

AUSTRALIA / JUDGMENT

Weatherall, S.E. v The Queen [1987] FCA 506

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JUDGMENT No. Soufe2.

CATCHWORDS

CRIMINAL LAW - murder - victim strangled by accused - whether open to jury to conclude atcused intended to inflict grievous bodily harm on victim - sentence.

CRIMINAL LAW - juries - retirement to consider verdict - recall and direction by trial judge - whether risk of distortion of verdict.

STATUTES - interpretation - Australian Capital Territory - accused charged under provision of N.S.W. Act made applicable by A.C.T. Ordinance ~ Whether inconsistent with Commonwealth provision - whether Commonwealth provision covering the field.

Juries Ordinance 1967 (A.C.T.), 5.38

Crimes Act 1900 (N.S.W.)} in its application to the A.C.T., s.349

Crimes Act 1914 (Cth.), ss.6, 11(1), LI(1A).

STEPHEN EDMUND WEATHERALL v. THE QUEEN

No. ACT G23 of 1987

THE QUEEN v. ANTHONY JOHN HAGEN

No, ACT G24 of 1987

CORAM: FOX, FORSTER AND MILES JJ.

DATE: 17 SEPTEMBER 1987

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IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY NO. ACT G23 OF 1987
DISTRICT REGISTRY
GENERAL DIVISTON
ON APPEAL from the Supreme
Court of the Australian Capital
Territory

BETWEEN : STEPHEN EDMUND WEATHERALL
Appellant

AND: THE QUEEN
Respondent
MINUTE OF ORDER
JUDGES MAKING ORDER: FOX, FORSTER AND MILES JJ.
DATE OF ORDER: 17 SEPTEMBER 1987
WHERE MADE: CANBERRA

THE COURT ORDERS
THAT: 1. The appeal be dismissed.
Note: Settlement and entry of orders is dealt with in
Order 36 of the Federal Court Rules.
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DISTRICT REGISTRY
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ON APPEAL from the Supreme
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BETWEEN : THE QUEEN
Appellant

AND: ANTHONY JOHN HAGEN
Respondent

BETWEEN : ANTHONY JOHN HAGEN
Cross-Appellant

AND: THE QUEEN
Cross-Respondent
MINUTE OF ORDER
JUDGES MAKING ORDER: FOX, FORSTER AND MILES Jd.
DATE OF ORDER: 17 SEPTEMBER 1987
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THE COURT ORDERS THAT: 1. The appeal and cross-appeal be dismissed.
Note: Settlement and entry of orders is dealt with in
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REASONS FOR JUDGMENT

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FOX J. In these appeals and cross-appeal I have had the advantage of reading the judgment prepared by Forster J. I agree with the orders proposed by his Honour and the reasons therefor.

I certify that this and the preceding page are a true copy of the Reasons for Judgment herein of his Honour

Mr. Justice Fox. ay) Associate: wg Fhrher

Date: [7-4-8

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IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

DISTRICT REGISTRY GENERAL DIVISION

CORAM:

DATE:

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FOX, FORSTER AND MILES JJ.

17 September 1987

ON APPEAL from the Supreme Court of the Australian Capital Territory

BETWEEN:

STEPHEN EDMUND WEATHERALL

Appellant AND: THE QUEEN Respondent No. ACT G24 of 1987 BETWEEN: THE QUEEN Appellant
AND: ANTHONY JOHN HAGEN Respondent BETWEEN: ANTHONY JOHN HAGEN
Cross~Appellant AND: THE QUEEN

Cross—Respondent

REASONS FOR JUDGMENT

FORSTER,

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Anthony John Hagen (Hagen) was convicted on 5 March 1987 after a trial by judge and jury in the Supreme Court of the Australian Capital Territory for murdering Colleen Anne Ransley. On 26 March 1987 he was sentenced by the trial judge (Gallop J.) to fifteen years' imprisonment. His Honour specified a period of nine years during which Hagen would not be eligible for parole. Stephen Edmund Weatherall (Weatherall) was convicted on the same day as Hagen after a joint trial of being an accessory after the fact to Hagen's crime of murder. Weatherall was sentenced to three years' imprisonment and a period of twelve months was specified during which he would not be eligible for

parole.

