IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 44 of 1982

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Between:

SHEW CHING TZYH aka HUI CHING Appellant

and

REGINAM Respondent

Mr. A. Ali with Mr. Prasad for Appellant
Mr. A. Gates for Respondent

JUDGMENT

On 19th March 1982 appellant was convicted by the Magistrate's Court at Suva of the offence of unlicensed fishing contrary to section 16(1) of the Marine Spaces Act (Cap.158A). The particulars were that between the 3rd and 10th days of December 1981 (both dates inclusive) appellant who at the time was the master of a foreign fishing vessel, the "PERNG SHING" used the said vessel for the purpose of fishing within the exclusive economic zone of Fiji when the said vessel was not licensed for such purpose.

The appellant was sentenced to a fine of $1,000 whilst a forfeiture order was made in respect of the vessel.

A number of grounds of appeal were filed but only some of which were argued and relied on at the hearing and have been conveniently dealt with in the written submissions prepared on behalf of appellant. Counsel for respondent also prepared written submissions in response to appellant's case. For such written submissions this Court is grateful. Before I deal with the various points raised on the appeal I think it would be convenient at the outset to enumerate the various items of evidence which the trial Magistrate accepted as credible and upon which appellant was convicted.

The items of evidence were as follows:-

(i) On 10.12.81 at about 10.20 p.m. the HMFS "Kiro" was sailing on a course from Cikobia roughly North Westwards when it saw a vessel's lights about 4-5 miles away. The lights included red over white which is an international sign for a vessel engaged in fishing.

(ii) The "Kiro" darkened its own lights and approached the other vessel to within 3 Miles when the order was given to the men to stand by all station.

(iii) As the "Kiro" closed in on the other vessel which was in fact the "Perng Shing" ("P.S." for short) at 00.22 a.m. on 11.12.81, the "Kiro" put on her lights and no sooner it did that the "P.S." turned off its lights. The "P.S." did not appear to be moving in any particular direction.

(iv) The men on the "Kiro" noticed activity on board the "P.S." as they approached it.

(v) The "Kiro" approached the "P.S." to about $1\frac{1}{2}$ miles when a signal was given that they intended to board the "P.S.", and when the "Kiro" was a few hundred yards away an armed boarding party was sent on to the "Perng Shing".

(vi) At that time the "Kiro" noted the position of the "P.S." as being $14^{o}52'S$ and $179^{o}30'E$.

(vii) The boarding party was led by Lieutenant Teleni (P.W.7) who went to the wheelhouse where he saw the appellant and the radio operator and where he took possession of various items including a Calculation Book (Ex.7) and the Navigational Diary (Ex.8).

(viii) On inspection of the "P.S." P.W.7 saw blood on the hatch cover and what he recognised to be fish guts on the deck which were still covered with blood and appeared recently cut. He also saw sharks' fins hanging behind the wheelhouse which still had blood dropping from them.

(ix) P.W.7 also saw fishing lines which were still wet coiled properly in the compartment. Brooms were lying about the deck. With the help of his torch P.W.7 looked inside the middle fridge and saw the fish on top had fresh blood on them.

In arriving at his decision the trial Magistrate took into account appellant's short unsworn statement from the dock in which he stated that he had finished fishing on 10.12.81 at 3.00 a.m. at a position of $12^{\circ}25'S$ and $179^{\circ}18'E$ - about 18 miles outside the exclusive economic zone i.e. in the Futuna waters.

The two main issues in the case to which the trial Magistrate had properly directed his attention in evaluating the evidence were:

1. The navigation and positions of the vessels; and
2. The question of whether or not the boat was or had recently been engaged in fishing.

The first ground of appeal relied upon at the hearing of the appeal averred that the trial Magistrate erred in law when he held as follows:

> "Section 24 of the Marine Spaces Act states that any offence against the Act committed within the exclusive economic zone shall be deemed to have been committed in Fiji. The Act quite clearly sets up an exclusive economic zone and by section 16 creates offences against the Act. This Court must be bound by that law."

Counsel for appellant submitted that the trial Magistrate should have ascertained and applied the rules of international law as required under section 9(3) of the Marine Spaces Act (hereinafter called "the Act"). Counsel submitted that in failing to do so a substantial miscarriage of justice has occurred. Counsel pointed out that section 9(3) of the Act and other similar sections in the Act made it clear that the exercise by Fiji of its sovereignty and sovereign rights was subject to compliance with the rules of international law.

