

CITATION: *Police v Chea Mey Taing* [2009] NTMC 015

PARTIES: PETER JOHN RUSSELL

v

CHEA MEY TAING

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20814598

DELIVERED ON: 8 May 2009

DELIVERED AT: Darwin

HEARING DATE(s): 3 September 2008 & 27 March 2009

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – *Fisheries Act* – Possession of commercially unsuitable mud crabs – obstruction of Fisheries Officers – knowledge for the purpose of possession

Fisheries Act ss 11, 37, 42
Justices Act ss 182 and 183

He Kaw Teh v The Queen (1985) 157 CLR 523
Tabo v R (2005) 225 CLR 418

REPRESENTATION:

Counsel:

Complainant: Ms McMaster
Defendant: Mr Abayasekara

Solicitors:

Complainant: ODPP
Defendant: NTLAC

Judgment category classification: B
Judgment ID number: [2009] NTMC 015
Number of paragraphs: 26

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

No. 20814598

[2009] NTMC 015

BETWEEN:

PETER JOHN RUSSELL
Complainant

AND:

CHEA MEY TAING
Defendant

REASONS FOR DECISION

(Delivered 8 May 2009)

Ms Sue Oliver SM:

1. The defendant, Chea Mey Taing, is charged with two offences under the *Fisheries Act*. The first charge alleges that being the holder of a particular Fish Retailer License she possessed 55 mud crabs which were commercially unsuitable. The second count is that she obstructed Fisheries Officers in the execution of their duties. The latter is an offence contrary to s 39(1)(a) of the *Fisheries Act*. The offences are alleged to have occurred on 9 May 2008.

Count 1- Possession of commercially unsuitable mud crabs

2. With respect to count 1, the complaint alleges that the offence was contrary to “clause 11(10) of the *Fisheries Act*”. Clearly the reference to a “clause” of the *Fisheries Act* is incorrect, there being no clauses only sections of an Act. However, neither does it appear to be a reference to an offence under s 11 of the Act. Section 11 of the Act refers to the granting of licenses by the Director of Fisheries. Section 11(10) provides that the Director may from

time to time, by written notice to a license holder, amend or revoke the conditions of the license or add new conditions. This is not an offence provision.

3. I raised with the parties the adequacy of the charge when it came to my notice. The Prosecution submitted that the complaint was adequate by reference to s 55 of the *Justices Act* which provides that in any complaint and in any proceedings thereon, the description of any offence in the words of the special Act or other document creating the offence or in similar words shall be sufficient in law. The Prosecution suggests that the sufficiency exists either because of s 37 or s 42 of the *Fisheries Act*. These provisions are as follows:

37. General offences and penalties

(1) Every person commits an offence who acts in contravention of or fails to comply with any provision of this Act, or of an instrument of a legislative or administrative character made under it, or any other direction, restriction, requirement, or condition given, made, or imposed under this Act or that instrument.

(2) A person who commits an offence against this Act for which no other penalty is prescribed shall on being found guilty be liable to a penalty not exceeding \$20 000 and, if the offence is a continuing one, to a further penalty not exceeding \$500 for every day after the first day on which the offence has continued and not exceeding \$50 for each fish or item of aquatic life taken or in possession in excess of a prescribed limit.

42. Buying, selling, or possessing fish, &c.

(1) A person commits an offence who buys, sells, or has in possession any fish or aquatic life taken in contravention of this Act or any instrument of a judicial or administrative character made under it.

(2) For the purpose of this section, fish or aquatic life shall be deemed to be sold if it forms part of a meal for which payment for that meal or any part of the meal is made or which is supplied to any person (whether in accordance with the terms of a contract of service or otherwise) who is employed by the person by whom the meal is supplied.

4. The parties tendered a statement of agreed facts to s 379 of the Criminal Code. One of the agreed facts is that at the relevant time, the defendant was

the holder of a Fish Retailer License and that clause 2 of her license stated that she shall not possess or sell commercially unsuitable mud crabs.

