

"FISHING WAR" IN THE TORRES STRAIT. THE QUEEN V. BENJAMIN ALI NONA AND GEORGE AGNES GESA[#]

Queensland District Court (Criminal Jurisdiction)
Cairns

David Haigh

Unreported

Healy DCJ

Pre-trial hearing

12 April 1999

Tensions recently erupted in the Torres Strait over local Indigenous and commercial licensee's fishing rights, resulting in two local Indigenous fishermen being indicted on criminal charges of robbery with violence. At the pre-trial hearing of legal argument, District Court Judge Healy upheld their defence of honest claim of right. At the subsequent trial, Judge White upheld these findings and stayed proceedings pending an application to the Court of Appeal. The Court of Appeal has reserved its judgement.

THE FACTS

In May 1998, three Murray (Mer) Island men ('the Defendants') were fishing in a dinghy off Mer. Nearby, they sighted three other dinghies from which commercial fishermen were fishing. The Defendants approached the commercial fishermen and in strong terms informed them to 'get out of our area.' One of the Defendants had a crayfish spear, which he pointed at one of the commercial fisherman. The Defendants took the fish in the commercial fishermen's dinghies and returned to Mer. There, the Defendants sold the fish to the Mer fish freezer cooperative and divided the proceeds amongst themselves. Later, two of the Defendants, Mr Nona and Mr Gesa were served with indictments alleging theft of the fish with violence under section 411 of the *Criminal Code Act*

[#] The material herein incorporates two Case Notes earlier published in the Indigenous Law Bulletin: David Haigh: "Casenote – 'Fishing war' in the Torres Strait – The Queen v Benjamin Ali Nona and George Agnes Gesa, Unreported, Healy DCJ, Pre-trial hearing, 12 April 1999;" 4(22) ILB (1999) 20; David Haigh: "Update – 'Fishing War in the Torres Strait –Round Two – The Queen v Benjamin Ali Nona and George Agnew Gesa": 4(24) ILB (1999) 18. JCULR acknowledges these sources and wishes to thank the publishers for reproducing them.

(1899)(QLD).

THE DEFENCE CASE

It was not disputed that the commercial fisherman had a statutory licence to fish in the area. However, the Defendants pleaded an honest claim of right to the fish,¹ basing their plea on the *Torres Strait Treaty (1975)* ('the Treaty') between PNG and Australia and legislation enacted to protect the traditional fishing and way of life.

Article 10 of the Treaty establishes a Protected Zone whose purpose is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants. The Defendants maintained that the confrontation took place in this area. The Treaty is also acknowledged in section 8 of the *Torres Strait Fisheries Act 1984 (Cth)*, which requires the Act's administrators to have regard to the Torres Strait peoples' traditional customs including 'in relation to traditional fishing'. A similar provision exists in the *Queensland Fisheries Act 1994*.² The Defendants did not plead their concern for customary marine title (CMT). The Crown argued that the true reason for the Defendants' confrontation with the commercial fishermen was not to protect their rights under the Treaty and legislation, but to protect their customary marine title. Since customary marine title claims under the *Native Title Act 1993 (Cth)* have not yet been legally recognised in the Torres Strait, it could not form a defensible basis for the Defendants' actions.

However, Judge Healy agreed with the Defendants' claim that providing they honestly believed that they were entitled to 'protect' the area, this was sufficient even if the title conferring that right was not recognised in law.

As well as the Treaty and legislation the Defendants relied on a 'gentlemen's agreement' with the commercial fisherman in which it was agreed that they could fish within a ten nautical mile 'exclusion zone' surrounding Mer provided they consulted with the relevant Island Chairman, elders and the community. In this instance, the commercial fishermen were in breach of that agreement.

THE PROSECUTION CASE

The Crown was required to prove beyond reasonable doubt that the area where the incident took place was not a traditional fishing ground upon which the Defendants' livelihoods depend, so demonstrating that the Defendants did not own the fish and were not entitled to take them from the commercial fishermen.

The Crown firstly contended that the commercial fisherman were fishing outside the 'exclusion zone' informally agreed to exist around Mer and, accordingly, that the Defendants had no rights to the fish. However, Judge Healy noted that even

¹ s.22

² s.14

if outside this smaller 'exclusion zone', the Defendants had traditional fishing rights anywhere within the Treaty's Protected Zone which included the 'exclusion zone' and virtually the whole Strait's waters and islands.

Secondly, the Crown contended that the Defendants' intention in taking the fish was not to assert their traditional fishing rights but to both punish the commercial fisherman for taking the fish and to profit from their sale to the Mer fish freezer cooperative. However, Judge Healy accepted that traditional fishing rights did not prevent the Defendants from selling fish obtained pursuant to those rights.

Thirdly, the Crown asserted that the Defendants' threats were not issued with the intent of enforcing their traditional fishing rights, but purely to deprive the commercial fishermen of the fish. The Defendants contended that *The Queen v Skivington*³ established that an honest claim of right 'involves an honest belief in your entitlement to the property but not in the means by which you go about it.' Judge Healy accepted that a valid claim of right doesn't have to be reasonable, it just has to be honest and if you adopt unreasonable methods to get what you honestly believed you are entitled to, that doesn't exclude [the claim].⁴

THE JUDGMENT

Judge Healy ruled that the Crown was unable to prove beyond reasonable doubt that the Defendants' claim was asserted dishonestly or excluded a bona fide claim of right to the fish. The Judge refused to allow the matter to go before a jury. The matter was referred back to the Queensland Director of Public Prosecutions who, in spite of Judge Healy's finding, refused to withdraw the indictment, and stated they intended to take the charges to a full trial. The matter was set down for hearing before Justice White in the Cairns District Court on 16 August 1999. His Honour upheld Justice Healy's finding, rejecting the Crown's argument that it did not need leave to proceed to trial. The Court found that committal hearings under s592A(l) of the *Criminal Code 1899 (Qld)* were binding [s592(3)] and could not be reopened by a trial judge without 'special reason' constituting 'substantial disagreement' with the ruling of the earlier Judge. Critical to this finding was the fact that the Crown consented to the direction hearing. His Honour also rejected the Defence attempt to argue issue estoppel to prevent a re-opening of the hearing. In obiter, Justice White did note that a 'paper trial' was somewhat unusual in the circumstances of this case. His Honour placed a stay on the proceedings pending application to the Court of Appeal. The Court of Appeal heard the matter on the 22nd February 2000. Judgement was reserved.

CONCLUSION

Judge Healy had noted that there have been a number of similar cases in the Torres Strait and that it is 'time something was done to resolve ... (it) ... because

³ 51Criminal Appeal Reports 167 at 170

⁴ Transcript, 27.

clearly there could be more serious trouble in the future...'⁵

The case raises important issues for the Protected Zone Joint Authority established under section 30 of the *Torres Strait Fisheries Act 1984 (Cth)*. The Authority is duty bound to protect the traditional fishing rights and way of life and to accommodate the rights of commercial fishers.⁶ Clearly, a memorandum of agreement between the Authority, Islanders and commercial fishermen is long overdue in the Torres Strait.

This case underlines the urgent need for the Commonwealth and Queensland Governments to live up to their responsibilities to protect traditional fishing under the Torres Strait Treaty. Their failure to finalise negotiations over Torres Strait fishing rights between local Indigenous people and visiting commercial fishermen risks a possibly violent 'fishing war'. Torres Strait people have taken the initiative by recently holding a major seminar on the Strait's fishing rights on Thursday Island.

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⁵ Transcript, 30.

⁶ s.8 and s.39 of the *Torres Strait Fisheries Act 1984 (Cth)*, respectively.

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