Weatherall appealed against his conviction upon a number of grounds stated in the notice of appeal and also later appealed against his sentence. The Director of public prosecutions on behalf of the Queen appealed against the sentence imposed upon Hagen and finally Hagen appealed by way of cross-appeal against

his conviction. All these appeals were heard together.

In order that the issues arising in the appeals may be properly understood it is necessary to set out briefly the facts

surrounding the death of Miss Ransley which are really not in

dispute.

On 21 October 1986 during the course of a day spent drinking at two clubs in the suburbs of Canberra the two accused met Miss Ransley at the Austrian Club and later went with her to the Woden Valley Club and then, after buying some beer at a hotel

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3. in Mawson, went to Miss Ransley's flat. It appears from the statements of Hagen to police that he was angered by Miss Ransley's slighting and insulting remarks addressed to Weatherall who left the flat soon after arrival there. After Weatherall had gone Hagen says that Miss Ransley continued to speak ill of him and in Hagen's words to Senior Constable Fagen, "I just snapped. I seen this cord and put it round her neck and kept pulling it. I choked her." He said similar words to Senior Sergeant Peters and in his unsworn statement to the jury at the trial. The cord mentioned was a cord for connecting an electric jug to a power outlet. The fact that Hagen's actions led to Miss Ransley's death was not in dispute at the trial. In the course of his unsworn statement Hagen said, "I am responsible for the girl's death". The contention put on Hagen's behalf was

that he should be acquitted of murder but convicted of manslaughter.

As I have said, Weatherall left Miss Ransley's flat soon after arriving there and was not present when she was killed. He went to a club and thence home to bed. At some time shortly after 10.30 p.m. Weatherall was called to the telephone at his parents' house where he lived and his mother later drove him to the Austrian Club where he met Hagen. Both men went to a flat where there were a number of other people and thence back to Weatherall's parents' house where both spent the night. At about 10.00 a.m. the following morning Weatherall woke his father who was asleep in the same house and asked him to drive him and Hagen to Yass to catch a train as they were going fruit picking.

After stops at Mrs Weatherall's place of work to get money and at

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4. the house where Hagen lived to get his clothes and at Hagen's bank, Weatherall senior drove the two men to Yass. It is Weatherall's assistance to Hagen late on the night of the crime and on the following day which forms the basis of the charge against him. It is not suggested that Weatherall's father was

guilty of any offence.

Hagen appeals against his conviction upon two stated grounds -

"(a) That the learned trial Judge erred in directing the jury that they could on the facts asserted by the Crown find the Cross-Appellant guilty of murder if they considered that the Cross—Appellant intended not to kill but to inflict grievous bodily harm on the deceased such hypothesis being not reasonably open to the jury to find.

(b) That the learned trial Judge erred in directing members of the jury that they might be kept together in a hotel overnight after they had deliberated {inclusive of the luncheon break) for over six hours, if they did not reach a verdict that evening and without enquiring as to whether a likelihood of an agreement that evening reasonably might exist and/or warning the jury that a juror should not forego a belief honestly held to conform to the majority view."

The basis for the first ground is the assertion that the evidence shows that in pulling the cord tight round the deceased's neck grievous bodily harm was not caused until she was asphyxiated and died. It is said that the only real choice the jury had was between intent to kill and a lack of an intent to kill and that they should have been directed accordingly. It is

said that it was a misdirection by the learned trial judge to

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5. mention to them the possible finding of an intent to do grievous

bodily harm.

This submission encounters a number of difficulties. In the first place the Crown opened the case to the jury on the footing of the two possible alternative intentions and at no time did counsel for the defence seek to challenge the proposition of law put by the Crown in this regard nor did he seek any redirection or altered direction from the learned trial judge although given an opportunity to do so. This failure to complain is not of course fatal to the submission that the

summing up was in error but it weakens its force.

In the second place it is pointed out by the Crown that after conviction in the course of submissions on sentence counsel for the appellant submitted that the learned trial judge should take the view that the appellant intended to inflict grievous bodily harm and did not intend to kill. I do not think that counsel should, because of this submission, made in another context, be precluded now from advancing the argument that the

direction as to intent to do grievous bodily harm was wrong.

