CITATION: *Perry v Simlesa & Reidy* (No. 2) [2003] NTMC 005

PARTIES:	RUSSELL LAWRENCE PERRY v MARKO SIMLESA & KODE REIDY
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20102600, 20015481
DELIVERED ON:	7 February 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	3 December 2002
DECISION OF:	Mr Wallace

CATCHWORDS:

Criminal Law – Forfeiture of property – Fisheries Act (NT) s 46 – whether court need order forfeiture

REPRESENTATION:

Counsel:

Complainant:	I Rowbottam
Simlesa:	P Cantrill
Reidy:	Unrepresented

Solicitors:

Plaintiff:	Office of the DPP
Defendant: (Simlesa)	Morgan Buckley

Judgment category classification:	C
Judgment ID number:	[2003] NTMC 005
Number of paragraphs:	26

IN THE COURT OF SUMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20102600, 20015481

[2003] NTMC 005

BETWEEN:

RUSSELL LAWRENCE PERRY
Complainant

AND:

MARKO SIMLESA
&
KODE ROBERT REIDY
Defendants

REASONS FOR DECISION

(Delivered 7 February 2003)

Mr Wallace SM:

1. On 31 July 2002, for reasons published on 12 August 2002, I found proved against each of these Defendants (and one other, a Mr Armytage) 2 offences contrary to the *Barramundi Fisheries Management Plan,* a management plan promulgated pursuant to part 111 of the *Fisheries Act* ("the Act"). On 7 October 2002 I sentenced the Defendant Simlesa, and made an order forfeiting to the Crown the dinghy, motor, and two gill nets which had been seen by Messrs Pearce and Reiter far up Perakary Creek on 13 August 2000. The question of the forfeiture of one other dinghy and motor, and of the fishing vessel "Jolly Roger" was adjourned. These Reasons deal with that question concerning which I heard evidence and submissions on 3 December 2002. Mr Rowbottam appeared for the Complainant, Mr Cantrill for the Defendant Simlesa, and also for Mr Peter Ince, a director of Pirate Pty Ltd, ("Pirate") the owner of the "Jolly Roger". I am entirely uncertain whether Mr Ince, or Pirate, have any standing in the matter. Happily, the unity of

interest between them and Mr Simlesa relieves me of any need to resolve that uncertainty.

2. Most of the facts relevant to the offences by the Defendants appear in my reasons of 12 August 2002. Evidence given by Mr Ince on 3 December 2002, which I accept, allows me to find the following additional facts. Mr Ince had intended to take a year off fishing in 2000-2001, hence Mr Simlesa's becoming the "nominated person" for the licence owned by Pirate. Possession of the "Jolly Roger" apparently went with the licence. As it happened, Mr Ince was on board the "Jolly Roger" during the voyage wherein the offences were committed. Mr Simlesa had contacted him just before he was due to sail. A deckhand had unexpectedly withdrawn his labour and no replacements could be found. Mr Ince agreed to go on the voyage, but strictly as a deckhand, Simlesa remaining in charge as skipper. Mr Ince appears not to have had a hand in setting the nets, legal and illegal, off the mouth of, and in Perakary Creek. He remained on board the "Jolly Roger". Nor did he have a hand in hauling in the catch. He did bring a second dinghy from the "Jolly Roger" to the seaward side of a sandbar at the mouth of the creek: the Defendants' dinghy was so low in the water by reason of the weight of their miraculous draught of fishes that some of the catch had to be transhipped to Mr Ince's dinghy before the Defendants' dinghy could cross the bar.

3. Mr Ince was involved in filleting and packing the catch, which comprised about 600 kg of salmon and 100 kg of barrumundi. The wholesale value of the fillets was a little under $ 2,000.

4. Mr Ince's evidence was that his dinghy and motor would be worth about $15,000, and that the "Jolly Roger" was worth about $100,000.