5. There is no provision under the *Fisheries Act* that makes it an offence to be in possession of commercially unsuitable mud crabs. There is an offence under Regulation 19 of the Mud Crab Fishery Management Plan of being in possession of a mud crab that is commercially unsuitable, however, that offence relates to a license for commercial fishing of mud crabs and not to a retail license as held by the defendant.
6. The question therefore is whether s 42 creates an offence of possession of commercially unsuitable mud crabs by reason of a prohibition of possession of fish in contravention of an instrument of administrative character made under the Act or whether the possession might be characterised as a general offence under s 37, being a contravention or failure to comply with a condition given, made, or imposed under the Act.
7. In my view, the offence may be characterised as arising under either of those provisions. Section 11 of the Act provides for the granting of licenses by the Director under which conditions may be set. A failure to comply with a condition of the license is therefore, in my view, either an offence contrary to s 37 by reason of a failure to comply with that condition or alternatively, amounts to a offence by contravention of the license as an instrument of administrative character. In my view, a license granted pursuant to s 11 of the *Fisheries Act* is “an instrument of legislative or administrative character”, noting that the definition of this phrase by the *Interpretation Act* is that it involves regulations, rules, by-laws, orders, determinations, proclamation, awards, documents and authorities made, granted or issued under a power conferred by an Act (emphasis added).
8. Sections 182 and 183 of the *Justices Act* deal with irregularities in information or complaints:

182 Information or complaint not to be objected to for irregularity

No objection shall be taken or allowed to any information or complaint in respect of –

- (a) any alleged defect therein, in substance or in form; or
- (b) any variance between it and the evidence adduced in its support at the preliminary examination or at the hearing (as the case may be):

Provided that the Court shall dismiss the information or complaint, unless it is amended as provided by section 183, if it appears to him or to it –

- (a) that the defendant has been prejudiced by the defect or variance; or
- (b) that the information or complaint fails to disclose any offence or matter of complaint.

183 Amendment of information or complaint

If it appears to the Court before whom any defendant comes or is brought to answer any information or complaint that the information or complaint –

- (a) fails to disclose any offence or matter of complaint, or is otherwise defective; and
- (b) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure the defect,

the Court may amend the information or complaint upon such terms as may be just.

9. In my view, there is no prejudice to the defendant due to the defect in the complaint. The allegation of the offence and its particulars were clearly spelt out in the complaint. The reference only to the appropriate provision of the *Fisheries Act* is in issue, an offence as described exists. I would grant leave pursuant to s 183 of the *Justices Act* to amend charge 1 to delete the reference to Clause 11(10) and insert instead a reference to s 37 of the *Fisheries Act*.
10. It is a further agreed fact between the parties pursuant to s 379 of the Criminal Code, that when Fisheries Officers, Sergeant Paul Tudor-Stack and Acting-Sergeant Peter Russell attended at the defendant's designated place of business which is her residence in Palmerston, that they there located 21 male crabs and 34 female crabs, each of which were commercially

unsuitable. All the crabs present were all tied with the same twine, however it was conceded in cross-examination that this is commonly available and used twine “the nature of it always similar, very similar, indistinguishable”.

11. The evidence of what the Fisheries Officers found maybe summarised as follows. In the afternoon of 9 May 2008 the Officers attended at the defendant’s premises. Having gained access to the backyard of the unit, they inspected the mud crabs which were stored there in a number of crates. The Officers recorded on DVD their inspection of the mud crabs. The commercially unsuitable mud crabs did not come from a single crate, but were in a mixture of crates. The crates were all commercial mud crabs baskets. In total, there were 150 kilograms of crabs, of which approximately 50 kilograms were found to be unsuitable. The majority of the commercially unsuitable mud crabs were said to be female, as particularised in count 1, that is, 21 males and 34 females.
12. The defendant denied any knowledge of the commercially unsuitable mud crabs and she produced to the Fisheries Officers invoices for the crabs that she said she had purchased. Two of these receipts are dated 7 May 2008 from the same person, indicating 110.4 kilograms of crabs on one receipt (number 30) and a total of 56.5 kilograms of “slow and no claw” crabs on the other invoice (number 31). In addition, there is an invoice dated 9 May 2008 from NT Mud Crabs which refers to a quantity of 20.32 large male mud crabs. Both suppliers appear to have been commercial wholesalers. The last purchase is on the Friday morning of the alleged offences and the defendant said she bought the crabs between 8.00am and 9.00am. She said that she always checked the crabs she bought to make sure they were not empty, having been advised of the issue back in 2002 when police officers told her about them.
13. No evidence of any sale or other disposal of the crabs purchased on these days was given. It might be expected then that the quantity of crabs to be

found at her premises would be in the order of 190 kilograms rather than the 150 kilograms identified by the Fisheries Officers.

