PAPUA NEW GUINEA

[NATIONAL COURT OF JUSTICE]

APPEAL NO. 357 & 358 OF 1997

CHIA HE JIA

AND

HUANG MING XIAN

APPELLANTS

AND

GISA KOMAGIN

RESPONDENT

Kavieng & Waigani

Jalina J

13 March 1998
30 March 1998

CRIMINAL LAW - Practice and Procedure - Information - Variance between words used and section under which charge is created - words to prevail - Fisheries Act 1994 s.57(1) & 2(a) and s. 30 District Courts Act.

CRIMINAL LAW - Practice and Procedure - Duplicity - Charges contained in separate information - Parties represented by Counsels - Objection not raised at trial - Whether substantial miscarrage of Justice - S.29 District Courts Act.

FISHERIES - Offences - Fishing licence - Whether requirement to hold a licence mandatory - Licence is mandatory - S. 57(1) Fisheries Act 1994.

CRIMINAL LAW - Evidence - Circumstantial Evidence - Fish found on boat - Nets and other equipment not properly stowed on boat - Whether boat was engaged in fishing - Inference to be drawn.

Cases Cited

John Worofang -v- Patrick Wallace [1984] PNGLR 144
Michael Simi -v- John Bayam [1980] PNGLR 300

This was an appeal from a conviction by a District Court Magistrate for various offences contrary to the Fisheries Act 1994.

Counsel

C Yalo for the Appellants

J Kawi for the Respondent

30 March 1998

Cur adv vult

JALINA J: The appellants were separately charged and convicted by the Lorengau District Court on 5th November 1997 following a joint trial for breaches of ss 57 and 63 in particular s. 57(1) & (2)(a) and s. 63(1)(c) of the Fisheries Act 1994. I will quote the relevant words of those provisions later in my judgment.

Both the Appellants and the Respondent were represented by counsel. They were each fined K20,000.00 on each of the four charges and ordered to pay a total of K160,000.00 within a week failing which they were to be imprisoned and the two vessels forfeited to the State.

> "The appellant Chia He Jia was the master of the vessel Man Tsia Fa No. 30 while the appellant Huang Ming Xian was the master of the vessel Sheng Hai.

The charges against each appellant were contained in four (4) separate informations. The informations against the appellant Chia He Jia were in the following terms:

> INFORMATION NO. 1
>
> "Being master of Fishing Vessel (FV) Man Tsai Fa No. 30, did on his own account caused the said FV Man Tsai Fa No. 30 a foreign boat to fish in Papua New Guinea Fisheries waters without license to do so granted by the National Fisheries Authority (NFA) under the Fisheries Act 1994.
>
> Thereby contravening section 57(2)(a) of the Fisheries Act 1994".
>
> INFORMATION NO. 2
>
> "Being Master of fishing Vessel (FV) Man Tsai Fa No. 30 did on his own account caused the said FV Man Tsai Fa No. 30, a foreign boat to be in Papua New Guinea fisheries waters without a license to do so granted by the National Fisheries, Authority (NFA) under the Fisheries Act 1994.
>
> Thereby contravening Section 57(2)(a) of the Fisheries Act 1994".
>
> INFORMATION NO. 3
>
> "Being Mast of Fishing Vessel (FV) Man Tsai Fa No. 30, did on his own account caused the said FV man Tsai Fa No. 30 a foreign boat to process fish, a related activity, in Papua New Guinea fisheries waters without a license to do so issued by the National Fisheries Authority NFA under the Fisheries Act 1994.
>
> Thereby contravening Section 57(2)(a) of the Fisheries Act 1994."
>
> INFORMATION NO. 4
>
> *"Being Master of fishing vessel (FV) Man Tsai Fa No. 30 did fail to comply with a lawful requirement of an officer namely Gisa Komagin by not producing any ships' Log book,*

Thereby contravening Section 63(1)(c) of the Fisheries Act 1994."

Except for his name and the name of his vessel (Sheng Hai) the information against the appellant Huang Ming Xian were in identical terms to those against the appellant Chia He Jia.

