

JURISDICTION : CHILDREN'S COURT OF WESTERN AUSTRALIA
IN CRIMINAL

LOCATION : PERTH

CITATION : R -v- GT [2012] WACC 18

CORAM : JUDGE REYNOLDS

DELIVERED : 30 OCTOBER 2012

FILE NO/S : CC 3719 of 2012

BETWEEN : THE QUEEN
Prosecution

AND

GT
Accused

Catchwords:

People smuggling - Child crew member - Principles to be applied - Weight for general and personal deterrence - Vulnerability, exploitation and opportunity - Turns on own facts.

Legislation:

Crimes Act 1914 (Cth)
Migration Act 1958 (Cth)
Young Offenders Act 1994 (WA)

Result:

General and personal deterrence given little weight where child is vulnerable, exploited and has no real opportunity not to become involved. Sentenced to a recognisance to be of Good Behaviour, taking time in custody and detention into account.

Representation:

Counsel:

Prosecution : Ms C K Bray
Accused : Ms V S Y O'Brien

Solicitors:

Prosecution : Director of Public Prosecutions (Cth)
Accused : Legal Aid (WA)

Case(s) referred to in judgment(s):

Nil

JUDGE REYNOLDS:

Introduction

1 GT is a young Indonesian male born on 18 May 1994.

2 GT has pleaded guilty and is before the Court for sentence for the offence that:

Between about 15 February 2012 and 18 February 2012 on the seas between Indonesia and the Australian Territory of Christmas Island, [GT] facilitated the bringing or coming to Australia of a person who is a non-citizen, namely [GRJ], where the said [GRJ] had no lawful right to come to Australia contrary to paragraph 233A of the Migration Act 1958.

3 GT was about 17 years and 9 months of age at the time of the offence. Although he is now over the age of 18 years, this Court has jurisdiction to sentence GT because he was less than 18 years of age at the time of the offence.

Factual circumstances of the offence and the offender

4 On 17 February 2012 the Australian Maritime Safety Authority received a distress telephone call from a foreign male person advising that he and a large number of Iranian and Pakistani persons were on a vessel headed for Christmas Island and that they needed urgent assistance. That person was not the defendant. Based on the coordinates given, the boat was located approximately 26 nautical miles north-west of the Australian Contiguous Zone near Christmas Island. Two Royal Australian Navy vessels were dispatched to the location.

5 The boat was located late into the night on 17 February 2012. It was a wooden hull fishing boat approximately 25 metres in length with a 4.5 metre beam. There were 77 passengers on board who were all later found to be non-citizens and who had no lawful right to come to Australia. Also on board was an Indonesian crew member, the defendant, and another Indonesian male who identified himself as the master of the boat. The defendant cooperated with the authorities and provided his personal details. On 18 February 2012 the passengers and the two crew members were offloaded at the wharf on Christmas Island.

6 The following information was obtained from passengers who had been on the boat. In the early hours of 15 or 16 February 2012 passengers were collected from hotels/apartments in the Bogor area of Indonesia in small vans (about 8 people to a van) with blacked out windows and driven

by Indonesian drivers to a jungle area near the sea. They walked about 50 metres in the jungle to a beach. From there they were taken in a number of small boats about 100 metres out to sea where the boat was anchored with the engine running. The passengers were assisted on to the boat by three Indonesian crew members and told to stay quiet and initially stay below deck and sit down until the boat got underway and was further out to sea past Indonesian waters.

7 Passengers identified the captain of the boat as being older than the other two crew. The boat was followed out to sea by another smaller boat. When the boat reached the limit of Indonesian waters the captain disembarked the boat and returned on a smaller boat to the mainland leaving the two younger Indonesians to crew the boat to Christmas Island. The two Indonesian crew members were observed sharing crew responsibilities on the boat including steering the boat and attending to maintenance duties.

