehow unique to Australia, or that the problems which we face are more severe than those faced by other countries in the world. To the contrary, it is clear that people smuggling is a world-wide phenomenon, and that it has had a more profound and significant impact on many countries other than Australia.

The international dimension of the problem was recognised by the adoption by the General Assembly of the United Nations on 15 November 2000 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, which is a supplement to the United Nations *Convention Against Transnational Organised Crime*. Australia signed the protocol in December 2001.

The protocol has its roots in proposals advanced by the Italian and Austrian governments. In the case of Italy, concern was motivated by the safety of unauthorised migrants arriving by sea, whereas Austria was motivated by the lack of co-operation from eastern European countries who were failing to act to prevent people being smuggled overland into Austria.

The protocol is linked to its "parent" treaty, the *Convention Against Transnational Organised Crime*. To become a party to the protocol, a state must also be or become a party to the *Convention Against Transnational Organised Crime*. Because of that link, the protocol only applies to offences which are transnational in nature and which involve an organised criminal group (Article 4).

Article 6 of the protocol obliges each state party to establish people smuggling as a criminal offence, and to establish as aggravating circumstances of the offence, the endangerment of the lives or safety of the migrants concerned, or the exploitation or inhuman or degrading treatment of those migrants. The article also contains provisions relating to the smuggling of migrants by sea (Articles 7 - 9).

The Australian legislation

Australia's endorsement of the Migrant Smuggling Protocol resulted in amendments to the *Criminal Code* (Cth) in 2002 to introduce people smuggling offences into Division 73 of that Code. Consistently with the provisions of the Protocol, those offences were (until 2010) only applicable if the offender was motivated by profit.

However, prior to the introduction of those offences into the *Criminal Code* (Cth), and following the incident involving the *MV Tampa*, the *Migration Act* was amended (by the *Border Protection (Validation and Enforcement Powers) Act 2001*) to provide mandatory minimum sentences for people convicted of people smuggling offences under the *Migration Act*. Under those amendments, if the offence involved the smuggling of five or more people, a minimum term of 5 years imprisonment, with a minimum non-parole period of 3 years had to be imposed in the case of first offenders, or in the case of repeat offenders, a minimum term of 8 years imprisonment with a minimum non-parole period of 5 years must be imposed. Those provisions did not (then or now) apply to juvenile offenders.

The relevant provisions of the *Migration Act* have been amended a number of times since 2001. However, the provisions requiring minimum sentences to be imposed upon conviction have been retained. The relevant division of the current Migration Act creates a number of offences. Most relevant for present purposes are the offences of people smuggling created by ss 233A-C. Under s 233A, the offence of people smuggling is committed if a person organises or facilitates the bringing or coming to Australia of a non-citizen with no lawful right to come. The maximum penalty for that offence is 10 years imprisonment.

Section 233B creates an offence of aggravated people smuggling, for which the maximum penalty is 20 years imprisonment. The circumstances of aggravation specified in that section are commission of the offence of people smuggling:

(a) intending that the victim will be exploited after entry into Australia; or

(b) subjecting the migrant to cruel, inhuman or degrading treatment; or

(c) engaging in conduct giving rise to a danger of death or serious harm or reckless as to the danger of death or serious harm to the migrant.

Section 233C creates another offence of aggravated people smuggling which is committed if a person organises or facilitates the bringing or coming to Australia of a group of at least five non-citizens who have no lawful right to come. The maximum penalty for that offence is 20 years imprisonment.

Section 236A provides that a court may not make an order under s 19B of the *Crimes Act 1914* (Cth) dismissing a charge of aggravated people smuggling without conviction or punishment unless it is established that the offender was under 18 years of age when the offence was committed. Further, s 236B provides that if a person is convicted for a first offence of aggravated people smuggling contrary to s 233C, the court must sentence the offender to imprisonment for a term of at least 5 years with a non-parole period of at least 3 years, or in the case of aggravated people smuggling contrary to s 233B, or a repeat offence, a minimum term of at least 8 years imprisonment with a non-parole period of at least 5 years. However, the section does not apply if it is established on the balance of probabilities that the offender was under the age of 18 at the time the offence was committed.

Is the mandatory minimum reserved to the least serious case?

It is well established that the maximum penalty for any offence provides a basis upon which the court can compare cases within the worst imaginable category with the case before the court and thereby obtain a

yardstick for the purposes of sentence - see ***Markarian v The Queen*** (2005) 228 CLR 357, [31]. Sometimes this principle is expressed (not entirely accurately) in terms that the maximum penalty is reserved for cases within the worst possible category.