FORFEITURE UNDER THE ACT

5. The Act provides for the forfeiture of in connection with offences in s 46:

"(1) On the finding of guilt of any person for any offence against this Act any vessel, vehicle or other conveyance, fishing gear, implement, appliance, material, container, goods, or equipment used in respect of the commission of the offence and any fish or aquatic life in respect of which the offence has been committed, whether or not they have been seized, taken possession of, detained, or released under a surety under section 33(3), and any proceeds from the sale of such property pursuant to section 33(4) shall –

(a) where the vessel is a foreign boat – be forfeit to the Crown; and

(b) in any other case – be forfeit to the Crown unless the court, for special reasons relating to the offence, thinks fit to order otherwise,

and disposed of as the Director thinks fit.

(2) A person whose property has been forfeit to the Crown under subsection (1) or a person who, immediately before the forfeiture, had a legal or equitable interest in such property may apply to the Director within 30 days after a finding of guilt for the sale of the property so forfeited; and the Director may order the sale to the applicant of the property on payment to the Crown of such amount as the Director thinks appropriate, being an amount not exceeding the estimated market value of the property.

(3) Any forfeiture directed or payment imposed pursuant to this section shall be in addition to, and not in substitution for, any other penalty that may be imposed by the court or by this Act.

(4) Subject to subsection (2), where fish or aquatic life or fishing gear is seized under this Act and a person pays an infringement penalty under section 37A that has not been refunded to him or her under section 37B in respect of the alleged offence to which the fish, aquatic life or gear relates, the fish, aquatic life or fishing gear is, notwithstanding that no conviction is entered against the person, forfeited to the Crown."

And s 4 (3) reads

"(3) In this Act, the expression "against this Act" in relation to an offence, includes an offence against the Regulations, a

management plan, or other instrument of a legislative or administrative character made under this Act."

6. It is clear, therefore that the Defendants' offences excite the operation of s46 of the Act. It is less clear how that section operates.

7. Section 46 (1) is not unique in providing for automatic forfeiture of property connected to the commission of an offence. *The Misuse of Drugs Act*, in s 34 (1), for example, provides (if the 2002 reprint is to be entirely trusted) :

> "(1) On the finding of guilt of a person for an offence against this Act, <u>any dangerous drug, precursor</u> in respect of which the finding of guilt is made is forfeited to the Crown." (my emphasis)

8. In the *Weapons Control Act 2001*, s 20(1) creates an comparable scheme:

> "(1) If a person is found guilty of an offence against section 6, 7, 8, 9, 10, 13 or 14(5) –
>
> (a) the court may order that the weapon or body armour to which the offence relates be returned to a specified person; or
>
> (b) if the court does not make an order under paragraph (a) – <u>the weapon or body armour</u> to which the offence relates is forfeited to the Territory."(my emphasis)

9. The *Liquor Act*, in s 96 (1) provides:

> "(1) A thing seized under this Part and not released under section 100A is, by force of this section, on a person being found guilty of the offence in connection with which it was seized, forfeited to the Territory."

10. Where s 46 (1) of the Act does seem to be peculiar is in its failure to suggest a mechanism, a procedure, an arbiter to identify what things might have been "used in respect of the commission on the offence". In the case of s 34 (1) of the *Misuse of Drugs Act* the mechanism is by reference to the terms of

finding of guilt –presumably to the Complaint or Information, and to the facts as found by or admitted to the Court. In the case of the *Weapons Control Act 2001,* the phrase "to which the offence relates", in context, would seem to direct attention to the same material. In both those cases, a very limited class of property is forfeit. In the case of the *Liquor Act,* the procedure is pivoted upon seizure, which act identifies the things potentially liable to forfeiture.

