CITATION:	*Russell Lawrence Perry v Marko Ante Simlesa* [2002] NTMC 041
PARTIES:	RUSSELL LAWRENCE PERRY
	v
	MARKO ANTE SIMLESA
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Fisheries Act
FILE NO(s):	201135
DELIVERED ON:	30 October 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	28 October 2002
DECISION OF:	Ms J Blokland

CATCHWORDS: Fish and Fisheries – Regulatory Offences – Mental element and mitigation – *Fisheries Act* NT s 13C(2) (c) – Barramundi Fishery Management Plan clause 13 (a) – Law v Deed [1970] SASR 374.
Forfeiture - *Fisheries Act* ss 46(1)(b), 46 (2), 46 (3), – Roy Stuart Mackay v Iwan Diman, SC (NT) 7 September 1999, Riley J unreported – special reasons"-whether applicable.

REPRESENTATION:

Counsel:

Complainant:	Mr Rowbottam
Defendant:	Mr Lawrence

Solicitors:

	ODPP
	Morgan Buckley

Judgment category classification:	B
Judgment ID number:	[2002] NTMC 041
Number of paragraphs:	25

IN THE COURT OF SUMMARY JURISTICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 201135

[2002] NTMC 041

BETWEEN:

POLICE
Complainant

AND:

MARKO ANTE SIMLESA
Defendant

REASONS FOR DECISION

(Delivered 30 October 2002)

Ms Blokland SM:

DEFENDANT'S PLEA

1. The defendant, Marko Simlesa pleaded guilty on 25 October 2002 in this Court to two charges on complaint against the *Fisheries Act (NT),* namely:

> "(1) That on the second day of September 2001, at Coopers Creek, being a person who is the licensee on Barramundi licence A7 036 in accordance with *Section 14* of the *Fisheries Act*, did not maintain direct control of his assistants whilst fishing operations were conducted under the Barramundi licence, contrary to *s 13C(2)(c)* of the *Fisheries Act,* and,
>
> (2) That on the same day, at Coopers Creek, being a Barramundi licensee 2001 A7/036 did fish with a gill net with a mesh size of 150mm which is less than the approved mesh size of 175mm (7 inch) lawfully allowed to be used in Coopers Creek, which is between the river closure line and the 7 inch net line for the East Alligator River, contrary to *Clause 13(a) Barramundi Fishery Management Plan.*"

2. The maximum penalty for each offence is a fine of $5000. Both are regulatory offences.

FACTS

3. At the material time, the defendant was approved as a nominated person of the licensee and in those circumstances is deemed to be the licensee of the commercial licence noted in the charges. He embarked on a fishing trip with three assistants, at least one of who is a regular assistant and has been employed by the defendant for two years. The plan was to fish in Cooper Creek that runs off of the Alligator River: (*see exhibit p1).* As I understand the prosecution facts, one assistant, (Darren Hicks) worked primarily with the defendant near the point where Coopers Creek meets the Alligator River: *(around point 6 on Exhibit 1)* and two other assistants, Rodder and Corbishly went downstream into Cooper Creek and set gill nets. The size of the nets set by Rodder and Corbishly, at six inches was prohibited under the *Barramundi Fishery Management Plan. The Barramundi Fishery Management Plan* provides that gill nets set in Cooper Creek must be seven inches. The prohibited nets were laid at points one and two as noted in *Exhibit p1*.

4. The nets laid by the defendant were the approved size. Fisheries officers seized the undersized nets laid by Rodder and Corbishly after ascertaining they were not of the approved size. Fisheries officers seized six gill nets and anchors, a 6.2 metre aluminium dingy, a Thiatsu motor, serial number M9083B7, 60 Barramundi and three threadfin salmon.

5. Although neither offence requires proof of intent or other mental element, the defendant has asked the court to take account of the fact in mitigation that the commission of these offences was not intentional. On that matter, the defendant has given evidence on how the offences came to take place. The defendant has stated this proposed trip was to take 7-8 days in the East Alligator region; that within a couple of days of commencing the trip, he

had a visit from fisheries officers in the area of the mouth of the East Alligator and that the Court should therefore realise that he knew fisheries officers were in the area and they knew of his presence, hence, he would be unlikely to intentionally do anything illegal; that he had loaded both six inch and seven inch nets on his boat; that he (the defendant) had told Troy Rodder to go and set nets where they usually set them in Cooper Creek; that he had fished in Cooper Creek previously with Troy Rudder; that he (the defendant) had set approved nets and that he went to bed after setting his nets and was therefore unaware that six inch nets had been set by Troy Rudder.

6. In cross examination, Mr Rowbottam raised a conversation that the defendant agreed he had with fisheries officers on the discovery of the nets. In that conversation, when the nets were raised by the defendant, the defendant said something like, the *nets were seven inch nets*. This could have pointed to an inconsistency in his explanations, namely, that he was suggesting at that time that the nets were in facts seven inches. The defendant explained this by saying that although someone of his experience could readily determine the size by looking at the nets, he couldn't really ascertain this until they were pulled further out of the water and he expected they were seven inch nets. Other parts of statements from fisheries officers indicate that the defendant gave a consistent explanation. It is not clear enough to me to make a finding against the defendant on that point.