In the third place it is true that part of the evidence of Dr Cook the pathologist can be interpreted as saying that if the constriction of Miss Ransley's neck by the cord had stopped short of killing her then although there might be fairly substantial bruising she would have been expected to recover quite quickly. What killed Miss Ransley was asphyxiation, not

any injury to the neck or elsewhere caused by the tightened cord.

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6. There is nevertheless other evidence from Dr Cook and from the exhibit photographs that substantial injuries which could amount

to grievous bodily harm were caused to Miss Ransley's neck.

Finally, however the question of Dr Cook's evidence be resolved, the enquiry for the jury concerned the appellant's intention, if any, at the time he tightened the cord round Miss Ransley's neck. The fact, if it be a fact, that by acting as he did he must either have killed Miss Ransley or injured her in some fashion falling short of grievous bodily harm seems to me almost irrelevant to the ascertainment of the appellant's intention at the time in question. There was evidence from which the jury could properly have concluded that the appellant intended to do Miss Ransley grievous bodily harm. In all the circumstances I consider that the learned trial judge was perfectly correct to instruct the jury as to the elements of the crime of murder in the way in which he did and indeed would have

been wrong to do otherwise. The first ground of appeal fails.

As to the second ground it will be necessary to set out at length the remarks of the learned trial judge. After the jury had retired for roughly six hours the learned trial judge recalled them to court and in the presence of counsel for all

parties the following took place -

"HIS HONOUR: Mr Foreman, ladies and gentlemen. I have called you back into court of my own volition because it is now in the order of six hours since you retired to consider your verdicts in this matter, that embraces, of course, the luncheon break, and I gather that you have not been able to reach agreement.

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7. THE FOREMAN: We have not, your Honour.

HIS HONOUR: Well, what I want to say to you is this. It is very desirable from everybody's point of view, both from the Crown's point of view and the accused's respective points of view, that there be some resolution of these charges which have been brought by the Crown. Your verdicts, of course, must be unanimous and therefore what I would like to urge upon you is that you strive to reach unanimity amongst you otherwise there are real prospects that this whole process would have to be gone through again. And that, of course, is not only a very expensive exercise but it is additional distress and anxiety to the parties involved.

So, from everybody's point of view it is very desirable that you resolve this whole matter. So you should strive to reach a unanimous verdict in relation to each accused and in doing that, I would like to encourage you to listen to the views of others amongst you. The whole thing is to do with respecting the points of views of others and being resilient enough to individually change your view if others are able to persuade you to a particular point of view. You must get, of course, dialogue going between you. It is not wrong to maintain your own point of view. It is wrong to sit in the corner and fold your arms and say, 'I don't care what you say, I've decided'. The whole jury system depends upon the mutuality of agreement, or the mutuality of a decision of the 12 men and women who constitute the, jury.

What I am going to do is send you to dinner and I have to indicate to you that for ail sorts of administrative reasons it would not be possible to take a verdict now before 7.30 at the earliest because you have to be taken away and everybody involved in the case has to go away and come back.

It would not be possible to reconvene before 7.30. I am not saying we will reconvene at 7.30. I am simply indicating to you that as you have not reached agreement I do not propose to discharge you now. indeed, I may not discharge you, depending on what you might tell me, but I may not discharge you at all this evening. I might keep

you together and you might have to go to a hotel somewhere to be isolated, as it were, until tomorrow. But at least until 7.30 we will not be able to take a verdict. I do urge you to try and reach agreement amongst yourselves. I do not think there is anything more I can say about it, Mr Foreman, ladies and gentlemen. So, would you retire now to continue your deliberations but as I say, I will not, even if you reach agreement I will not have you back before 7.30. Thank you,

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you may go. JURY RETIRED

HIS HONOUR: Any of you gentlemen want to raise anything? Adjourn the court please."