11. In the Commonwealth *Fisheries Management Act* s 106A provides for automatic forfeiture as follows:

> "106A. Forfeiture of things used in certain offences
>
> The following things are forfeited to the Commonwealth:
>
> (a) a foreign boat used in an offence against:
>
> (i) subsection 95(2); or
>
> (ii) section 99; or
>
> (iii) section 100; or
>
> (iv) section l00A; or
>
> (v) section 101; or
>
> (vi) section l01A;
>
> (b) a boat used in an offence against section 101B as a support boat (as defined in that section);
>
> (c) a net or trap, or equipment, that:
>
> (i) was on a boat described in paragraph (a) or (b) at the time of the offence mentioned in that paragraph; or
>
> (ii) was used in the commission of an offence against subsection 95(2) or section 99,100, 100A, 101, l01A or 101B
>
> (d) fish:

(i) on a boat described in paragraph (a) or (b) at the time of the offence mentioned in that paragraph; or

(ii) invo1ved in the commission of an offence against subsection 95(2) or section 99, 100, 100A, 101, 101A or 101B."

12. This provision, by thus exhaustively listing the items that are forfeited, appears to avoid some of the uncertainty created by S 46(1) of the Act, at least in cases where the foreign boat or support boat has been apprehended -- which is to say, for practical purposes, all cases.

13. (A "support boat" is a boat, among other things – see s 101B of the *Fisheries Management Act* – situate outside the Australian Fishing Zone, assisting a foreign vessel inside it. The concept of the "support boat" appears to have been devised to extend jurisdiction to include such vessels, which if so operating within the AFZ, would have crews guilty of offences through ordinary principles of complicity, not through the "support boat" concept. There is no reason to think that the Commonwealth Parliament believes there is any distinction between actual fishing boats – say, Mr Simlesa's dinghy – and "mother ships" supporting these boats' operation – say, the "Jolly Roger" – even if such a belief expressed in a Commonwealth Act were relevant to the interpretation of a Territory Act, which it is not.)

14. It seems to me that s 46 of the Act has created a procedure for a forfeiture which operates, at least so far as the question of identification of the forfeited things is concerned, completely outside and independent of the process of prosecution to finding of guilt against an offender. In my opinion the Court of Summary Jurisdiction does not have the responsibility, or indeed, the jurisdiction to decide whether a given thing was or was not "used in respect of the commission of the offence." On the assumption that a given thing – say the "Jolly Roger" -was, the Court does have jurisdiction to remit, pursuant to s 46 (1) (b), the forfeiture which otherwise comes with the finding of the guilt. Mr Cantrill, pointed out, contrary to interest as it were,

that on a literal reading of s 46 (1), the s 46 (1) (b) discretion had to be exercised "on the finding of guilt", that is, at the same time, as the finding of guilt, and that by adjourning the question, on that literal reading I had missed the bus. I agree that that is the literal reading of the section but to apply it in practice would be absurdly inconvenient, and I can see no reason not to interpret the discretion created by s 46 (1) (b) according to a variety of the golden rule that would permit the usual power of adjournment for further evidence, submission etc.

THE s 46(2) DISCRETION

15. As far as I am aware there has not been any reported case on the exercise of the discretion created by s 46(2). Mr Rowbottam, counsel for the Complainant, had Senior Constable Russell with him when the forfeiture issue was argued on 3 December 2002. Mr Russell is now working as the police prosecutor on Fisheries matters: until recently he had been attached the Fisheries enforcement unit for as long as anyone remembers. Mr Russell said - and I accept that his knowledge is encyclopaedic - that the last time a "mother ship" was forfeited was in early 1980s. Presumably that was in connection with a prosecution under the old *Fish and Fisheries Act 1979*: in that Act, at least for Australian vessels, the question of forfeiture of items seized was at "the discretion of the court recording the conviction" – see s 83 (1). I know nothing of the relevant facts of that case. I know nothing as to the number of cases which have involved the two factors: a finding of guilt; and the involvement of a "mother ship". I assume that there have been at least a few.

