

IN THE SUPREME COURT OF SEYCHELLES

EXPARTE: JEAN DINGWALL

APPLICANT

Criminal Side No 11 of 2003

Mr. F. Ally for the Applicant

Mr. P. Pardiwalla for Rolly Lesperance (Party noticed)

Mr. R. Govinden for the Republic

ORDER

Perera J

Seven Accused were convicted for offences under the Wild Animals and Bird Protection Act (Cap 143), and were sentenced to serve terms of 2 years imprisonment each, pursuant to Section 3(1) of the said Act, which reads as follows-

"3(1) Any person guilty of an offence against any regulation made under this Act shall, on conviction, be liable to the penalty prescribed by regulation, or where no such penalty is so prescribed, to a fine not less than Rs.5000/- and not exceeding Rs.500,000, or to a term of imprisonment not exceeding two years".

Section 2 A (1) and (2) make provision for a boat or other vessel which the Police believe, has been used in the commission of an offence under this Act to be seized and delivered to the custody of the Court to be dealt with according to the provisions of Sub Section (3) or Sub Section (4): These Sub Sections are as follows-

"(3) Where, upon the conviction of the person for an offence under this Act a fine is imposed, such boat or other vessel shall be held until the whole fine is paid, and if within sixty days following the imposition of a fine

any part of the fine remains unpaid, such boat or other vessel may be sold towards the payment of the fine.

- (4) *Where Sub Section (3) does not apply or where a satisfactory bond or other security for the value of such boat or other vessel..... is given at anytime, the Court shall order its release".*

On 6th February 2003, this Court made order that the vessel "Kalkal" seized by the Police on reasonable belief that it was used in the commission of the offence, be kept in the custody of Court through the guardianship of the Commander of the Coast Guard.

In sentencing the Accused persons, this Court exercised its discretion under Section 3(1) and imposed custodial sentences. Although Section 2 A (4) provides that where Sub Section (3) does not apply, that is, where a fine is not imposed, and a custodial sentence is imposed, the Court shall release the vessel., This Court held that as neither of the convicts claimed ownership of the vessel, the principle of sentencing that the offender who has been convicted should be punished, should be followed. In doing so, the Court took into consideration that three of the convicts were unemployed, while the disposable income of the other three were below Rs.2000 per month. On the authority of R v. Baxter (1974) Crim. L. R. 611 R v. Po (1974) Crim. L. R. 557 wherein it was held that it was a wrong principle of sentencing to impose heavy fines on the assumption that someone other than the offender would provide the means to pay it, custodial sentences were imposed partly on that ground, and as also the Court found the need to impose deterrent sentences for the reasons stated in the order. The Court also expressed the view that where a fine is imposed on the offenders who do not own the vessel, and it remains unpaid after 60 days, and consequently the vessel which belongs to a third party is sold, the offenders in effect, go unpunished. The Court therefore interpreted, Section 2 A (3) and (4) on the basis that a penal provision should not be interpreted in a manner which leads to absurdity.

Although the Accused in the case referred to the vessel "Kalkal" as "Dingwall's boat", the lawful owner did not identify himself nor made any application for release of the vessel upon furnishing security. The Court therefore making the custody order in the Ruling on sentence, stated thus-

"If an application is made by the lawful owner, he should first explain the circumstances in which his boat was used by the convicted persons. The Court would thereupon make a suitable order. If however no such application is made within 30 days from today, the boat would stand forfeited to the Republic on the basis of an abandoned property".

In compliance with that ruling a motion dated 31st May 2004 has been filed with an affidavit of one Jean Eddy Dingwall claiming to be the lawful owner of the vessel "Kalkal". He has produced a "Local Fishing Vessel licence" issued to him by the Seychelles Licensing Authority in respect of a vessel named "St. Christophe". This licence was valid from 11th April 2002 to 10th April 2003. It was submitted that Mr. Dingwall purchased the vessel from the Seychelles Fishing Authority under the name "Kalkal", but that he changed the name to "St. Christophe" subsequently. There is no dispute as to that issue.

