

CITATION: *Australian Fisheries Authority v Kaka & Arsat* [2009] NTMC 065

PARTIES: AUSTRALIAN FISHERIES AUTHORITY

v

KAKA AND ARSAT

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20930329 & 20930339

DELIVERED ON: 2nd December 2009

DELIVERED AT: Darwin

HEARING DATE(s): 26th November 2009

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal Law – Fisheries Prosecution – Illegal Indonesian fishing – Mistake of fact – Sections 100, 101 and 166 Fisheries Management Act, Section 6.1 & 9.2 Criminal Code (Cth)

Australian Fisheries Management Authority v Su [2009] FCAFC 56 - distinguished

REPRESENTATION:

Counsel:

Plaintiff: Mr McCarthy

Defendant: Mr Lees

Solicitors:

Plaintiff: Director of Public Prosecution (Cth)

Defendant: NT Legal Aid

Judgment category classification: C

Judgment ID number: [2009] NTMC 065

Number of paragraphs: 26

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

No. 20930329 & 20930339

[2009] NTMC 065

BETWEEN:

**AUSTRALIAN FISHERIES
AUTHORITIES**
Plaintiff

AND:

KAKA AND ARSAT
Defendants

REASONS FOR DECISION

(Delivered 2nd December 2009)

Ms FONG LIM SM:

1. Foreign fishing vessel KM Rahmat Sainal was apprehended by Customs on the 18th August 2009. The defendants are charged with using a foreign boat in the Australian Fishing Zone (AFZ) for commercial fishing and in the case of Arsat having in his charge a foreign boat equipped for fishing. There are a number of agreed facts (P1). The agreed facts establish most elements of the offences and leave two narrow issues to decide. Was the Rahmat Sainal within the AFZ when fishing and had the Defendants been fishing in the AFZ.
2. The position of the Rahmat Sainal was averred in the information as Latitude 11 degrees 33.153 minutes South and Longitude 125 degrees 57.722 minutes East at the time of committing the offences. It is agreed that position sits approximately 2 nautical miles within the AFZ. What is not agreed is actual the position of the Rahmat Sainal when first sighted and then apprehended and whether they had been fishing within the AFZ.

3. The master of the Rahmat Sainal, Arsat, was navigating with charts and a handheld GPS and at all times insisted that at time of apprehension the boat was 11degrees 32.670 minutes South and 125 degrees 55.765 minutes East a position outside of the AFZ. In his defence he argues that he had the reasonably held belief that the Rahmat Sainal was outside the AFZ when apprehended and if it was in the AFZ the Rahmat Sainal must have drifted on the current into the zone after they were sighted by customs. The only evidence of a current is from Arsat who stated the current was from the north to the south. The captain of the Corio Bay, the customs vessel, did not do a calculation of the current because it would have required some time.
4. Evidence was heard from the captain of the Corio Bay, the Fisheries officer and customs officer who boarded the Rahmat Sainal, the naval officer who downloaded the information from the GPS off the Rahmat Sainal and both the defendants. There were various charts and diagrams produced to the court setting out the position of Rahmat Sainal when first sighted and when apprehended some showing the tracks of where the boat had been for the 17th and 18th of August.
5. **Was the Rahmat Sainal in the AFZ at the time of apprehension?** The answer to this question is complicated by the fact that the Rahmat Sainal was first sighted at 7:47 am and boarded at 8:15 am some half an hour later, its position changing in the meantime.
6. The position of the boat at the time of sighting and apprehension was recorded in several ways. The captain of the Corio Bay, recorded his observations from his ship's GPS in his notebook (P2) and the Ship's log also recorded those positions. The boarding party relayed their GPS co – ordinates back to the customs vessel and those co – ordinates were also recorded in the Ship's log (see P3). The GPS used by the Arsat was also seized and taken to Northern Command where all of the data for the 17th and 18th of August 2009 was downloaded and that information used to produce

diagrams showing the movements of the Rahmat Sainal during that time when the GPS was on, and the way points entered into that GPS (P10 & P11). On those diagrams the points of first sighting, when the Corio Bay was alongside the Rahmat Sainal and when the Rahmat Sainal was boarded are provided by the Corio Bay's GPS and an adjustment made to the co-ordinates into digital (P11). Those diagrams show the Rahmat Sainal to be within the AFZ at all of those times and also show that the Rahmat Sainal had been within the AFZ the night before. At the time of sighting the Rahmat Sainal was approximately 1.8 nautical miles inside the AFZ as recorded in the ships log.