7. On balance, I find the setting of the six inch gill nets was not intended by the defendant and I sentence him on that basis.

RELEVANCE OF MENTAL STATE TO SENTENCING

8. In relation to strict liability offences, (or in this case, being regulatory offences which are closer in character to absolute liability offences, there being no possibility of raising mistake of fact), although the mental element is not required for proof of the offence, in some circumstances lack of

knowledge or innocent mental state may amount to mitigation. Nothing in the plea of guilty to a strict liability offence admits the state of the defendant's knowledge or state of mind: *(see eg.Law v Deed [1970] SASR 374).* The plea in this instance negatives only that not all reasonable precautions were taken to prevent the commission of the offence: *(which amounts to a defence under s 13E Fisheries Act).*

9. I do however reject Mr Lawrence's submission that these offences were committed by *accident. Accident* tends to connote not having control over the situation. Here as the licensee, the defendant had a duty to take positive steps of prevention and could have done so. It is also important to differentiate between count one and count two. Count one involves an *omission* to act, namely an omission to *maintain direct control of assistants*. It would defeat the whole regulatory scheme to suggest that *accidentally* or *non intentionally* omitting to perform the duty would mean the offence is default of fault element. All that can be gleaned from the defendant's evidence on this point was that he assumed one of his assistants would act in the same (lawful) manner as he had done in the past. To that extent, he may have thought he had control, but he did not. In relation to count one, this has some, but not significant mitigating effect.

10. In relation to count two, I am prepared to accept that the defendant, notwithstanding he was the nominated licensee, did not know and did not think that his assistant would commit the offence. His culpability on this count is lessened by virtue of his lack of knowledge compared with a situation of a person who has knowledge.

SENTENCING FACTORS

11. In sentencing the defendant, I adopt the submissions made by Mr Rowbottam that the purpose of the scheme of the *Fisheries Act* is to preserve the resource for all in the community, both commercial and recreational fishers and others who rely on the resource. Mr Rowbottam reminds the

Court that other industries such as tourism are affected by the depletion of the resource which can eventually be brought about by the actions or omissions of people like this defendant. It is bizarre that commercial fishers who could be most directly and adversely affected by the depletion of the resource, fail to take the steps reasonably required by law to conserve the fish stocks.

12. The defendant has prior convictions for fishery offences in 1980 and in 1994. Although the offences in 1980 were when he commenced his career as a professional fisher, and as he has stated in evidence, he didn't have much instruction at that time on fishing regulation, I would have thought that one brush with the authorities and a further conviction in 1994 would have given him a heightened sense of awareness of the need for compliance. Even if he doesn't become more sensitive to the need for compliance for the sake of the community as a whole, I would expect he would have some heightened awareness of the need to protect his very livelihood. I note also, which was not before me, that he was convicted by Mr Wallace SM on 12 August 2002 for other offences unrelated. I do not propose to take those into account. They are not strictly speaking prior convictions, and the parties advise me that the matter is still under appeal. I do not sentence on his prior convictions, but the fact that he has been dealt with previously means I will need to take into account specific deterrence to ensure he stops offending in this way. He does not receive the mitigation a first offender might receive.

13. It has been submitted that proportionately, this is a mid-range example of these offences. So far as I can tell from the small number of cases I have been made aware of, I agree.

PERSONAL CIRCUMSTANCES

14. The defendant is a hard worker from a hard working family. His father came to Australia as a migrant from Croatia and both parents worked extremely hard. This industrious ethic has been imparted to their children including the

defendant. Three detailed references before the court attest to the defendant's honesty and integrity. I accept that outside of this problem he has with compliance with fisheries law he is a good person. He is 40 years old and married with three children. He learnt about fishing initially from his father and later obtained his master's ticket. He has been in the industry for 23 years. I accept also that commercial fishing is a difficult profession with its long hours, hard work and lengthy trips away from family. The financial management of the business can be precarious. This defendant has a deal of debt associated with both the usual domestic as well as business issues. His wife is his business partner and together their annual income is $70,000.

15. Aside the issues of forfeiture that must be dealt with separately, he lost financially on this trip as after the seizure of equipment by fishery officers it was not worth while going on with the trip. He gave evidence indicating that on a trip such as this one, he would have expected to catch around three and a half tonne valued at around $15,000 -$18,000. Through an arrangement with fisheries he has paid $10,000 to obtain possession of the dingy, worth $25,000: (*Ex D2)*.

16. These charges have taken some time to resolve. He was not summonsed to Court until April 2002. After a number of mentions he indicated a plea of not guilty. Mr Lawrence told the court he advised the defendant to change course as the defendant could not have relied on the statutory defence. Pleas were entered on 18 October. The defendant cooperated with fisheries officers at the time of the detection of the offences. The defendant is entitled to some mitigation because of this.

