

CITATION: *Peter John Russell v Edward Richard Trippe* [2004] NTMC 011

PARTIES: Peter John Russell
(Complainant)

v

Edward Richard Trippe
(Defendant)

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20306050

DELIVERED ON: 23 February 2004

DELIVERED AT: Darwin

HEARING DATE(s): 10 February 2004

DECISION OF: Jenny Blokland SM

CATCHWORDS:

FISHERY OFFENCES :*Fisheries Regulations* (NT) s 8; meaning of tether; *Gleeson v Billock* [2002] NSWCA1; *Daniel v Weissenburger* [2002] WASCA 289; *Daniele v Pritchard* WA SJA 1053 of 1998; *Beckwith v R* (1976) 12 ALR 333; *Interpretation Act* (NT); *Silk Bros Pty Ltd v State Electricity Commission* (Vic) (1943) 67 CLR1; Lori Gruen, "Animals" in *A Companion to Ethics*, ed Peter Singer at 343, Blackwell Publishing; *Animal Welfare Act* (NT).

REPRESENTATION:

Counsel:

Prosecutor: Mr Woodcock
Defendant: Mr Rowbottam

Solicitors:

Prosecutor: ODPF (Summary Prosecutions)
Defendant: Withnall Maley

Judgment category classification: B
Judgment ID number: [2004] NTMC 011
Number of paragraphs: 13

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

No. 20306050

BETWEEN:

PETER JOHN RUSSELL
Complainant

AND:

EDWARD RICHARD TRIPPE
Defendant

REASONS FOR DECISION

(Delivered 23 February 2004)

Jenny Blokland SM:

Introduction

1. The defendant is charged with an offence against *regulation 8, Fisheries Regulations (NT)*, namely, taking and *tethering* three fish. Count two on the complaint has been withdrawn. The relevant heading and regulation read as follows:

“8. No tethering of live fish

A person shall not, after a fish has been taken, place or retain it on a tether line.”

2. The relevant facts are before the court in Exhibit P1 and photos of the three fish are before the court in Exhibit P2. The facts are as follows: *At 7 am on Monday 14 th of April 2003, the defendant now before the court, (known as Rick Trippe), boarded the “Sea Cat 1” Ferry from the Cullen Bay Ferry Terminal to travel to the Mandorah Jetty. On arrival at the Mandorah Jetty the Defendant alighted from the ferry. He placed tub and diving gear on one*

of the lower central metal platforms just above the water line. He then put his “stinger” diving suit, gloves and other diving equipment on. When suited up he took his speargun into the waters under the jetty and swam around. During that time he speared 2 fish with his spear gun and tied these fish he had dangling in the water by passing the rope through the gills and out of the mouth of the fish. The fish were killed before being placed on the line. He then continued to swim around and during this time he shot another fish with his spear gun. He took the fish off the shaft and tied it to the line, which at some stage had been untied and readjusted, so that it stayed deeper under the waters surface. At this stage he had three fish in total tied onto this line. A short time later he returned to the surface.

3. At the heart of this matter is whether the prohibition on tethering fish covers fish already *deceased* when they are placed on the line.

Summary of Counsels’ Arguments

4. Both counsel agree there is no authority on the point. Both counsel submit the “heading” of the regulation, ***no tethering of live fish***, cannot be used to resolve the issue: (*Interpretation Act NT, s 55*). On behalf of the defendant Mr Rowbottam submitted the ordinary meaning of *tethering* covered only live animals and in support of this he referred me to a number of dictionary meanings. The *Concise Oxford Dictionary* (seventh edition) states: *tether...1. Rope, chain, halter, by which grazing animal is confined; scope, extent of one’s knowledge, authority, etc at the end of one’s....having reached the limit of one’s abilities, resources, patience, etc 2. Tie (esp. grazing animal) with tether.* The *Concise Oxford Dictionary* (ninth edition) states: *tether...1. A rope etc by which an animal is tied to confine it to the spot 2. The extent of one’s knowledge, authority, etc; scope, limit, tie (an animal) with a tether. At the end of one’s tether having reached the limit of one’s patience, resources, abilities, etc.* The *Concise Oxford Dictionary* (10th edition) states: *a rope or chain with which an animal is tied to restrict*

its movement. Tie with a tether. The *Collins English Dictionary* (Third Edition) states: 1. A restricting rope, chain, etc by which an animal is tied to a particular spot. 2. The range of one's endurance etc. 3. At the end of one's tether, distressed or exasperated to the limit of one's endurance. 4. To tie or limit with or as if with a tether. The obvious submission being that phrases such as *restricting movement* become irrelevant when the animal is dead. The ordinary meaning of the word contemplates only a live animal. The only cases counsel could locate concerned a consideration of *tethering* in the context of animal cruelty cases: (*Gleeson v Bullock [2002] NSWCA 1*; *Daniele v Weissenberger [2002] WASCA 289*; *Daniele v Pritchard WA SJA)1053 of 1997*). Obviously this concerned tethering of live animals, but it is accepted the cases do not shed much light on the current problem.