8 This was not the first time that the young offender had crewed a boat bound for Australia carrying non-citizens. On 22 October 2011 he was apprehended on a boat outside the Australian Contiguous Zone carrying 79 passengers who were all non-citizens. There was another juvenile crew member on board the boat with the defendant. On 27 October 2011 the offender, due to the Australian Government Policy at the time that juvenile crew members would not be charged in relation to these matters save for certain circumstances, was issued an official caution, warned that if he participated in another journey bringing non-citizens to Australia that he would be subject to prosecution, and returned to Indonesia.

9 The offender was born in Roti, Indonesia. The defendant's father passed away when the defendant was very young. Thereafter he and his younger brother were raised by his grandparents. His grandfather passed away about three years ago. He attended school until he was 14 years of age. He then relocated to Kupang, Indonesia, to gain employment. He lived there with his uncle and aunty.

10 When the offender lived with his grandmother she worked on a farm and was paid in food. The young offender usually had one meal a day of rice or corn depending on what his grandmother had been farming. It was a case of subsistence living. They lived in a hut about 2 metres by 2 metres and made of coconut leaves and straw. There was no running water or electricity. When he lived with his uncle and aunty, his uncle was also paid in food. They rented a room about 3 metres by 3 metres and had electricity but no running water. When the defendant commenced work at

the age of 14 years he used his income to support his grandmother and his younger brother. He worked on building sites six days a week from about 7:00am to 5:00pm each day.

11 Sometime prior to this offence, the offender borrowed the equivalent of approximately \$180.00 AU to pay for his grandmother's medical care. She had issues with her eyesight and mobility. He was only earning the equivalent of about \$3.00 AU per day at the time and became unable to repay the money together with the interest on it. The person who loaned him the money told him that if he worked for another person, who he identified, then his debt would be paid. He agreed to work for this other person to perform household maintenance at this person's house in Jakarta. He was in the employ of this other person for a period of about three weeks before becoming a crew member on the boat. During that three weeks there was an occasion when he was kept in a room for a day as punishment for leaving his employer's house. There was no history of his employer assaulting him or instructing anyone else to do so.

12 One night about three weeks into his employment, the defendant was told by his employer to get into a car and he was driven to a beach. There were no small vans near the beach area when they arrived. At that location he was told to get into a boat and was taken out to sea. He says that he did not ask his employer where they were going. They came upon the boat which was anchored just off the shore as previously mentioned. It was only when he boarded the boat that he saw the passengers and realised what was happening. When he boarded the boat he was told by someone that he should stay on board or face the consequences. He did not ask and was not told what that meant. He felt pressured and coerced. The boat travelled out to sea to a location where one of the crew got off and was taken back to the mainland in a smaller boat. That person was an adult male of about 27 years of age. The young defendant remained on the boat and continued towards Christmas Island.

Analysis

13 Section 16A of the *Crimes Act* sets out matters which the Court must have regard to when considering sentence. Section 16A(2) lists numerous matters. Section 16A(2)(j) expressly refers to personal deterrence. There is no express reference in ss 16A to general deterrence. However, s 16A(1) and (2) are clearly not meant to be interpreted as providing an exhaustive list of matters to be taken into account. It is well settled that general deterrence is a matter which the Court must have regard to when determining sentences under the *Crimes Act*. General deterrence is a

matter continually referred to when sentencing offenders for offences of this sort under the *Migration Act 1958* which are commonly referred to as 'people smuggling' offences.

14 This Court has not been called on to sentence a child for an offence of this sort for a very long time. The most recent authority provided to me by a President of this Court was handed down in 2002. There are a number of reasons for that. They include that for some time for policy reasons children who crewed on boats which brought non-citizens to Australia were warned and returned to Indonesia without charge. This case therefore requires this Court to consider for the first time for a long time how the principles of sentencing should be applied in cases of this sort involving children.

15 I should at the outset make it clear that offences of this sort are very serious. The statutory maximum penalty for this offence is 10 years imprisonment and/or a fine or \$110, 000. That shows that the legislature regards it as very serious and with respect, rightly so. Offences of this sort directly concern Australian sovereignty and border protection. They give rise to legitimate concerns on issues to do with Australia's national security.