7. The ship's log also records the Rahmat Sainal at time of sighting as "underway making way" which terminology, as explained by the captain of the Corio Bay, means with the engine on and moving. The notes of the captain and his memory is that the Rahmat Sainal was "dead in the water", that is the engine was not on, and then started to move north once the Customs vessel was sighted. This evidence is corroborated by the tracking of the Rahmat Sainal's GPS shown in the diagrams P10 and P11. Using the information relayed from the ships log those diagrams show that from the time the Rahmat Sainal was said to be sighted to the time it was apprehended the Rahmat Sainal had moved north. This is consistent with the captain of the Corio Bay stating that the Rahmat Sainal had moved north once sighted.
8. Interestingly on the more accurate of the diagrams (P11) the boat is shown to have moved slightly south after the Corio Bay had pulled up alongside, it had stopped its engines and was boarded by the customs and fisheries officers.
9. Arsat claims to have checked his GPS when he was "told by a friend" that customs were coming. He says he checked to ensure they were still outside of the AFZ and noted the co-ordinates as 11 degrees 32.670 south and 125

degrees 55.765 east which satisfied him that they were approximately 2 nautical miles north of the AFZ he then did the curious thing of deleting those co – ordinates from the GPS.

10. When questioned by the customs officer while in detention Arsat continued to state those were the co – ordinates as checked by him when he was asked to turn off his engine. His explanation for why they were within the AFZ when boarded was that the boat must have drifted south with the current in between times. The evidence is that between being alongside the boat and boarding the vessel 15 minutes had passed (P2 & P3). There is no evidence that the current was strong enough to move the boat 2 nautical miles south to the AFZ plus further distance to move it to 1.8-1.9 nautical miles within the AFZ within 15 minutes.
11. Arsat also told the customs officer that apart from checking his position when sighted by the Corio Bay he had not used the GPS since the day before. This evidence is not supported by the data downloaded from the GPS. That data does show gaps in the times the GPS was switched on however it does show the GPS was used at 19:02 -19:03 & 19:16-19:17 on the 17th of August (the night before the apprehension) and at both times the boat was south of the AFZ. The GPS was switched off after 20:22pm until the next morning and when it was switched back on the Rahmat Sainal was south of the AFZ.
12. When cross examined about the accuracy of his GPS Arsat agreed the GPS was accurate and the only explanation he had for its data placing the boat inside the AFZ that morning and the night before is that the “customs officers must have played with it”. This allegation was not put to the officers in question and does not bear any weight. The allegation is unbelievable and is not supported by the contemporaneous notes taken on the Corio Bay as to the position of the boat.