5. Mr Rowbottam submitted that the regulation was clearly directed at fishers who, in an attempt to take the best fish and stay within the bag limit, would tether fish (thereby disabling them) and take the best of the fish at the end of the day. By *tethering* fish already deceased, a fisher such as his client was not attempting to avoid the bag limit, nor was he maltreating the fish. Further, he submitted, I should take account of the fact that spear fishers don't have any other place to put their speared fish if they don't thread them to a line. Taking all of this into account, he submitted that being a criminal provision, I should not give the word *tether* an extended meaning beyond its ordinary use.
6. Mr Woodcock argued that it was entirely plausible to speak of a dead animal being tethered and gave the example of tying up a dead animal to stop it being moved so as to entice a preying animal. He used a safari style example of *tethering* a dead goat to keep it in a particular spot to wait for the lion. Mr Woodcock also argued that because the regulation prohibits the placing and *retaining* of fish that have been *taken*, retention should indicate the section is broad enough to inculcate a person who has *tethered* dead fish. Further, he argued that I should find a different meaning for the word

tethering as it applies to aquatic life as opposed to land animals. Mr Woodcock argued that as a practical ramification, if the court agreed with the defendant, such a ruling would encourage the mistreatment of fish and would have adverse consequences for the management and policing of the *Fisheries Act (NT)*.

Discussion and Conclusions

7. I agree with counsel that the context of the regulation is vitally important to its correct interpretation. The provision does however create an offence. Mr Rowbottam argues it should be construed strictly. The current test with penal statutes is that the ordinary rules of construction must be applied. If any ambiguity remains, the statute must not be interpreted so as to extend the category of criminal offences: *Beckwith v R (1976) 12 ALR 333* at 339, Gibbs J. Words in a statute must be interpreted in accordance with their ordinary and current meaning. In my view people would find it surprising to speak of *tethering* a dead animal, even bearing in mind the context of this legislation. *Tethering* does invoke a notion of confinement that would seem irrelevant to dead animals. In that circumstance, if the regulation was meant to inculcate tethering dead fish, it needed to spell it out. The opposite interpretation would result in the court extending the category of culpable conduct beyond that which is plainly stated.
8. In relation to the argument that the use of the word *retain* is enough to show an intention to include deceased fish, I am of the view that *retain* is used merely to inculcate persons who may not themselves have tethered the fish but who later come into possession or control of the tethered fish.
9. It seems to me also within the context of this legislation that I should bear in mind there are circumstances that allow a person to raise a defence to taking prohibited fish, provided the fish taken is returned *with as little injury to it as possible: reg 11 Fisheries Regulation*. In my view there is a definite element of prohibiting cruelty in the regulations, as both counsel

have pointed out. Clearly, the regulations prohibit tethering as a method that might be relied on in a defence under *regulation 11.Tethering* is inconsistent with the immediacy of return and the humane treatment required by *regulation 11*.

10. I have considered the animal cruelty implications of this decision. Those considerations are not finally determinative of the matter. Provided the method, environmental regulations, bag limits and other commercial considerations (if it is a commercial fisher) are complied with, there is no law against killing (unprotected) fish. Although there may be different philosophical views, (current western philosophical thought is summarised by Lori Gruen, *Animals*, in *A Companion to Ethics*, ed Peter Singer at 343, Blackwell Publishing), the law, as I understand it, does not regard it as intrinsically cruel to kill a fish. Once deceased, it is not regarded as cruel to do all manner of things to fish – scale them, fillet them, eat them etc. Unless the legislation makes it very clear, it cannot be said to be cruel or mistreatment to *tether* them once they are deceased. All of that would be different if the fish were still alive . That is what is recognised by this legislation. None of this reasoning is inconsistent with other relevant legislation such as the *Animal Welfare Act (NT)* in relation to other *animals*. Curiously, it is ambiguous whether aquatic life is covered by the *Animal Welfare Act (NT)*, as the definition of *animal* in that Act refers to *fish in captivity* only. In any event, that legislation is concerned with the treatment of animals while they are alive, or if to be killed, whether the method is humane.

11. Although counsel are correct to point out that the heading of the regulation is not part of the regulation under the *Interpretation Act (NT)*, in my view it is not completely *irrelevant* either. In *Silk Bros Pty Ltd v State Electricity Comm (Vic) (1943) 67 CLR 1*, Latham J stated:

“The headings in a statute or in Regulations can be taken into consideration in determining the meaning of a provision where that

provision is ambiguous, and may sometimes be of service in determining the scope of the provision.”

12. I have not relied on the heading in coming to my conclusion, but I am comforted by it. I am aware, however that the heading itself may be a tautology. I believe members of the public would think it very odd indeed if the regulation meant something quite different than the heading. I have rejected the argument that spear fishing would be made virtually impossible if not for this ruling. Although I have thought about the enforcement implications of this ruling, I cannot conclude that fishers would be so fickle as to kill fish and place them on a tether to avoid culpability. If they do, they may well be in breach of other regulations, particularly if they are storing fish to select the best at the end of the day. If I am wrong, the regulation needs to be amended to cover fish already deceased when they are placed on the line. In my view the regulation is capable of covering fish that are alive at the time of being taken and tethered but subsequently die.

Orders:

13. Count 1:

I find no prima facie case and the count is dismissed.

Count 2: is withdrawn and dismissed.

Dated this 23rd day of February 2004.

Jenny Blokland
STIPENDIARY MAGISTRATE