16 Further to all of that, the fact of the matter is that over recent years there has been an increase in the number of boats carrying non-citizens to Australia. I should put that into some sort of perspective. A boat used for this purpose is described by the relevant Commonwealth authority as a Suspected Irregular Entry Vessel (SIEV). This boat was given the description SIEV305. In the eight months since this boat entered Australian waters there have been a further 138 boats or SIEVs arrive in Australia. That clearly supports the general proposition that Courts dealing with these offences should give substantial weight to general deterrence, and where appropriate, personal deterrence, when sentencing.

17 The people at or about the top who organise these sorts of offences have no regard for the lives of the people whose money they take to transport to Australia. It seems that boats are usually, if not always, unseaworthy and poorly equipped. The primary objective of these organisers is monetary gain. The nature of this kind of enterprise and the desire for maximum monetary gain results in poor people, including poor children, being recruited and used to captain and crew the boats used to carry non-citizens to Australia.

18 The weight given to general deterrence, and where appropriate personal deterrence, will vary according to the particular circumstances of the case. Clearly substantial or maximum weight for general deterrence should be applied to organisers at or about the top of such enterprises. As you go down the line, generally the weight to be attached to general deterrence may decrease. As I have said, each case depends on its own circumstances.

19 Further to all of that, I wish to say that sentences for adults for these kinds of offences can in no way be used as a guide to arrive at the proper sentences for children. The *Young Offenders Act 1994* (WA)(the YO Act) mirrors key objectives and principles for sentencing children that are provided in the Convention on the Rights of a Child (CROC), United Nations Assembly Resolution 44/25 of 20 November 1989. They include that a custodial sentence is to be used as the sentence of last resort and if imposed should be for the shortest necessary time. They also require the Court to have regard to youth, culture and the rehabilitation of children.

20 Many of the authorities referred to in sentencing for offences of this kind apply to adults. There needs to be great care to ensure that comments made in cases involving adults are not necessarily equally applied in cases involving children.

21 Can I give an example of that. I have read it said in numerous authorities that being a crew member is a pivotal role and vital to the success of these sorts of enterprises and that as a consequence it is necessary for the Courts to deal strongly with offenders who have crewed boats in order to deter others from doing so. That may well be true in many cases but what weight should be given to general deterrence in cases involving crew members should be arrived at by taking into account all of the particular circumstances in the particular case. For example, is the offender an adult or a child, was the offender vulnerable and/or exploited, and was the offender in all of the circumstances really able to avoid becoming involved? Further, in the case of children the relevant sentencing principles for sentencing children should also be applied. In this case this Court is required to apply all of the objectives and principles for sentencing children as contained in the YO Act.

22 All of that said by way of background, I now move on to consider what weight should be given to general and personal deterrence in this particular case.

23 The reason that I have set out such a comprehensive and detailed outline of the facts on both the offence and the offender is because I consider it essential for the purpose of deciding the proper sentence to take into account not only the fact that the defendant was a child at the time of the offence but also whether, and if so the extent to which, his involvement in the offence resulted from him being vulnerable and exploited by an adult or adults.

24 In my view the factors of vulnerability and exploitation, if present, are particularly relevant in deciding what weight should be attached to personal and general deterrence in cases of this sort involving child offenders.

25 First, I wish to examine the factor of vulnerability. The offender was a child of 17 years of age at the time of the offence. He comes from an extremely impoverished background in an economic and material sense. From the early age of 14 years he had to carry responsibilities well beyond his years.

26 In a relatively short time period immediately preceding the offence the offender had to support himself and his family and incurred what to him was a considerable amount of debt to pay for health care for his grandmother. His daily income was extremely low. He agreed to go to Jakarta and work for the person who was his employer at the time of the offence because the employer paid out his debt and provided him with employment. He was dependant on his employer to continue providing him with employment to enable him to repay the debt, to enable him to forward money to his family for their support, and to secure his own accommodation in Jakarta. Culturally he was subservient to his employer and was and felt unable to refuse his employer's demand to crew the boat.