14. Mr Le who lives at the defendant's premises and who is the father of her child gave evidence that he had met up with an old Vietnamese friend, a person whom he previously knew from Melbourne, on the Thursday evening. This friend, referred to as "Hoong", asked him to store some mud crabs for him until he was ready to collect them because he did not have anywhere to put them. He said that there were 40, nearly 50 kilograms of mud crabs in cardboard boxes that he was given by this person and that he took them home and he mixed them up with the defendant's crabs in the crates in which he had her crabs stored. He said he put them everywhere because it was dark. He said that the defendant was not home when he put the crabs there and he did not tell her that he had put the crabs there. He was not able to give any further detail of this person other than the name "Hoong" and a description of him as short and dark and Vietnamese. He said that he found Hoong after the police had been and that on the Tuesday he took him with the defendant to the police premises at Winnellie to explain that the crabs were his but that no-one was there at the time.
15. The defendant's evidence was that she told the officers that she had bought good crabs but when she looked at them (when they were being inspected) they were empty crabs. She said she told them that they were not her crabs. She said she asked Mr Le and he then told her that he had put them there when she was out on the Thursday evening. She said he had never done this before because he knew that she would not let him. She said she did not know how the crabs had gotten mixed up from where she had put them when purchased. She confirmed Mr Le's story of attempting to take Hoong to the police on the Tuesday. She said that Hoong had had a fight with Le because he did not believe that the police had taken the crabs.

16. If the evidence of Mr Le is correct, and there had been no disposal of the crabs the defendant had purchased, there should have been something in the order of 230 to 240 kilograms of mud crabs at the premises and not the 150 kilograms that were found. No explanation was advanced as to the discrepancy either of there being less crabs present than is the subject of the invoices and significantly less than would have been the case if 40-50 kilograms of crabs had been added to those purchased by the defendant.
17. Although offences under the *Fisheries Act* are regulatory offences (see s 38) the onus is on the prosecution to prove beyond a reasonable doubt not just physical possession of the commercially unsuitable crabs contrary to the defendant's licence but also that she had knowledge that crabs of that nature were in her possession. In *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 539 Gibbs CJ having reviewed the authorities as to what is required for proof of "possession" concluded that:

"[W]here a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence ('in his possession') themselves necessarily import a mental element".

18. In my view that conclusion has application to an offence involving possession under the *Fisheries Act*. It was a condition of the defendant's licence that she "shall not possess or sell commercially unsuitable crabs". There is nothing to indicate that "possession" in the context of a licence condition should be other than generally required under statute, that is, that she knew that she had commercially unsuitable crabs.
19. In *Taber v R* (2005) 225 CLR 418 Gleeson CJ gave consideration to what was sufficient to constitute "knowledge" concluding that:

"... knowledge, is not limited to knowledge gained from personal observation, or certainty based upon belief in information obtained from a third party, although those states of mind would suffice. The

word "awareness" is sometimes used as a synonym. A belief in the likelihood, "in the sense that there was a significant or real chance", of the fact to be known, will suffice."

20. Mr Le gave an account of how commercially unsuitable mud crabs came to be amongst the defendant's mud crabs. The defendant has adopted his account by way of explanation. I do not fully accept Mr Le's story that the presence of commercially unsuitable mud crabs can be attributed to his taking crabs from a person called "Hoong" and mixing them with the defendant's mud crabs. That the defendant appears to have accepted his explanation for the presence of the "empty crabs" does not in my view affect the credibility of her evidence. She was consistent in her denial of knowledge both at the initial inspection, in an extensive record of interview and in her evidence. Her evidence was that she was not aware of the presence of "empty crabs" and that she checks them when she purchases them and that she did not believe that the crabs that were at her premises were commercially unsuitable. I cannot exclude the possibility that Mr Le dealt with her crabs in some way that resulted in the presence of less than the number of crabs she had purchased and resulted in the presence of commercially unsuitable crabs. He had access to and the opportunity to deal with them. Some dealing has to have occurred in order to explain the weight discrepancy and nothing has been attributed to the defendant in this regard. I could not be satisfied beyond a reasonable doubt that she knew that she had such crabs in her possession. I find that the defendant is not guilty of count 1.

