

Public Prosecutor -v- Kenneth Charles CASSEL
Ian George LIND

Coram : Chief Justice, Mr Justice F.G. Cooke.
Public Prosecutor, Mr F. Coté.
Defence Counsel, Mr D. McFarlane.
Mr P. Malsangai, Assessor.
Mr J. Bolango, Assessor.
Miss V. Millet, Assistant Registrar.

JUDGMENT

In this case the accused were charged that on or about the 18th December 1981, at Port-Vila, stole the vessel " Glenelg " from the harbour and that at the time of the theft, to overcome resistance to its being stolen, used violence against one Jack Turkington an offence contrary to section 137 of the Penal Code.

This case became complicated by the Defence attempting to show that at least K.C. Cassel (hereafter called accused 1) had an equitable interest in the vessel stolen and therefore alleged that he, Accused 1, thought he honestly had a right to take the vessel.

The facts were clear and are as follows :-

In April 1979 accused 1 was interested in purchasing a vessel called M.V. Glenelg (hereafter called the vessel).

Cooper and Lybrand an accounting firm in Vila who were dealing with the probate of the estate of the owner of the vessel appointed a Captain Kennedy in Sydney to sell the vessel.

Accused 1 approached Captain Kennedy and paid him a deposit of A\$ 5000 for the purchase of the vessel.

Later accused 1 paid him A\$ 70,000/ was the stated purchase price of the vessel.
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However, accused 1 did not have sufficient funds to repair the ship and bring it into survey and operate it commercially.

Accused 1 approached a man named Jack Sussman, a financial broker in Sydney and as a result an approach was made to Pacific International Trust Company (hereafter called PITCO) to provide funds.

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Mr Bayer the managing director of PITCO stated in evidence that as a result of the approach by Sussman he went to Sydney and had meetings with Sussman and a person named Ohlen on the 25th of April 1979.

On the 27th of April 1979 he had a meeting at the Hilton Hotel Sydney where Sussman, Ohlen and accused 1 were present.

After much discussion it was agreed that money would be made available for the purchase of the vessel but that all repairs necessary to bring the vessel into survey would be borne by accused 1 without any claim by accused 1.

A letter to this effect Mr Bayer stated, was signed by accused 1 and is exhibit 4.

In Vila a company named Glenelg Limited was incorporated for the purpose of purchasing the vessel.

In fact the vessel was actually purchased by Glenelg Limited on the 17th May 1979. (Exhibit 5.) is the agreement for sale and purchase of the vessel for A\$ 63,648.00 and signed by Credit Facilities Limited by Mr Barret the senior member of Cooper and Lybrand accountants in Vila on behalf of Glenfield Shipping Services Limited a firm owned by Mr Esgate whose estate they were administering and by Mr Bayer on behalf of Oak Ltd Secretary to Glenelg Ltd.

A supplemental Agreement (Exhibit 6) was executed by the same parties to provide for the retention of the purchase price by a stockholder until the Bill of Sale executed by the Vendor in favour of the Purchaser was duly registered and recorded at the Panama Shipping Registry where the vessel had been registered.

It was further agreed between Glenelg Ltd and accused 1 that the vessel would be leased back to accused 1 at a rental of A\$ 6352 per month. No rentals to be paid until the 1st October 1979 when the lease was to commence to give accused 1 a period of time to bring the vessel into survey. (Exhibit 7 is the Bareboat Charter or lease).

Clause 18 (a) of Exhibit 7 provided for the termination of the lease should the lessee fail to pay on the due date any rent payment.

The Bareboat Charter named Glenelg Ltd as the lessor and Delphin Shipping (Pacific) PTE Ltd ^{lessee} the latter company was purchased from Singapore and known there as Delphin Services PTE Ltd but was renamed Delphin Shipping (Pacific) PTE Ltd (Exhibit 34) and operated in Trust for accused 1 by Investors Trust Company Port-Vila.

Its managing Director was J.M. Leversedge. The Charter was signed on behalf of Glenelg Ltd by an officer of the Company and witnessed also by an officer of the Company and by Mr Leversedge on behalf of the lessee Delphin Shipping (Pacific) PTE Ltd.

There was a further agreement between the lessor and lessee whereby the lessee was given an option to purchase the vessel at the end of the lease period for A\$ 25,000 (Exhibit 20)

When the registration of the Bill of Sale for the vessel to Glenelg Ltd was complied with, the sum of A\$ 63,648 was paid to Glenfield Shipping Services Ltd who owned the ship.