Paragraphs 5, 6 and 7 of the affidavit are as follows-

5. *That I have no personal knowledge as to how and why the fishing vessel was used by the convicted persons in the commission of the offences which they have been charged and convicted of. However, I am advised by Conrad Dingwall, my nephew, that the fishing vessel was in the custody of Rolly Lesperance, a mechanic, who was undertaking the mechanical and electrical works on the fishing vessel. According to my information Rolly Lesperance asked Conrad Dingwall for permission to go on a fishing trip in order that he may test the engine and he was granted permission to do so.*
6. *That I did not give permission to the above named mechanic and/or any other person to go on any fishing trip or any trip to commit any offence or the offences with which they have been charged and convicted of.*
7. *That apart from Rolly Lesperance I do not know anyone of the convicted persons".*

When the evidence in a case discloses that the vessel belonging to a third party had been used in the commission of an offence, the release of the vessel to the owner, without the Court being satisfied that he had taken all precautions to prevent the use of such vessel, or that the vessel had been used without his knowledge for the commission of the offence, would be an absurdity. Hence the Court summoned the owner Mr. Jean Dingwall, his Nephew Mr. Conrad Dingwall, and Rolly Lesperance the 4th Accused in the case who is presently serving the two year sentence of imprisonment.

At the hearing of the motion, Mr. Jean Dingwall testified that although he is the owner, his Nephew, Conrad Dingwall was in charge of the boat. He stated that he was informed by him that Rolly Lesperance had taken the boat for testing the new engine and also for fishing. That was the second time the boat was being tested. He denied knowing any of the other persons who were convicted in this case, but stated that it was Conrad who would know the crew going out fishing. He however got his share of the profits as owner.

As regards Rolly Lesperance, he stated that he knew him for about five years and was a trustworthy person. He could not understand why he would take the boat for fishing and came back with turtle meat. He came to know that his boat was seized by the Police only through the news broadcast on radio and television. Conrad informed him later. He did not make any statement to the Police, but Conrad made a statement.

Questioned by Court he stated that he had instructed Mr. Frank Ally who represented the 5th and 6th Accused at the trial, to look after his interests. The record of proceedings bears out that Mr. Ally indeed informed Court that he was representing the interests of the "owner of the vessel", but did not name him. Unlike the 8th Accused, Beddy Payet, whose pick up was also seized in this case, no application for release of the vessel was made by the owner.

Conrad Dingwall testified that after the engine repair, Rolly Lesperance alone took the vessel to sea for testing. On the second trip he mustered a crew of eight persons for them to

familiarize themselves with the working of the engine and the radio. During the trip, they were to be engaged in fishing. He was "embarrassed" when he heard that they had been turtle poaching.

As the evidence of Jean Dingwall and Conrad Dingwall clarified the averments in the affidavit filed with the motion, the Court found it unnecessary to hear the evidence of Rolly Lesperance.

On a consideration of the evidence, it is likely that at least Conrad Dingwall was aware that the crew went to sea for the purpose of turtle poaching. He was aware that that the vessel would be at sea for about one month. That was too long a period for testing. He admitted that in his statement to the Police, he stated "*Rolly told me that just after the new year festivities, that they intended to go fishing for one month saying that they will be back in February 2003*". Despite that statement, he maintained that the primary object of the second trip was to test the engine and the radio, and for the crew to familiarise themselves with the working of these items. That evidence is not credible. However, he is entitled to the benefit of the doubt.

On a consideration of the affidavit of Jean Dingwall, and the clarifications made by him in his testimony on oath, the Court is satisfied that the vessel had been used in the commission of the offences, without his knowledge. Hence the Court releases the vessel "*Kalkal*" from its custody. However, as was stated in the sentencing order dated 19th May 2004, since an appeal has been filed before the Court of Appeal, this restitution order will take effect only upon the final disposal of that Appeal.

Order made accordingly.

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A.R.PERERA

JUDGE

Dated this 19th day of November 2004