16. It is well established that a discretion to forfeit (or to "unforfeit", as in s 46(1)(b) of the Act) must be exercised judicially after considering all the relevant matters. In some areas of the operation of the criminal law the relevant matters almost always point decisively in one direction. Thus, on the question of the forfeiture of foreign fishing vessels (when that question

was discretionary before the enactment of s 106A of the *Fisheries Management Act*) see the decision of Riley J in *Mackay v Diman* [1999] NTSC 96, unreported judgement of 7/9/99, and in particular the authorities and statistics gathered together by His Honour in paragraphs 15-20 of his Reasons for Judgment.

17. In other areas the discretion is very rarely exercised: indeed, its exercise is not often even considered. Thus there has almost never been forfeited, in the NT at least, land on which cannabis was grown, and very rarely motor vehicles in which prohibited drugs have been transported, although powers of forfeiture under the successive pieces of drug legislation – the *Prohibited Drugs Act,* the *Poisons and Dangerous Drugs Act,* the *Misuse of Dangerous Drugs Act,* and the old Criminal Code s390(8) – or its peculiarly circumscribed (eventual) successor, s 99 A of the *Sentencing Act* – probably empowered such forfeitures, between them. Similarly when Mr Cavit SM sought to incapacitate on incorrigible offender from further driving unregistered, by forfeiting the car the offender had so used so often (using the s 390 (8) power) Mr Cavit's decision was upset on appeal. (I have been unable to track down that case.) Forfeiture powers have, as far as I know, not been applied to any traffic offences since then, ie 1984 or 1985. Nor can I recall a single instance of there being forfeited a vehicle used by burglars to travel to the entered premises, and/or transport the loot from them.

18. If forfeiture has been, in a given set of circumstances, historically rare, or unknown, then it seems to me that the practice thereby established would be a factor militating against forfeiture, for reasons cognate with the reasons militating against a sudden, steep, unannounced increase in penalties for an offence, concerning which see *Breed v Pryce (*1985) 16 A Crim R136, and *R v Lew Fatt* (1993) 66 A Crim R451 (Mildren J), and (1993) 70 A Crim R 66 (Court of Criminal Appeal).

19. As for the other factors relevant to a discretion to forfeit:

1) I have no idea whether offences like the Defendants' are prevalent.

2) I am satisfied that such offences are difficult to detect – the nets were found by sheer chance by public spirited citizens; the Territory's coastline is long; the Fisheries enforcement unit is fairly small.

3) I am satisfied that such offences are expensive to combat. The evident costs of the police investigation in this case serve as one token of that.

4) Whether or not offending is prevalent, judging by the abundance of the Defendants' catch, the temptation to offend must be strong, and given 2) and 3) above, the risk of forfeiture may dissuade fisherfolk from succumbing to that temptation.

5) There is a clear need to protect the fishery – like every other fishery – from overexploitation. This need, which is the purpose behind the Act, Regulations and Plan, is recognised and supported by the public, who often report fisheries offences (and seldom any other offences).

6) In this case the disproportion between the value of the "Jolly Roger", on the one hand, and of the proceeds of the offence, on the other, though quite large – 50 or 60 to 1 – is not egregiously so. The amateur offender who exceeds the bag limit of 2 barramundi on the Mary River (or who uses barbed hooks) commonly forfeits a rod and reel worth about $600-$1,000 for catching an extra fish or two (or no fish at all). And in the case of the Commonwealth offences, the value of the Indonesian vessels routinely forfeited represents perhaps 10 years' income for a skipper or crew member.

7) The absolute value of the "Jolly Roger", $100,000 or so, is very large by comparison with most other forfeitures under the Act, although less than the value of Taiwanese trawlers and other large fishing vessels which are occasionally apprehended by the Commonwealth authorities, and which were usually forfeited when court retained that discretion. Of course, these vessels were directly used for fishing. The "Jolly Roger" was not.

8) The "Jolly Roger" was not owned by the offenders. If forfeited, the loss will initially fall on Pirate. I cannot even

guess at the likelihood of Pirate's being able to recover from the Defendants.