17. Taking all of these matters into account, on count 1 he is convicted and fined $2,200.

18. On count 2 he is convicted and fined $2,000. There is a victim's levy of $ 20.00 on each complaint. Without mitigation issues, on the objective facts only, these fines would be more in the order of $3,000 on each count.

19. I have also considered in setting this penalty that the two offences are related in the sense that the omission comprising count 1 essentially creates the environment in which the commission of the offence comprised in count two can occur.

FORFEITURE

20. The Crown seeks forfeiture of the goods seized.

21. Mr Lawrence has submitted that I should not forfeit all of the seized property or I should forfeit only part of the seized property, primarily on the basis that these were unintentional breaches of the *Fisheries Act,* the loss already occasioned to the defendant and the financial difficulties he has already been placed in. I am mindful of *s 46(3) Fisheries Act* requiring this court to consider forfeiture quite separately from the question of sentence. Forfeiture is in *addition* to sentence. *Section 46 Fisheries Act* requires mandatory forfeiture to the Crown of seized items where the vessel is a *foreign boat,* however, in all other cases (such as this one), forfeiture is expected to occur under *s 46(1)(b) unless the court, for special reasons relating to the offence, think fit to order otherwise.* There is, therefore, a *limited* discretion not to order forfeiture. A number of other Acts require mandatory forfeiture: *(eg Liquor Act 1978, ss 95(1)(d), 96 – forfeiture of the vehicle by force of the conviction).* I have read, as suggested by Mr Rowbottam, the decision of *Roy Stuart Mackay v Iwan Diman, SC(NT), 7 September 1999, Riley J, unreported* concerning forfeiture in the Commonwealth setting. Naturally the facts are quite different, involving the deliberate commercial fishing by a foreign vessel in Australian waters. Some principles revealed in that decision are useful guidance. First, forfeiture is directed at the protection of the resource and general deterrence. Second, it

is inappropriate to rely on the personal circumstances of the defendant as a reason *not* to forfeit the seized property. Thirdly, forfeiture is aimed at *incapacitation.* Fifthly, *deliberate* violation will almost invariably result in an order of forfeiture.

22. Under the *Fisheries Act*, I must find *special reasons* relating to the *offence.* I bear in mind that forfeiture is directed to the conservation of the resource that might not be achieved without measures such as forfeiture. No doubt this is why *special reasons* are required to avoid forfeiture.

23. Use of the word *offence* only, precludes me from taking into account the personal circumstances of the *offender* that are unrelated to the commission of the offence.

24. This interpretation accords with the second principle revealed in *Diman* (above), where Riley J held the magistrate to be in error in taking into account the age of the offender, what might occur on his return to Indonesia and other personal circumstances. I doubt in any event the usual principles of proportionality apply to forfeiture as in the case of sentencing law, or, if they do, only in an extremely limited way. Here I can take into account the lack of knowledge on the part of the defendant as a relevant matter pertaining to the offence. As stated earlier, it appears to me he did not anticipate the second offence and the prior working relationship with one of the assistants appears to have led him to not take steps to directly control him. This is not a matter of allowing the forfeiture matter to be influenced by the sentence and vice versa, but rather, some facts are relevant to both issues. On the question of incapacitation, while that is not the test here, the seizure of the dingy and associated equipment has not, in fact led to incapacitation of this defendant to fish or therefore be able to potentially commit fishing offences. He has been able to enter into a bond to secure the boat's temporary release back after payment of a $10,000 bond and presumably uses it fishing. I am mindful this does not of itself exempt the

boat from a forfeiture order by virtue of the section. This was not a *deliberate* violation, however, the test is whether there are *special reasons. McKay v Diwan* is useful as the philosophical basis for forfeiture.

25. I have been unable to find judicial comment on this phrase in this context. At first I thought this may be a safeguard for innocent third parties whose property gets seized, however, there is some attempt to deal with that problem in *s 46(2)Fisheries Act.* I take the phrase in its common meaning, bearing in mind the philosophy underpinning forfeiture law. There must be something out of the ordinary on the facts, but it must not be read to be such a high test that it is incapable of application to any circumstance reasonably envisaged. I consider the lack of knowledge of the defendant concerning the assistant's illegal activity in a context where he had known him to behave lawfully previously saves the boat and motor from forfeiture. I consider the fact the defendant himself set lawful sized nets and told his assistants to set nets in the usual spots, not believing anything untoward would occur is a *special reason* not to forfeit the dingy. So far as the defendant knew, the assistants went upstream in Cooper Creek, as instructed by him. The nets, I think are in a different category. The seized nets may be used in other areas outside of this fishing zone, quite lawfully. Although the defendant did not know the nets would be used on the date of the offences, he knew he had both types of nets at the outset of this trip. Knowing he was going to a zone where they could not be used at all, he should have taken greater precautions that they did not somehow become available for use in any way, advertently or inadvertently. The nets were directly involved in an unlawful catch. As the seized catch was the result of unlawful activity, the catch should be forfeit to the Crown.

Dated this 30th day of October 2002.

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J. BLOKLAND
STIPENDIARY MAGISTRATE