In people smuggling cases, the prosecution has suggested that a similar principle should be applied where the legislature has specified a statutory minimum penalty. Put more bluntly, it has been submitted that because the statutory minimum for a first offence contrary to s 233C is a term of 5 years imprisonment, that term should be reserved for cases in the least serious category. So, the argument goes, if the offender has not pleaded guilty, the case cannot fall within the least serious category from which it follows that a term of more than 5 years imprisonment must be imposed.

This submission was rejected by Riley CJ in ***The Queen v Pot, Wetangky & Lande***, Unreported; NTSC; 18 January 2011. In that case, his Honour ruled that the proper approach was to apply the sentencing principles set out in the *Crimes Act* and those applicable at common law and taking into account all relevant factors, determine an appropriate sentence. Where that process resulted in a sentence less than the statutory minimum, the standard statutory minimum should be imposed.

Subsequently in ***Bahar v The Queen*** [2011] WASCA 249, the argument rejected by Riley CJ was re-presented to the Court of Appeal of Western Australia. The submission was again rejected, although not for the reasons given by Riley CJ. The leading judgment was written by McLure P, with whom Mazza J and I agreed. Her Honour observed that the general sentencing principles specified in the Crimes Act are framed at a level of generality and can be applied within the boundaries of the

sentencing power established not only by the maximum statutory penalty, but also the minimum statutory penalty. In her Honour's view:

> It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the 'just and appropriate' sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a 'just and appropriate' sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. The statutory minimum and statutory maximum penalties are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied.

Further, for reasons explained by her Honour, it is a mistake in principle to proceed upon the assumption that a sentencing outcome is dictated by the presence or absence of one or more mitigating factors. The mistake in that approach is that it necessarily connotes a two-stage approach to sentencing - namely, the identification of a "starting point" with adjustment for aggravating and mitigating factors - a process which has been disapproved by the High Court (in ***Markarian*** and other cases).

Her honour concluded:

> Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate. The sentencing judge in this case did not err in refusing to identify a starting point at some level above the mandatory minimum so as to enable discounts for common mitigating factors. The sentencing judge was correct to reject the Crown's submission that he should do so. To choose a starting point at a sufficiently high level solely for the purpose of accommodating reductions for all potential mitigating factors

offends the proportionality principle and treats the mere absence of mitigating factors as having an aggravating effect.

Mandatory minimum terms - policy

Where an offence is created by the legislature, it is for the legislature to prescribe the range of sentences that may be imposed. It is the invariable practice of the legislature to prescribe the maximum sentence which can be imposed. Less frequently the legislature will prescribe the minimum sentence which can be imposed. However, the infrequency of this practice should not encourage the view that the prescription of a minimum sentence is novel or exceptional. To the contrary, minimum sentences have been a feature of Australian law since the arrival of the first fleet. Perhaps the most well-known example of a statutory minimum penalty is the penalty for murder which was, for much of Australia's history, a mandatory penalty of death, which could be commuted by the exercise of executive clemency. Following the abolition of the death penalty in all Australian jurisdictions, many jurisdictions retain a mandatory sentence of life imprisonment for murder.

Within the framework of the Australian constitution, responsibility for the prescription of the range of sentences which might be imposed by a court in respect of a statutory offence rests with the legislative branch of government. That branch of government is elected by, and responsible to, the community. It is entirely appropriate for that branch of government to exercise the mandate given to it by the people by prescribing the bounds within which sentences may be imposed for particular offences, including, if it thinks appropriate, the lower bound.

When that power is exercised, it is, of course, the duty of the courts to act within the powers conferred by the legislature.

When a legislature is considering exercising the power to set a minimum bound for the exercise of the sentencing discretion, it will hopefully take account of the fact that the prescription of a minimum sentence creates the risk that a court may be required to impose a sentence which is disproportionate to the culpability of the offender, or the seriousness of the offence, or which may prejudice the prospects of rehabilitation and which is to that extent unjust, and will evaluate those risks against the perceived advantages of a mandatory minimum sentence.

Recognition of the constitutional responsibility of the legislature does not mean that it is inappropriate or undesirable for a court or judge to observe, in measured and moderate terms, that in a particular case the application of sentencing constraints imposed by the legislature may have given rise to injustice. Such observations provide both the legislature and the electorate with information which may be of assistance in the formation or revision of public policy with respect to sentencing.