27 An analysis of the young offender's vulnerability requires a consideration of when he first became aware that he was being required to crew a boat to take non-citizens to Australia and also what opportunity he really had to avoid becoming involved in the commission of the offence.

28 The offender's version of the facts that he first became aware of that when he boarded the boat when it was anchored offshore and saw the passengers on board is not necessarily inconsistent with that part of the statement of material facts presented by the Commonwealth that the passengers were assisted on the boat by three Indonesian crew members and told to stay quiet and initially below deck. It is reasonable to think that the exercise of ferrying the passengers to the boat involved a multiple

number of Indonesian people who came and went and who were strangers to the passengers. In such circumstances the offender may well have boarded the boat when that exercise of ferrying the passengers had been completed. Anyway, the Commonwealth has not taken any issue on the offender's version on this factual particular.

29 A question arising from that factual situation, is what real options did the young offender have when he first became aware of what he was being required to do? I repeat all of the factors that I have already mentioned. In addition to all of them, the young offender was now at sea and he could not swim. Although he had not been assaulted by his employer or anyone else on his employer's instructions he was nevertheless worried that he would be if he refused to crew the boat. In my view that concern could not be dismissed as being unreasonable in the circumstances.

30 There is no issue that after the boat was driven further out to sea to the limit of Indonesian waters that an adult Indonesian person who was thought by the passengers at that time to be the captain, disembarked the boat and embarked on to a smaller boat and returned to the Indonesian mainland. This left the offender and one other Indonesian person as the only two crew on board the boat with 77 passengers all of whom wanted to go to Christmas Island. Another question arising is what real options did the young offender have at that time when his employer and no one else associated with the organisers of the voyage were present on or about the boat?

31 In my view, there is a sound basis to conclude that at that time the young offender had no real options or choice but to continue. He was well out at sea, it was dark, he did not have any access to a smaller boat to get back to land, swimming was not an option, and it is highly likely that the passengers would not have taken too kindly to any attempt by him not to help them get to Christmas Island.

32 During the sentencing a factual issue arose on whether or not the offender knew how to use the GPS and the wet compass which were on the boat to help navigate it towards Christmas Island. The Commonwealth says that he did know and he says that he did not. In my view, given that he had no real option to do anything other than crew the boat to Christmas Island after the captain disembarked the boat and that it is likely that irresistible pressure would have come from passengers that he did so, whether he steered the boat by him using the GPS and wet compass or whether he steered it on the directions of the passengers by them using the

GPS and wet compass does not really matter in the circumstances of this particular case.

33 On my assessment of it all, the offender was not only young but in combination with that he was also very vulnerable to being sought out and used to crew the boat to take non-citizens to Christmas Island and he had no or little real opportunity of avoiding becoming involved.

34 I now turn to consider whether the young offender was exploited by an adult or adults. The first point I wish to make on this aspect of the case is that there is no issue as between the parties that the young offender did not seek out any involvement in crewing the boat to Christmas Island. Rather, he was sought out and required to perform the role.

35 The offender's version of his impoverished circumstances, his grandmother's need for health care, his indebtedness, and how he came to work for his employer and that he did work for his employer as he has described has not been challenged by the Commonwealth. Nor has his version of the facts that he was driven at night with his employer to a location near a beach and then taken in a small boat with his other junior crew member and bosses out to the boat which was anchored about 100 metres from the shore. Also, as mentioned, the Commonwealth accepts that a person who seemed to be the captain, disembarked the boat and was taken in a smaller boat to the Indonesian mainland leaving the young offender and the other crew member as the only two crew on board the boat when it was well out to sea.