This amount was paid to accused 1 so that ^{at} this stage accused 1 had all the money he paid to Captain Kennedy returned to him less disbursements Glenelg Ltd further acknowledged and accepted that the sum of A\$ 132,768.53 as due to Glenfield Shipping Services Ltd as the agreed value placed on the vessel was A\$ 200,000.

Finally an escrow agreement (Exhibit 8) was executed between Glenelg Ltd and Delphin Shipping (Pacific) PTE Ltd by two Directors Mr Seago and Mr Leversedge, whereby the latter company being the lessee were required to give security to secure the vessel during the Charter period. By the agreement the lessee agreed to pay PITCO as escrow agent the sum of A\$ 100,000 which said money was to be placed on interest bearing deposit in a Vila Bank on a ninety days roll-over basis. Upon completion of the lease the deposit and interest to be paid to Delphin Shipping (Pacific) PTL but if the lease agreement is defaulted the compensated security deposit, or such part of the compounded deposit as is necessary to pay out the amount due to Glenelg Ltd in accordance with the lease agreement

shall be paid to Glenelg Ltd and the balance if any shall be paid to Delphin Shipping (Pacific) PTE Ltd. The balance of the 132,768.53 amounting to A\$ 15,753.30 was paid to Investors Trust Ltd for Delphin Shipping (Pacific) PTE Ltd and explained in (Exhibit 12 (a).

(Exhibit 15) the certificate of Survey of the vessel states that the vessel was surveyed in accordance with our rules at Harwood in September 1979 by our Surveyor.

Harwood was the shipyard that accused 1 chose ^{for} carrying out the necessary repairs to the vessel. So by October 1st 1979 the date when the lease or Bareboat Charter (Exhibit 7) was stated to commence, the ship had been passed for survey and ready for commercial use.

It would seem that by the 30th November 1979 Glenelg Ltd were slightly worried.

The company held a meeting of Directors (see page 6 of exhibit 14) it is stated there -

" Whereas the M.V. Glenelg owned by the company is under charter to Delphin Shipping (Pacific) PTE Ltd of Singapore in accordance with a Charter Agreement dated 1st October 1979, and whereas there is reason there may be circumstances and conditions surrounding the operation of the M.V. Glenelg which may constitute a default under the terms of the said Charter it was RESOLVED THAT the company issue a power of Attorney to Mr Jacques Sussman of 56 Berry Street, North Sydney, Australia for the purpose of securing the vessel in any Australian Port in order to carry out an investigation of the actions of the vessel which may constitute a breach of the Charter and if possible to resolve any matters which may constitute a breach and to declare the charter in default if he so deems it to be and to ensure the vessel does not leave port until all matters are resolved ".

A further meeting of the company was held on the 18th December 1979 (pages 8 of exhibit 14) wherein it is stated -

" Mr Jacques Sussman of 56 Berry Street, North Sydney, Australia, was appointed our Agent and Attorney on the 30th November 1979 and whereas the vessel M.V. Glenelg is now under arrest and physically secured by our representative in Cairns etc ".

Again on the 3rd January 1980 the company held another meeting (page 9 of exhibit 14) and agreed to terminate the Bareboat Charter or lease (Exhibit 7) by reason of the default and failure of the lessee to pay the rental payments of A\$ 6.352.00 each due on 1st November and 1st December 1979 which seems were unpaid by the 3rd January 1980 and that the company shall forthwith repossess the vessel as a result of such default.

As a result of the Company's resolution the Notice of Termination of the Bareboat Charter (Exhibit 9) dated the 3rd January 1980 was served on Delphin Shipping (Pacific) PTE Ltd at Investors Trust Ltd at Port-Vila. When accused 1 was informed of the arrest of the vessel he decided to come to Vila and deal with the matter here. Accused 1 took the vessel with one other person and brought it to Santo where the vessel was repossessed by Glenelg Ltd and accused 1 arrested.

The vessel was later brought to Vila and there anchored near the main Government wharf and a guard placed thereon. Later the vessel was arrested by an order of the court in connection with a claim for wages by seamen who worked on the vessel at some time. These proceedings are still before the court in Vila. Accused 1 went back to Australia, Mr Bayer the managing director of PITCO stated that efforts were made to sell the vessel and inquiries were made by persons from the United States of America, New Zealand, Singapore and Solomon Islands but he said the legal uncertainty and unknown Creditor position precluded a sale. He stated there were claims totalling A\$ 150.000 against the vessel.