Counsel for appellant also submitted that at the time of the alleged commission of the offence no treaty had then been passed by the various nations concerned at the Third Law of the Sea Conference. Counsel argued that the Act came into force on 1st December 1981 and the offence was committed between 3rd and 10th December 1981 when according to international law the area of the exclusive economic zone was still part of the high seas upon which fishing was unrestricted and could not be regarded as unlawful. Counsel referred to authorities which according to him supported the principle that under international law no State may make a unilateral declaration of an exclusive economic zone.

Looking at the matter broadly I think there is a basic flaw in the argument against jurisdiction of the trial Court over this case. This was brought out clearly in the submissions in reply made by counsel for respondent. I would agree that counsel for appellant was not entitled to construe the expression "rules of international law" as used in the Act to refer to the regime of the law of the sea relating to the exclusive economic zone which was then being considered by the Third Law of the Sea Conference which had still to reach a general agreement on various matters among the nations participating. I think what has happened is that Fiji in anticipation of such a major agreement passed the Act thereby declaring for its waters an exclusive economic zone of 200 miles. It was an act of sovereignty on the part of Fiji and is

consistent with a well-established constitutional principle which is restated in the following quotation from the written submissions of counsel for respondent:

> "The basic constitutional principle of English law is the supremacy or sovereignty of Parliament: as Parliament can make law or unmake any law whatsoever, it follows it may disregard or alter, for the purpose of internal application as part of English municipal law, any rule of the common law or of international law."

The position in Fiji would be somewhat modified by the fact that the Constitution is the supreme law but in this case nothing turns on this gloss.

At the time of the offence there was still no Law of the Sea Treaty to be considered in relation to the question as to whether it has become part of the municipal law of Fiji. As already pointed out Fiji had merely pre-empted the general consensus of views among the majority of nations of the treaty on the law of the sea by enacting the law on the 200 miles exclusive economic zone. It may well be that the Parliament of Fiji had in mind with regard to its use of the expression "rules of international law" the matters to be agreed upon in the Law of the Sea Treaty. Therefore in my view in passing this particular legislation Fiji was not acting against the interest of international law or of comity of nations since the majority of nations appear to our Parliament to be favourably disposed to the regime of the Law of the Sea relating to the 200 miles exclusive economic zone.

It seems to me that in this case the trial Magistrate did no more than what his judicial oath and duties enjoined him to do, namely to implement and enforce the laws of Fiji.

This ground of appeal therefore fails.

The next ground of appeal which was relied on alleged that the evidence purporting to establish that the appellant's vessel had been engaged in fishing was so weak and unreasonable that the trial Magistrate was not justified in his finding

to the contrary.

Counsel for appellant submitted that if the trial Magistrate had directed himself properly on the evidence of various prosecution witnesses which was far from satisfactory he could not reasonably have found such evidence sufficient to support appellant's conviction. In other words it was contended that the trial Magistrate did not evaluate the evidence correctly in the case.

As counsel for the respondent pointed out I think it must be noted that the trial Magistrate was sitting as a tribunal of both fact and law and therefore did not have to direct a jury or assessors. Thus reviewing the decision of the trial Magistrate on its findings of fact this Court in its appellate jurisdiction is only concerned with the question whether the evidence he found and accepted could reasonably support his decision. An appeal such as this is not a re-hearing of the case. Having regard to this aspect of the matter in relation to the evidence which was adduced before the trial Magistrate this Court is unable to say that there was no evidence to support the decision of the trial Magistrate that at the material time the appellant's vessel had been engaged in fishing within the exclusive economic zone of Fiji. It is true that the trial Magistrate had drawn inferences which he thought proper from the evidence but again this Court cannot say that those inferences were unreasonable or untenable.

Counsel for appellant had also raised the question of the lack of evidence of actual fishing on the part of the "P.S." from the time when it was sighted and until it was boarded by the men from the "Kiro".

I think it is clear from the provisions of section 16(1) of the Act under which the charge against appellant was laid that essentially what must be shown is that at the material time the vessel was being "used for the purpose of fishing" and as was noted above such a finding was inferred by the trial Magistrate as he was entitled to do from the

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whole circumstances of the case.

Accordingly I can find no merit in this ground of appeal.

The next ground of appeal complained that the trial Magistrate erred in law in rejecting the evidence of the appellant when he speculated on matters which were not in evidence and upon a theory not presented by the prosecution so that the defence had no opportunity of meeting the same.