Section 38 of the Juries Ordinance is as follows :

"Where, at a criminal trial

{a) a period of six hours has elapsed since the jury retired; and

(b) the judge is satisfied, after examination of one or more of the jurors, that the jurors are not likely to agree,

the judge may discharge the jury, but, except and

otherwise provided by this Ordinance, the judge

shall not discharge the jury until the period of six hours has elapsed."

The appellant's argument is that in telling the jury that they might be kept together and have to go to an hotel the learned trial judge was threatening them and informing them in effect that if they did not reach a verdict they would be kept together overnight. It is said that this threat and improper pressure brought to bear by the learned trial judge was such as to raise a serious risk that their verdict might have been distorted. It is also said that the judge should have enquired as to whether there was any real possibility of agreement if further time for consideration were given and if he were told that there was no prospect of agreement even if extra time were given he should have used the procedure provided for in s.38 and

discharged the jury.

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I do not think there is any substance in this complaint. It is perfectly proper for a judge to urge a jury to make every effort to agree and reach a verdict and to bring a proper degree of pressure upon them. What is proper or improper is a matter of degree. In the present case the learned trial judge simply informed the jury that he did not propose to discharge them immediately, that for administrative reasons a verdict could not be taken before 7.30 p.m. and that the position could be reconsidered then. He also told them that they might be kept together all night, not that they would be.

The learned trial judge had an absolute discretion as to whether or not he would discharge the jury provided he attained

the satisfaction required by s.38 of the Juries Ordinance. He

also had an absolute discretion as to how long he would keep them together in search of a verdict. In my view the judge in the passage quoted above was simply informing the jury of the choices open to him and was careful not to say that he had made up his mind one way or the other. The present case falls a long way short of *R. v. McKenna* (1960) 1 Q.B. 411 cited by the cross—appellant. Finally, I point out. that being given an opportunity by the learned trial judge to make submissions on what he had just said to the jury, counsel for the cross-appellant remained silent. In a case like the present when a great deal depends upon the effect of what the judge said

in the atmosphere then prevailing at the trial, the fact that experienced counsel made no complaint when given an opportunity provides a strong argument against the argument of improper

influence of the jury now put and suggests that no improper

10. pressure was brought to bear. This ground also fails and the cross-appellant's appeal against conviction therefore fails and should be dismissed.

For convenience I deal now with the appeal by the Crown against the sentence imposed upon Hagen. As I have said, his Honour sentenced Hagen to fifteen years' imprisonment and specified a period of nine years during which he should not be eligible for parole. The sentence was passed on 21 March 1987 and it and the non parole period was ordered to date from 5 March 1987, the date of the jury's verdict.

The appellant appealed against the sentence upon _ the following stated grounds -

- ""(a) he failed to have due regard to the seriousness of the offence and the facts and circumstances surrounding the commission of the offence;
- (b) he failed to incorporate adequate deterrent and retributive factors in the sentence imposed;
- {c} he failed to take account sufficiently of the criminal record of Anthony John Hagen;
- (d) the sentence imposed was manifestly inadequate; and
- (e) he ordered the non-parole to be backdated when there was no legislative basis for this."

As is almost always the case in Crown appeals against sentence ground {d} above is the principal ground.

It was agreed on both sides that the sentence for murder

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in the Australian Capital Territory is at large and may vary downwards from life imprisonment.

The principles which should guide an appeal court in matters of sentence are now well settled and the court will only interfere if it can be shown that the trial judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some important feature of the evidence. A sentence may be so excessive or so inadequate as by the very excessiveness

or inadequacy to demonstrate a departure from principle (see R.

v. Tait _and Bartley (1979) 24 A.L.R. 473).

Grounds (a), (b) and (c) are in substance different ways of stating ground (d) and counsel before us admitted as much when he said that his submission was in essence that the sentence was manifestly inadequate. Ground (e) was not argued by the appellant and I say no more about it. Counsel for the appellant told the court that the sentencing judge adverted to all relevant matters and that no error of principle could be pointed to except that the inadequacy of the sentence demonstrated that a mistake

had been made.