20. If the question before me was whether to forfeit the "Jolly Roger", I think that the last mentioned item would tip the scales against forfeiture. But that is not the question. The structure of s 46 of the Act means that the question for me is whether there are "special reasons relating to the offence" to order otherwise.

21. In my judgment the ownership of the "Jolly Roger" is not a matter of "relating to the offence". It is clearly the case that forfeiture pursuant to s 46 would occur even if offenders had stolen the "equipment used in respect of the commission of the offence", and that in such a case the remedy for the true owner of the equipment rests with the discretion of the Director pursuant to s 46 (2): the Director could sell back the equipment for a peppercorn.

22. Similarly, it seems to me difficult to place the public policy considerations, usually very relevant to an exercise of forfeiture discretion, within the rubric of "special reasons relating to the offence.". I suppose that a court, before deciding to "unforfeit" equipment, must consider whether to do so would, in the context of the particular offence, seriously or at all undermine the policies of general deterrence etc. Public policy considerations thereby take the role as one of the last arguments against remitting a forfeiture, a very different role from that expounded for them in *Mackay v Diman,* where they are at the centre of the decision whether or not to forfeit.

23. The offences in this particular case were serious ones of their kind. The maximum penalty for each – a fine of $ 10,000 – derives from the general penalty provision in the Act, s 37. There are graver maximum penalties in the Act for particular offences, including imprisonment for some – see eg; s 15, 18, 36, 41. These are, it must be said, rather specialised offences. The general penalty seems to apply to just about all offences relating to taking

the wrong fish, in the wrong place, with the wrong or no licence or with the wrong equipment. So in the general run of offences against the Act, Regulations, etc, these are serious offences. The most mitigating item in the evidence or submissions is that Mr Simlesa made enquiries about the existence of any closure line pertaining to Perakary Creek. Having, it seems, been told (correctly) by someone that there was none, it was put that he assumed the law allowed him to fish where these two nets were laid. I accept that he made that inquiry: I do not accept that he made that mistake of law.

24. The "Jolly Roger" was not directly used in the commission of the offences. It was at all times standing off from the coast, a couple of kilometres from the mouth of Perakary Creek. Nevertheless it was an indispensable adjunct to the offending. It has carried the offenders to the area. The catch was filleted and boxed on board. It took the catch back to Darwin. I have referred already to the disproportion between its value, and that of the catch. Nevertheless, I cannot regard any of these matters as special reasons sufficient to make it fit, in my opinion, to make an order pursuant to s 46 (1) (b). I make no finding as to whether the "Jolly Roger", Mr Ince's dinghy or its motor were "equipment used in respect of the commission of the offences". I make no order pursuant to s 46 (1) (b).

25. I should add that I now am of the view that my order forfeiting the dinghy used by the Defendants, and its motor and 2 nets, could not be made by me pursuant to s 46 of the Act and was therefore mistaken, unnecessary. I could have (and would have) ordered those items forfeit to the Territory pursuant to s 99A of the *Sentencing Act* (rather than to Crown pursuant to s 46 of the Act) but that is not what I thought I was doing.

26. I should also add that in my opinion the structure of s 46 (1) of the Act creates an indesirable, and as far I can see, unnecessary amount on uncertainty about property rights. On the face of it property like say, the

"Jolly Roger", might automatically, and outside contemplation of anyone, be forfeited pursuant to s 46 (1) for months or years before the Crown sought to exercise its rights. Or the commission of and prosecution for the offences causing the forfeiture might be completely unknown to the owner. Either way, the limited protection provided by s 46 (2) would be useless to the owner. And on a more general basis, it does not seem satisfactory that some sort of declaratory remedy, or action in the nature of a prerogative writ, might be required to determine, of a piece of property, whether it had been "used in respect of the commission of an offence". Those concerned with the updating of the Act might consider amendment of the section to make these matters more certain.

Dated this 7th day of February 2003.

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R J WALLACE
STIPENDIARY MAGISTRATE