13. The integrity of the data on the GPS from the boat is corroborated by the data taken from the ship's log etc. It is also telling that one way point was registered in the GPS within the AFZ and very close to where the boat was first sighted. Arsat confirmed he knew where the AFZ line was and that he had those co –ordinates entered into his GPS, he had used the GPS for four years and knew the way points in the GPS were where they would put down their lines.
14. The fact that Arsat deleted the co-ordinates he observed on the GPS at the time of being stopped by Customs is curious and unexplained. He clearly knew he was about to be questioned by Customs yet he chose to delete a reading of his GPS which would have exonerated him.
15. The evidence of Kaka is of no assistance to the position of the boat at time of apprehension as he had no idea where they were and only asked when the Corio Bay was sighted. He was assured by Arsat that there was no problem.
16. Mistake of fact is defence available to the defendants. Certainly if they had a reasonable belief that they were still outside the AFZ then that is a mistake of fact which would excuse them from criminal responsibility. In Australian Fisheries Authority v Su [2009] FCAFC 56 the High Court held that a mistaken belief as to the position of the boat was a mistake of fact. In that case the master of an fishing boat believed his boat to be outside the AFZ because he believed a red line on his GPS was representing the AFZ and as his co –ordinates had not crossed that line he reasonably believed he was not committing an offence. The Court agreed. In the present matter Arsat is not saying he was misled by the GPS and the use of it he is saying he positively confirmed by checking his GPS that he was outside the AFZ when the Coria Bay was alongside. He insisted that the GPS was accurate and could not explain why the data downloaded contradicted his contention.
17. Arsat's evidence raises the defence of mistake of fact however the evidence for the prosecution and Arsat's agreement that his GPS was accurate

negative any suggestion that his belief was reasonably held. In fact it raises serious doubt that was Arsat's belief at all. His explanation of the data showing the boat to be within AFZ is an attempt to cast doubt on the credibility of the customs officer and indicates his willingness to invent evidence. That allegation was not put to the customs officers in cross examination and it is open to me to find that evidence to be of recent invention.

18. While it is Arsat's evidence that he had the belief that he was within Indonesian waters he cannot be believed. He had clear knowledge how the GPS worked and his accusation of the Customs officers somehow altering the data on his GPS support the view that his evidence is self serving and not to be believed. Arsat's past use of the GPS and his understanding of how to input data into the GPS as well as knowledge of the function to be able to calculate distances between co-ordinates indicates he is a person well conversant with the use of that equipment. The fact that he knew how to delete information also indicates a sophisticated use of the GPS.
19. Arsat also marked on a chart where he thought his boat was at the time of apprehension and the marks he made were clearly just south of the AFZ (see P13). Given there is clear evidence that the boat had moved north under power just before it was apprehended Arsat's evidence that the boat was always north of the AFZ line and then drifted south is not supported. His marks on the chart indicate he knew full well he was south of the AFZ even if only just South.
20. Given Arsat's evidence cannot be believed I am satisfied beyond a reasonable doubt that he did not have the belief that he was outside of the AFZ and there was no mistake of fact. I therefore find Arsat guilty of charge 2, that he had in his control a foreign boat equipped for commercial fishing contrary to section 101(2) of the Fisheries Management Act.

21. **Was the boat being used for commercial fishing?** It is clear from the agreed facts and the oral evidence that the boat was being used for commercial fishing, in particular shark fin. There were the admissions of Arsat, the relevant equipment and the dried catch as well as the fresh catch on board at the time of apprehension.
22. Kaka's evidence is that they had been fishing all night and that the three fresh fish on board had been pulled up that morning and after that they were looking for the lines. It is agreed that dawn was at about 7:25 that morning about half an hour before the boat was first sighted by the officers on the Corio Bay. At that time according to the data downloaded off the GPS belonging to the Arsat the boat was within the AFZ.
23. That data corroborates the observations of the captain of the Corio Bay that he sighted the boat just after dawn. It is also supported by the evidence that the crew advised that they had lost some nets north of the point of apprehension some time the night before and a search did not produce the lost equipment. The way points indicated by the Arsat on the GPS where the nets might be were all within the AFZ.
24. I am satisfied beyond a reasonable doubt that the fresh fish aboard at the time of apprehension were caught in just before dawn on the 18th of August 2009 and at that time the boat was within the AFZ.
25. I therefore find both defendants guilty of using a foreign fishing vessel for commercial fishing within the AFZ without a licence to do so contrary to section 100(2) of the Fisheries Management Act (Cth).
26. I will hear the parties on sentence.

Dated this 2nd day of December 2009.

Tanya Fong Lim
STIPENDIARY MAGISTRATE