The question is whether the trial Magistrate was on the evidence before him justified in finding that the "P.S." was at the material time used for the purpose of fishing inside the 200 miles exclusive economic zone. Counsel for appellant submitted that there was no evidence to justify the finding that the "P.S." was fishing illegally in Fiji waters. According to counsel the conclusion arrived at in this regard by the trial Magistrate was based on speculative matters which had not been canvassed in evidence.

As counsel for respondent stated the analysis on navigational positions of the "P.S." arose out of the denial by appellant in his unsworn statement that he had at the material time conducted his fishing activity in Fiji waters and gave a position which would have put his vessel outside Fiji's exclusive economic zone. As counsel for respondent also submitted that appellant's statement being unsworn was not tested in cross-examination. According to counsel in those circumstances it was open to the trial Magistrate to draw such inferences as he thought proper from the position of the vessel when it was first sighted and the vessel's probable course of navigation when it reached such a position.

The analysis in the judgment to which strong exception was taken was formulated in these words:

> "However, to reach the position where he was seen from 12° 25'S 179° 18'E requires a course almost due South (in fact 5° East of South or 175° True) and continued it would have reached Vanualevu more than 20 miles west of Udu Point.

> The course for the most southerly point of land in the Tonga Group would need to be 150°T and for the most Northerly point 133°T.
>
> I cannot accept that an experienced Captain wishing to travel to new fishing grounds would have pursued the course at the least 25° off the shortest route and also chosen one that inevitably would lead it through the reefs and islands of Fiji rather than the clear water of the direct course."

It seems to me that it is not quite correct to say that the analysis was speculative and theoretical in the sense that there was no evidential basis for it. From the record it is quite clear that the trial Magistrate based himself on materials that given the type and nature of the case could not be regarded as wholly unreliable. This is clear when he concluded his analysis in these words:

> "I am satisfied beyond any doubt at all that the positions shown in Exhibit 7 accurately states the position of the "Perng Shing" over the days of December 1981 and I am equally satisfied that the longitudes stated as 79° are, in fact 179°."

In the circumstances I am satisfied that there were before the Court materials on which it was open to the trial Magistrate to find that the "P.S." was at the material time within the 200 miles exclusive economic zone and was engaged for the purpose of fishing.

This ground of appeal also fails.

The next ground of appeal relied on avers as follows:

> "That the trial Magistrate erred in law in relying upon the evidence of P.W.7 and two other members of the boarding party who were not experts as to whether the guts were fish or otherwise after having correctly pointed out to counsel (during trial) that the witnesses were merely pointing out their opinion and that since the prosecution is calling a fisheries officer the questions be best put to him thus causing the defence to stop cross-examination on the point."

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It appears that the main question posed by this ground of appeal is whether the guts which were found by P.W.7 and others on the deck of the "P.S." were properly identified as fish guts and whether it was open to the trial Magistrate to accept such evidence as conclusive on the issue without assistance of expert evidence. It was submitted that the trial Court was not entitled to accept and act upon the evidence of P.W.7 who merely relied on his boyhood fishing experience to identify the guts found on the vessel as those from fish.

The issue was squarely faced by the trial Magistrate when introducing the subject he said:

> "The evidence that fish guts were found on board has been hotly contested. It appears the presence of fresh blood and guts is not disputed. The captain states they were seagulls guts."

He then went on to consider the evidence from which he reached the conclusion based on P.W.7's evidence that they were in fact fish guts.

In my opinion the question of identifying fish guts is really not one that could only be resolved by expert evidence. Surely anyone familiar with fish guts from his own experience should as a matter of common sense be able to testify to his experience with fish guts. P.W.7 did no more than using his boyhood fishing experience to identify the guts found on the deck of "P.S." as those from a fish. It is true that the trial Court had rather hoped that expert scientific evidence would be obtained but it turned out that such attempt to do so by the prosecution was not successful and did not fulfil the trial Magistrate's earlier expectations.

Complaint was also made with reference to this ground of appeal that because no expert evidence was tendered as anticipated he therefore was prevented from cross-examining P.W.7 at length on his identification of the guts on the deck. While I accept much inconvenience was caused to the defence

in this regard I do not accept that it was such as to preclude counsel for appellant from seeking leave to cross-examine P.W.7 further if he had wished.

Accordingly this ground of appeal fails.