Count 2 – Obstruction of Fisheries Officers in the execution of their duties

21. Evidence to support this charge was first given by Officer Tudor-Stack. His evidence was that when he and Officer Russell arrived at the defendant's premises, Mr Le was in the front area of the unit carrying a box of fruit or vegetables to his van. He looked up, saw the Officers and then called out in a short sentence in a language that Officer Tudor-Stack did not understand.

Officer Russell said that he spoke in Vietnamese, although he could not understand what he said. Mr Le is Vietnamese and required the assistance of an interpreter for the giving of his evidence. Mr Le was walking away from the Officers and Officer Tudor-Stack called for him to stop. At that moment Officer Tudor-Stack saw the wooden front door of the defendant's unit "slam shut". He was about seven metres away at the time. He immediately approached the door and found that the screen door in front of the wooden door was locked. He called out for the door to be opened. Officer Russell then went around to the back while Officer Tudor-Stack waited at the front door. It was opened by the defendant on Officer Tudor-Stack's estimate after only a couple of minutes and he was allowed in and he and the defendant went out to the back yard.

22. According to Officer Russell's evidence he had seen the defendant go out to the back when he looked through the front window. He went around the back and he climbed over the fence. He did not call to her to open the gate which he might have been expected to do, knowing as he said he did that this is where she had gone. He said the defendant was in the backyard moving some crates about and he saw her place two empty crates on another one with Hessian on it. He told her to go and open the front door which she did and allowed Officer Tudor-Stack entry.
23. The defendant is Cambodian and speaks Khmer. She likewise required the assistance of an interpreter to give her evidence. She said that she speaks, in addition to Khmer, some English and a little Vietnamese. She does not always understand what Mr Le says. She said she did not understand what he said when he called out when the Officers arrived. She said she heard a noise out the back and that was why she went out there. She said that it was her young son who shut the door as he had been doing that – opening and shutting the door – while she was inside cutting up pawpaw before the Officers arrived. She said the screen door was already locked because of her son. Mr Le's evidence is that the son was running in and out and that

the screen door was not locked. Neither of the Officers saw the son outside when they arrived. Having observed the young son in court, whose activity levels there and in evidence in the record of the interview with the defendant, during which he was present, it would seem highly unlikely that his parents would not confine his movements when they were otherwise occupied with tasks to get ready for the market.

24. Officer Tudor-Stack confirmed that the screen door was locked when he approached. He did not give evidence of her locking the screen door or of seeing her slam the wooden door. Officer Russell's evidence was not consistent with this. He said he saw the screen door shut, then heard a noise, then the wooden door was shut. Initially in his evidence he said he could not say what the noise was, then later he said that the time during which he saw her in the doorway before it was shut was "long enough for her to do something with the latch, step back and shut the front door, the wooden door." In my view this account is simply a reconstruction of what Officer Russell believed must have happened rather than his actual visual record of what occurred at the time. I do not accept his evidence that the defendant latched the screen door then closed the wooden door. Officer Tudor-Stack did not see these things happen. On his evidence, Officer Russell was behind him when approaching the door.
25. I accept that the screen door was locked before the Officers arrived. I could not be satisfied beyond a reasonable doubt on the evidence of Officer Russell that it was the defendant who shut the wooden door. Neither Officer saw that happen and the defendant says it was her son. The defendant says she went out the back because she heard a noise. There was a very short space of time before she came back to open the door for Officer Tudor-Stack. There was no back exit from the unit. It was a confined small backyard. There was no chance of her removing any mud crabs or secreting them from the Officer's inspection. Although Officer Russell knew she was in the backyard he did not request her to give him access. He immediately

climbed the fence. She was not given the opportunity to provide access to the Officers, the assumption having already been made that she was not going to do so. In my view the sequence of activity described when the Officers arrived is not sufficient to amount to an obstruction of them in the execution of their duties. They were shortly both admitted to the property and the defendant did not impede their inspection. Mr Le caused some difficulty initially for the Officers inspecting the crates of mud crabs by being angry and abusive. There is no evidence that the defendant acted in any similar fashion. I am not satisfied beyond a reasonable doubt as to Count 2 and find her not guilty.

26. Both charges on complaint are dismissed.

Dated this 8th day of May 2009.

Sue Oliver
STIPENDIARY MAGISTRATE