On at least 11 occasions, at the time of writing, judges imposing the mandatory minimum sentence of 5 years imprisonment for people smuggling have made observations critical of the mandatory minimum with varying degrees of stridency[1]. In addition, two judges have criticised the mandatory minimum extracurially[2]. In a number of the cases, judges have observed that without the constraint imposed by the

[1] Supreme Court of Northern Territory - Riley CJ, Kelly J, Barr J, Mildren J, Blokland J; Supreme Court of Queensland - Atkinson J; District Court of WA - Yeats DCJ; District Court of New South Wales - Conlan DCJ, Knox DCJ; District Court of Queensland - Martin DCJ, Farr ADCJ
[2] Chief Judge Blanch, Murray J (SCWA)

statutory minimum, they would have imposed a lower sentence which would, in their view, have been appropriate to the circumstances of the case and the culpability of the offender. A number of judges have also been critical of the prospect that the minimum sentence which they have been required to impose is likely to have any significant general deterrent effect, given that the offenders coming before the courts have been typically illiterate and poor fisherman from remote islands of the Indonesian archipelago where there is no electricity, no television and no radio, and therefore little prospect of offenders being aware of the sentencing practices in force in Australia. In ***Bahar***, McLure P observed that the effectiveness of the statutory minimum sentence as a deterrent "depends on securing widespread knowledge of its existence, particularly outside Australia".

Such data as is available bears out the anecdotal experience of the courts in relation to the characteristics of the typical people smuggler coming up for sentence. According to data tabled in the Australian Parliament, as at 18 October 2011, 493 people had been arrested for people smuggling related offences over the preceding three calendar years. Of those arrests, only ten could be termed organisers, and the remainder described as crew. Typically the people arrested as crew are those who are left on the boat at the time it is apprehended in Australian waters. Very commonly more senior personnel, including organisers, will have disembarked, perhaps at Rote Island or perhaps onto another vessel before there is any risk of apprehension. Those that remain and are arrested and brought before Australian courts are often impoverished and illiterate, and have been induced to work on the boat for a sum which they regard as very substantial, but which is the Indonesian equivalent of between $300 and $500.

The growth in the numbers of such persons coming before our courts also suggests that the criticisms of the limited deterrent effect of mandatory minimum sentences in this area may have some substance. Although the figures vary, depending upon their source, all the data I have seen, and the experience of the courts is that the numbers of offenders brought before the courts for people smuggling has increased exponentially over recent years. Referring again to data tabled in the Parliament, as at 30 June 2009, there were 30 people smuggling prosecutions underway before the courts. A year later (as at 30 June 2010), there were 102 cases pending, and by 30 June 2011, 304 (that is, ten times as many as 2 years earlier).

It is in this context that the high likelihood of apprehension to which I earlier referred is relevant. Leaving aside the prospect that a people smuggling vessel might be apprehended in Indonesian waters and forcibly returned to port (which seldom occurs), the crew remaining on the vessel as it approaches Australian waters after all opportunities for disembarkation have passed must be aware that their journey can only have two possible outcomes. Either they will be lost at sea, or they will be apprehended at or shortly after the time they enter Australian waters. If those crew members were aware that apprehension in Australian waters would almost certainly result in a term of imprisonment of 5 years (with a 3-year non-parole period), it seems most unlikely that they would embark upon a process which would almost inevitably have that result for the equivalent of between $300 and $500.

Mandatory minimum terms - practical consequences

The imposition of mandatory minimum sentences also has a number of significant consequences for the administration of justice generally, as those involved in that system will know, and as Chief Judge Blanch has publicly observed. Because almost all the offenders coming before the court are first offenders, whose only role was to serve as crew and who had no organisational role or capacity, and whose only hope of profit was a very modest amount (which might alleviate their poverty), offenders are almost invariably sentenced to the statutory minimum, irrespective of whether or not they plead guilty. Because of the significance of the penalty which they face, legal aid is invariably granted. Because their defence is funded, and there is no advantage to be derived from a plea of guilty, pleas of not guilty and lengthy trials are very common. The exponential increase in the numbers involved is posing very significant issues for the publicly-funded agencies responsible for providing resources to these cases. Those agencies include the Federal Police, the Commonwealth Director of Public Prosecutions, the various State Legal Aid agencies and the state and territory courts. Because the accused seldom speak English, interpreters are necessary at every stage of the process, including throughout the trial, and this significantly adds to the expense involved. Further, when the offenders are found guilty and the mandatory minimum terms of imprisonment imposed, state and territory prison systems that are already over-crowded must find accommodation and provide interpretation facilities for these prisoners.

I am not aware of any attempt to quantify the total amount of public funds involved in these processes through the various agencies involved, but there can be no doubt that the amount would be significant.

Conclusion

Responsibility for the prescription of the bounds within which sentences may be imposed for people smuggling offences rests with the legislature, not the courts. However, it is appropriate for the courts to draw the attention of the legislature to the fact that there is good reason to think that the terms of imprisonment which the courts are required to impose are often considered to be disproportionate to the culpability of the low level offenders who come before the courts, and the circumstances of their offending, and do not seem to be having any significant effect in deterring others who might be offered a position as crew on a people smuggling vessel. It is also clear that the imposition of these penalties is having significant practical and cost implications for the administration of justice generally.