The next ground of appeal relied on states:

> "That the trial Magistrate erred in law in allowing the prosecution to recall P.W.3 (Ravindra Nath) and having allowed a recall further erred by not asking the defence if it wanted to cross-examine the witness."

Counsel for appellant submitted that as the matter upon which P.W.3 was recalled, namely on the correct spelling of the name of the vessel seized by the ship "Kiro" did not arise ex improviso it was not open to the trial Magistrate to allow P.W.3 to be recalled. Accordingly the trial Magistrate wrongly and improperly used his discretion in the matter.

As counsel for respondent pointed out and it seems to me quite clear on the record of proceedings that it was made clear that P.W.3 was merely released for the time being but would be recalled at a later stage in order to give evidence on the question of the correct spelling of the name of the "P.S." as until then the matter was never in issue. It seems to me that the course adopted was reasonable and caused no prejudice to the defence. Counsel for appellant also complained that the defence was not asked to cross-examine P.W.3 when he was recalled. The question whether P.W.3 should be cross-examined is essentially one for counsel for appellant and not for the court which held no brief for either side. It was for counsel for appellant to express his wish in that regard and as he did not choose to do so at the time he could not now complain. The control and carriage of his case lies entirely in his hands.

I can see no merit in this ground of appeal.

All grounds of appeal against conviction having failed

the appeal against conviction is dismissed.

On the appeal against sentence it is said that the trial Magistrate erred in law when after convicting appellant he forfeited the vessel, fishing gear and the bait because he had no powers to make such an order.

Counsel for appellant submitted that the forfeiture order was part of sentence. According to counsel under the Act a Magistrate was limited in his powers to fine an offender up to $1,000 and since under the Criminal Procedure Code the offence in question was punishable "by fine alone", it followed that he could not lawfully make an order of forfeiture in addition to the fine which was imposed on appellant. Alternatively counsel contended that if a Magistrate could lawfully make a forfeiture order such an order must be limited to a monetary sum of $1,000 and no more. According to counsel the forfeiture of a vessel worth $90,000 was quite in excess of the jurisdiction of the trial Magistrate in this case.

Counsel for respondent submitted that it is clear from the words of the relevant provisions in the Act that so far as the Court's powers to forfeit a vessel engaged in illegal fishing are concerned, such powers are not in any way limited by financial considerations.

I think counsel for respondent is correct that the Act does not place any financial limits on the trial Court's powers of forfeiture. It is, so it seems to me, all part and parcel of the scope of punishment available to a trial court where there has been a contravention of section 16 of the Act.

Section 18 reads:

> "On conviction by the owner, master or licensee of an offence under section 16, the Court may also order the forfeiture to the Crown of the fishing vessel and any fish, fishing gear apparatus, cargo and stores found therein or thereon."

The legislature obviously intended by this section that a deterrent approach be taken in respect of any infringement against section 16 so that the order of forfeiture made by the trial Magistrate, stiff by any standards, was clearly consonant with the intention of Parliament. The rationale of the approach adopted by the Court to this type of legislation in the present case is well explained by Mason J. in R. v. Cheatley 127 C.L.R. 291 to which reference was made by both counsel. In that case it was recognised that the legislature plainly viewed a contravention of its provisions as a very serious matter. In that case the Court acknowledged the difficulty of enforcing compliance with customs legislation over the length of the Australian coastline and the Court felt that a stern deterrent was called for if observance of the legislation was to be secured. Such a position applies in my view equally strongly to the 200 miles exclusive economic zone which by its nature and having regard to the resources of this country is not susceptible to easy policing.

A further aspect of counsel for appellant's argument on the question of forfeiture is that it was inappropriate that such an order should be made because the owner of the vessel was not a party to the proceedings and had not in fact been convicted under section 16. It was claimed that the order of forfeiture made by the trial Magistrate in respect of the "P.S." was done in serious breach of the rules of natural justice and consequently the order could not be held to be lawful and valid.

Counsel for respondent submitted that the powers given to the Court under section 18 are unequivocal in their terms and covered the situation of an absent owner of the vessel concerned. It seems to me from the wording of section 18 a power of forfeiture arises as soon as a conviction under section 16 has been obtained in respect of either the owner or master or licensee. In this case the master (appellant) was acting as an agent of the master and in strict legal theory the master would in the circumstances disclosed be vicariously liable for the offence in question. I am satisfied that the

argument based on the concept of natural justice is misconceived and untenable.

The appeal against sentence is also dismissed.

Chief Justice

Suva,
18th August 1983.