This was a murder of a defenceless woman seriously affected by liquor and was, as his Honour the trial judge said, a very serious case of murder. The respondent has a bad criminal record including some offences involving violence to the person. He was described by Dr Bartholomew the psychiatrist as having an anti-social personality with a condition of alcoholism. It is

apparent from his history that when sober he behaves a good deal

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better than when affected by liquor.

This was an unpremeditated murder committed in heat when to some extent at least the actor was provoked by the deceased.

The respondent had consumed a good deal of liquor and lost

control as a result of abuse directed towards his friend Weatherall and possibly also as a result of the deceased's boasting about men she had had convicted of rape. The respondent's brother was said to be in prison for rape. The jury must have concluded that a reasonable person would not have been so provoked by the deceased's conduct but it is not disputed

that the respondent lost control because of what was said.

Opinions may well differ as to what the appropriate sentence and non parole period for the respondent should have been and for myself I might well have imposed a somewhat longer term of imprisonment or set a somewhat longer non parole period. However this may be I am quite unable to conclude that' the sentence imposed was manifestly inadequate either with respect to the head sentence or to the non parole period. The Crown appeal

against sentence must therefore be dismissed.

I come now to the appeal of Weatherall. Originally Weatherall appealed against his conviction on seven stated grounds. At the beginning of the hearing before this court a new notice of appeal was substituted by leave containing two grounds - ground (a) from the original notice and ground (b) being ground (g) in the original notice, somewhat recast.

During the hearing, by leave, the applicant Weatherall added an

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appeal against sentence. His final notice of appeal against

conviction stated the following grounds -

"(a) That the learned trial judge erred in ruling the Crown was entitled to proceed upon a count in the indictment pursuant to section 349 of the Crimes Act 1900 (NSW) in its Application to the Territory the said section being inconsistent with and/or impliedly repealed by a provision in an Act of the Commonwealth Parliament in force in the Territory, to wit, section 6 of the Crimes Act 1914;

{b) That the learned trial judge erred in

directing the jury (at about 6.05 p.m.) as follows: 'I may not discharge you at all this evening. I might keep you together and you might have to go to a (sic) hotel somewhere to be isolated, as it were, until tomorrow...

I do urge you to try to reach agreement amongst yourselves."

His appeal against sentence was on the following stated

ground —

"(c) That the learned trial judge erred in imposing a head sentence in excess of the maximum sentence provided by section 6 of the Crimes Act 1914 (Commonwealth) ."

What I have already said disposes of ground (b) and this leaves ground (a) with respect to conviction. I should also say that counsel for Weatherall only presses the appeal against sentence if the court reaches the conclusion for whatever reason that the charge against Weatherall is brought under s.6 of the Crimes Act (Commonwealth). Should this be so the sentence of three years' imprisonment is plainly wrong as exceeding the

maximum provided by s.6. Should it not be so the sentence is

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conceded not to be excessive.

It is necessary to determine under what statute the charge against Weatherall is brought. The information mentions no statute but simply charges that Weatherall "knowing the said Anthony John Hagen to have murdered Colleen Anne Ransley as aforesaid did receive, harbour, maintain, and assist the said

Anthony John Hagen".

Section 6 is as follows —

"6. Any person who receives or assists another person, who is, to his knowledge, guilty of any offence against a law of the Commonwealth or of a Territory, in order to enable him to escape punishment or to dispose of the

proceeds of the offence shall be guilty of an offence.

Penalty: Imprisonment for 2 years."

Section 349 of the Crimes Act (N.S.W.) is as follows -

"349. Every accessory after the fact to murder, or the crime of robbery with arms or in company with one or more other person or persons, shall be liable to imprisonment for life."

It is said that at the trial it was accepted that the charge against Weatherall was brought under s.349 applicable in

the A.C.T. pursuant to the Seat of Government Acceptance Act 1909

and the Seat of Government (Administration) Act 1910. A

submission was made to the trial judge prior to the trial that in

so far as Weatherall was charged with being an accessory after

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15. the fact pursuant to s.349 in its application to the A.C.T. this was not permissible because s.349 is inconsistent with s.6 which should be regarded as covering the field. An order quashing the

information against Weatherall was sought and refused.