36 On my assessment of it all, the young offender's employer was likely a significant person working with others in arranging the transportation of non-citizens by boat to Christmas Island and so to Australia. Where in particular the young offender's employer was positioned in the hierarchy of the organisers of the operation is not something that I can reliably conclude. However it is likely that he was in the upper echelon or was working in association with people in the upper echelon. Given at least that he was the young offender's employer, that the young offender was indebted to him and dependant on his employment, and the power disparity within the employer/employee relationship, I think that the young offender was exploited by at least his employer to crew on the boat. In my view he was known to be a child and was used and considered expendable. While the organisers would have made a significant amount of money from the enterprise, the young offender did not stand to make any particular amount of money by being involved.

37 This is perhaps an appropriate point in my analysis to mention and comment on the fact that this was the second occasion in a relatively short time that the young offender had crewed on a boat to take non-citizens to Christmas Island.

38 While it is arguable that this may be a reason to give greater weight to general and personal deterrence, in my view it is also a reason which made the young offender more vulnerable and open to exploitation. He would have been known to organisers and his employer as being a child and a person who had shown that he could successfully crew a boat to Christmas Island. Those two factors in combination would have made him a better choice to them.

39 I wish to add that in my view the fact that the young offender had crewed on a boat to Christmas Island before did not diminish the fact and the extent to which he was vulnerable and exploited on this particular occasion. Further, while it would have been an extra reason for him not to get involved on this second occasion, it would not have improved the circumstances he was in to the point of giving him any real opportunity of avoiding becoming involved.

40 For all these reasons I conclude that the young offender in this case came to be involved in the commission of this offence because he was a child who was vulnerable and exploited by an adult or adults. It was the adult or adults that made a substantial financial gain no matter whether that is measured against an Indonesian standard or an Australian standard. In this particular case the young offender did not stand to gain any particular amount of money. Rather, this is a case where the young offender did what his employer required him to do for the reasons mentioned.

41 Having said all of that and reached those conclusions I now come to mention what I regard as an important point of principle which should be applied in this case and other cases like it which concern vulnerable and exploited children. In cases of offences of this kind, where the offender is a vulnerable child who was exploited by an adult or adults and who had no or little real opportunity to avoid becoming involved in the commission of the offence, little weight should be given to personal and general deterrence in the overall consideration of the proper sentence.

42 The young offender is now about 18 years and 5 months of age. He was taken into custody on 17 February 2012 and held in custody over night. He was granted bail the next day which resulted in him being

detained in an Immigration detention facility from that time because he was and still is a non-National of Australia. Since then he has now served about 8 months and 12 days in detention and about 8 months 13 days in total in custody and detention. As I understand it he has spent some time in a detention facility in Darwin and some time in a detention facility in Perth.

43 Whatever view may be held on how and why the young offender came to be in detention, I think it needs to be borne in mind that detention for the young offender has likely been difficult because he has been separated from his family and country. He cannot remember when he last saw his grandmother. One of the principles that the Court must apply when dealing with children is to have regard to a young person's sense of time. In addition to the particular difficulties just mentioned I think that it can be properly said that both objectively and subjectively the young offender has been in detention for a long time.

44 Counsel for the Commonwealth has submitted that the young offender should be sentenced to a period of immediate imprisonment, the length of which would require him to serve the additional time in an adult prison before being released on a recognisance.

45 While the nature of this offence is of course serious and generally for offences of this kind there will need to be substantial weight given for general deterrence, I am of the view that such a sentence is not appropriate in this case having regard to all of its circumstances. Further, for reasons already expressed, I do not think that the fact that the young offender crewed on another boat to Australia only about three months or so before this one, adds to the circumstances of this case to require a sentence of immediate imprisonment.

46 In my view the young offender has spent a long time in custody and detention. If it is not more than enough it is at the very least enough. This time must be taken into account for the purpose of sentence. It is necessary to consider and assess my sentence by taking all of that time in custody and detention into account.

Conclusion

47 For all these reasons I convict the young offender of this offence on his plea of guilty and order that he be released upon him entering into a recognisance in the sum of \$500.00 to be of good behaviour for a period of 4 years, to include a condition to apply for the first two year period of

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the recognisance, that he will not travel on a boat carrying any non-citizen to Australia.