Mr Bayer stated that in November 1981, accused 1 phoned him from Australia advising that he had new backers and was interested in purchasing the vessel. He said he advised Accused 1 that he would only deal with him on cash basis, Subsequent to this proposal he accused 1 and accused 11 met in Sydney in November 1981 where accused 1 put a proposal to him to purchase the vessel.

He said he demanded to know from accused 1 who was his backers and how could he contact them to verify his proposal.

Accused 1 gave him the name of Mr Norm Witherow in Melbourne.

He called Mr Witherow and asked him to confirm the proposals of accused 1 and he stated he was advised that his group (Witherow) were interested in purchasing the vessel or the shares in Glenelg Ltd subject to inspection by accused 1 who had been the person most knowledgeable about the condition of the ship prior to its arrival in Port-Vila.

Mr Bayer said he agreed to this and on the 12th December 1981, accused 1 came to see him in Port-Vila and said he wished to proceed with the purchase of the vessel as soon as possible as small repairs would be required to the vessel. Both accused visited the vessel and made minor repairs under the supervision of Mr Turkington an employee of Glenelg Ltd and PITCO. Mr Bayer said he spoke to accused 1 in December 1981 regarding the purchase of the vessel and indeed pressed him to know whether Witherow would be coming to Vila and was told he would be coming shortly when he had completed his business in Noumea.

Mr Bayer further stated that both accused 1 and 2 worked on the vessel each day under the supervision of Mr Turkington and that on the 18th December 1981 he saw the vessel leave the Vila Harbour.

Later the same day Mr Turkington came to see him.

He, Mr Turkington, had a bloody ear, his clothing was dishevelled, black marks on his clothes and a very red face.

Mr Turkington in evidence stated that he had taken both accused to the vessel each day from the 14th December and let them carry out repairs. He, Mr Turkington had two Ni-Vanuatu assistants.

Mr Turkington stated as follows -

" On the 18th of December 1981, I took the two accused to the vessel but before we set out in a boat to the vessel his Ni-Vanuatu assistants told him that the anchor chains of the vessel had been cut. We all went to the vessel. I went forward and looked at the chain - one either side of the bow.

Abock (one of the Ni-Vanuatu boys) pointed out where the chains had been cut.

The chains had been cut between the windless and the chain bits.

Looking at the cuts in the steel - it had blue discolouration marks which indicated it had been cut by an electric grinder - used for cutting steel. I was suspicious that either accused had cut the chains - all of us were in the bows where the chains were cut.

I suspected accused 1 because he had used one of the electric motors and diesel motor would have to be started to use the electric grinder. There was an electric grinder on the ship.

Cassel (accused 1) had said he used the grinder to remove some sealing securing straps on doorways. After that I suggested to both accused that we remove the remnants of the cut chain lengths and join it up. That was done with the electric grinder by accused 1 then both chains were reconnected with shakles. After that I had the windless started and accused 1 used it to wind up the chain so that the shakles were below deck.

I suggested we should all go back to Vila in view of what happened. Accused 1 said someone was trying to sabotage the vessel to prevent him from buying the ship.

I suggested we leave the vessel and make it more secure and prevent sabotage.

I had unlocked the wheel house that morning but I cannot remember unlocking the engine room access door.

When I first decided to leave the vessel I went and locked the wheelhouse.

As soon as I got on the vessel in the morning I think accused 1 gained access to the engine room via another door. After locking the wheelhouse I went onto the main deck and saw accused 2 go into the chain locker in the bows of the ship - it is a steel box with a hatch - I went up to the hatch

and heard metallic noises which I thought might be accused 2 undoing the shackles on the anchor chains so I went into the chain locker to have a look and while looking at the anchor chain accused 2 climbed out of the locker and closed and locked the hatchway cover. I banged on the cover yelling to let me out and one of the Ni-Vanuatu boys let me out after four of five minutes.

When I was in the locker the main engine had been started.

When I came out of the locker I saw and heard accused 2 breaking into the wheel house.

The main engine was running - it did not have a gear box so the vessel was moving against the chains.

I was at the windless - accused 1 came towards me, I picked up an oar. I thought he was going to release the chains so I was going to stop him with the oar. Accused 1 picked up an oar and we had a fight - accused 1 tried to hit me with it, At some stage accused 1 tried to throw me over the vessel. He tried to get my leg and put me over the side.

I put him over the side of the ship with the assistance of the two Ni-Vanuatu boys. After that accused 2 came from the wheel house.

I went towards him - he picked up a spear with prongs on the end

I smashed the spear out of his hand. At this stage accused 1 had regained the deck - the ship's ladder was on the side of the Ship.

When both accused confronted me accused 1 said

" it is worth more than your life to stop me taking the ship ".