Counsel for the appellant Weatherall sought from this court an order quashing Weatherall's conviction and sentence upon the basis that his Honour was wrong to reject the pre-trial

submission which I mention above.

There are two main reasons why in my view this appeal must be dismissed. In the first place the offence created by

8.349 (see s.41 of the Acts Interpretation Act) must be taken to

be that defined by the common law since the section provides no definition but merely provides for punishment of a limited class

of accessories after the fact.

At common law a person can be convicted of being an accessory after the fact only if he assists the perpetrator of a crime having knowledge of all the relevant facts, or acts, with respect to which it may be said by someone with the requisite legal knowledge that they constitute the precise felony with respect to which the Crown alleges that the accused was an accessory. (See *Rv. Stone* (1981) V.R. 737). The knowledge required to be proved before a person may be convicted under s.6 is knowledge of guilt, a thing which may be very different in kind. It seems to me that for this reason alone that ss.349 and 6 create different offences and that they are not inconsistent

nor, in my view, can it be said that s.349 is impliedly repealed

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by s.6 on the footing that the latter section covers the field.

It was put by the Crown that the two sections are different in another respect namely that the intention ascribed to the accessory in s.6 is to enable the principal actor "to escape punishment or to dispose of the proceeds" whereas it is said the intention ascribed to the accessory by the common law is to hinder or prevent the principal's arrest, trial or punishment. It seems to me that this difference is more apparent than real. Hiding or helping to escape punishment may include hiding or preventing arrest and trial. Section 6 must proscribe the hiding or prevention of arrest or trial as well as the end result described viz. punishment, otherwise the section must be so narrow as to amount to an absurdity which Parliament could not have intended. I do not agree that the two sections are

different with respect to the intent necessary to be proved.

In the second place it seems to me that the validity and effectiveness of 5.349 is preserved by the provisions of s.11(1A)

of the Crimes Act which is as follows -

"(1A) Where an act or omission constitutes an offence against a law of a Territory, the validity of that law is not affected by reason only that the act or omission also constitutes an offence against a law of the Commonwealth."

Section 11(1) is as follows -

"(1) Where the act or omission of a person is an offence against a law of the Commonwealth and is also an offence against another law of the Commonwealth or some other law, the person may be prosecuted and convicted under either of those laws."

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17. The effect of these provisions of the Crimes Act is, as it seems to me, that Weatherall might be prosecuted under s.349 or under s.6. If, as is accepted on all sides, he were prosecuted under s.349 at the trial then this fact does not

constitute a flaw in the process of his trial. Ground (a) fails

also and the appeal must be dismissed.

The appeal against sentence does not require consideration as the only ground for it advanced has no basis.

This appeal must also be dismissed.

I certify that this and the |b preceding pages are a true copy of the Reasons for Judgment of Mr Justice Forster.

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Dated: 17.4: 37

Counsel for the 1st appellant : Mr Maguire Q.C. with Mr Pilkington

Solicitors for the 1st appellant : Messrs Porter Pilkington

Counsel for the 1st respondent : Mr Redlich Q.C. with Mr Williams

Solicitors for the 1st respondent Director of Public

Prosecutions

Counsel for the 2nd appellant : Mr Redlich Q.C. with Mr Williams

Solicitors for the 2nd appellant : Director of Public Prosecutions

Counsel for the 2nd respondent Mr Higgins Q.C.

Solicitors for the 2nd respondent : Legal Aid Office Counsel for the cross-appellant : Mr Higgins Q.C.

Solicitors for the cross-appellant Legal Aid Office

Counsel for the cross-respondent : Mr Redlich Q.C. with Mr Williams

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IN THE FEDERAL COURT OF AUSTRALIA

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CORAM: FOX, FORSTER AND MILES JJ.

DATE: 17 SEPTEMBER 1987

REASONS FOR JUDGMENT

MILES J.

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I have read in draft a copy of the reasons for judgment

of Forster J.

I agree with the orders proposed by His Honour

and with the reasons given in support.

I certify that this and the one GQ) preceding paze ig a tv™ve copy of the Reasons for Judgment
herein of nis Honour Mr. Justice Migs

Associate

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Prepared on 27 October 2026 · Esheria