Both accused were fighting me

The fight moved towards the windless - at some stage accused 1 grabbed me by the waist and accused 2 was holding a piece of an oar and it seemed as if he was going to hit me with it,

So I said, let us stop this and let me get off the vessel with the two Ni-Vanuatu boys. Accused 1 and 2 let us get off the vessel into the dingy. I sustained a cut ear, bruises on my leg and chest.

I was hit by both accused with oars.

I left the vessel into the dingy down the ladder with the two Ni-Vanuatu boys and proceeded to the wharf. The vessel had been going around the anchor chains.

I noticed the anchor chains had been released - they were dropped into the water - the last I saw of the vessel was when it was sailing out of the harbour - I did not authorise both accused to take the vessel ".

Accused 1 gave evidence on oath and agreed that meetings had taken place in Sydney between himself, Mr Bayer, Mr J. Sussman and Mr Ohlen, on the question of finance being provided for the bringing of the vessel into survey. He admitted receiving his A\$ 63, 648 from Captain Kennedy. The accused denied he saw any of the documents negotiated in the deal such as the memorandum and Articles of Association of Delphin Shipping (Pacific) PTE Ltd (Exhibit 31) renamed Delphin Shipping (Pacific) PTE Ltd (2) Escrow Agreement (Exhibit 8) Option Agreement (Exhibit 28) and Bareboat Charter or lease (Exhibit 37).

As Investors Trust Ltd were acting on behalf of accused 1, I do not think it was necessary for him to see all these documents but it was a matter between him and Investors Trust Ltd what communications, if any, should take place between them but certainly did not effect the charge against accused 1. Lastly accused 1 said he was not informed of the notice of termination (Exhibit 9).

The evidence is clear that accused 1 was in Cairns when the vessel was arrested by Sussman. It was as a result of the action of Sussman that he sailed the vessel with only one of the crew to the New Hebrides (Vanuatu) and actually got to Santo where he was arrested and the vessel repossessed. It was clear to me that the actions of accused 1 in contacting Mr Bayer in November 1981 and informing he had new backers who were interested in purchasing the vessel, that accused 1 then knew full well that the vessel belonged to Glenelg Ltd.

Accused 1 may well have had some money due to him for repairs carried out to the vessel but many other creditors existed who had equal right but a redress was open to them in the Civil courts and indeed the Best Brothers exercised that right for wages due.

Their case is pending but efforts are being made to settle.

Therefore when accused 1 said at the end of his evidence that he honestly thought he had a right to take the boat I did not believe him. I put all relevant points to the assessors when I summed up for them and in view of the lack of evidence that accused 1 and 11 intended to permanently deprive the owner of the vessel I suggested to the assessors that a finding of guilty on a charge under section 126 (b) would be more appropriate if they were of the opinion that accused 1 and 11 took the vessel without lawful authority.

Accused 11 did not give evidence or make a statement but I believe the evidence of Turkington and to me, it was clear that without his help the vessel could never have been taken away from Vanuatu waters.

I explained this also to the assessors and referred them to section 30 of the Penal Code regarding complicity in an offence.

I took into consideration all the cases referred to me by Counsel for the defence but as the facts before me bore no relation to the facts in the stated cases I considered the decisions in those cases had no relevancy. The assessors retired for one hour and on returning to the Court each expressed his view that accused 1 and 11 were guilty under section 126 (b) of the Penal Code.

I agreed with the opinion of the assessors, found the two accused guilty under section 126 (b) of using the vessel without lawful authority and convicted both accused.

Both accused had been in custody for eight months in New Caledonia and Port-Vila.

I considered that accused 1 entered into the world of high finance without understanding properly his undertakings although the letter from his good friend Barry West (Exhibit D8) did attempt to ^{make} accused 1 aware of the difficulties to no avail.

I felt a certain amount of sympathy for accused 1.

He had a good record and has had no previous convictions. Regarding accused 2 I formed the view that he may have been led astray somewhat by accused 1 but the fact remains that he did take an active part in the removal of the vessel from Port-Vila.

I considered that both accused should be shown some leniency as they had been in custody for eight months.

I discussed the sentence with both assessors and our decision was unanimous.

I sentenced accused 1 to 3½ years imprisonment with an alternative of paying a fine of 290,000vt and 50,000vt costs.

I sentenced accused 2 to 2 years imprisonment with an alternative of a fine of 200,000vt and 50,000vt costs.

Dated this 26th day of August 1982

Frederick G. Cooke
FREDERICK G. COOKE
Chief Justice