The grounds of appeal and orders sought by each appellant which are in identical terms are as follows:

"1. That the learned Magistrate erred in law by convicting the Appellant/Defendant under Section 57(2)(a) of the Fisheries Act 1994 (hereafter "the Act") for the offences of fishing and processing fish without licences when such offences are not prescribed as offences under Section 57(2)(a) the Act, hence the Appellant/Defendant suffered substantial miscarriage of justice;

2. That the learned Magistrate erred in law and fact by finding that a foreign boat entering PNG fisheries waters is guilty of an offence unless authorised to do so by a licence granted under the Act;

3. That the learned Magistrate erred in law and fact by convicting the Appellant/Defendant under Section 57(2)(a) of the Act where the alleged offences were artificially split up when the course of conduct was only one, thereby convicting the Appellants/Defendants of three offences of the one and same conduct;

4. That the learned Magistrate erred in law by convicting the Appellant/Defendant of the offence pursuant to Section 63(1)(c) of the Act when the charges were defective and in breach of Section 29 of the District Courts Act;

5. The learned Magistrate erred in law by convicting the Appellant/Defendant of the offences pursuant to Section 57(2)(a) of the Act when the charges were defective and in breach of Section 29 of the District Courts Act;

6. That the learned Magistrate erred in law by proposing to sentence to imprisonment the Appellant/Defendant if the K80,000.00 fine was not paid by the 13th November, 1997;

7. That the learned magistrate erred in fact by accepting that the Appellant/Defendant was guilty of the offence of fishing illegally when there was no evidence offered by the Informant and his witnesses to show that the Appellant/Defendant was in the act of fishing when apprehended;

8. That the learned Magistrate erred by finding the Appellant/Defendant guilty of the offence of fishing illegally when there was no evidence offered by the Informant and his witnesses to show that fishing gear including bail on board the vessel was used for fishing immediately prior to being arrested by the HMSPNG Tarangau 01;

9. That the learned Magistrate erred in not accepting the Appellant/Defendant's uncontested and uncontradicted evidence that he began fishing on the high seas with eight radio buoys and that the eight radio buoys were stowed when HMSPNG Tarangau 01 arrested him;

10. That the learned Magistrate erred by accepting that the Defendant/Appellant was guilty of the offence of processing fishing without a licence issued by the National Fisheries Authority, when there was no evidence offered by the Informant and his witnesses to show that the Appellant/Defendant was caught by HMSPNG Tarangau 01 in the act of processing fish;

11. That the learned magistrate erred by not accepting the uncontested evidence of the Appellant/Defendant that the fish kept on his vessel was caught at high seas and processed at high seas;

12. That the learned Magistrate erred by accepting that the Defendant/Appellant was guilty of the offence of failing to produce a log book when the evidence offered by the Defendant/Appellant showed that the seized documents included a log book;

13. That the learned Magistrate erred in law and fact by not accepting the Appellant/Defendant's right in international law of innocent passage;

14. That the learned Magistrate erred in law and fact by accepting that HMPNGS Tarangau 01 was entitled to pursue the vessel, Man Tsai Fa No. 30 on high seas and arrest the said vessel on high seas;

15. That the learned Magistrate erred in law and fact by refusing to accept that the Appellant/Defendant's vessel had engine repair work done and consequently drifted into PNG fisheries waters when this evidence was not contested through contrary evidence by the Respondent/Informant;

16. That the learned Magistrate erred by finding contrary to evidence given by the Appellant/Defendant that his fishing gear was not stowed and that the gear was used for fishing prior to HMSPNG Tarangau 01 boarding the vessel;

And the Appellant/Defendant seeks the following Orders:

17. That the judgement or conviction orders of the Lorengau District Court be quashed or annulled for causing substantial miscarriage of justice to the Appellant/Defendant.

18. That the Appellant/Defendant be discharged forthwith;

19. That the vessel, Man Tsai Fa No. 30 be returned to the Appellant/Defendant forthwith;

20. That the Appellant/Defendant's documents, including passports and other property seized by the Respondent/Informant and or on his instructions be returned forthwith;

21. Further or alternatively, the District Court Order be quashed and the matter be referred back to the Lorengau District Court for rehearing;

22. Such further or other Orders as this Honourable Court may deem fit."

Before I proceed further however, let me point out that grounds 4 and 6 have been abandoned by the appellants. I now propose to consider each ground of appeal but where one or more grounds are argued together, they would be considered in the same manner.

GROUND 1

This ground is based on the application of s. 57 subsections (1) & 2(a) of the Act.

"57. FOREIGN BOATS IN FISHERIES WATERS

(1) No foreign boat shall enter, be in or be used for fishing or related activities in fisheries waters:

(a) except for a purpose recognised by international law; or

(b) unless it is authorized to do so by a licence granted under this Act.

(2) A person who:

(a) on his own account, or as the partner, agent or employee of another person, causes or permits; or

(b) causes or permits a person acting on his behalf to cause or permit, a foreign boat to contravene subsection (1) is guilty of an offence.

Penalty: In the case of a crew member - a fine not exceeding K25,000.00; and In the case of any other natural person - a fine not exceeding K250,000.00; and In the case of a corporation - a fine not exceeding K500,000.00.

Mr Yalo for the appellants has submitted that in view of the clear wording of s.57 sub-section (1) and (2)(a), the appellants could not be convicted under sub-section (2)(a) because that provision does not create the offence. The offence is created by sub-section (1)(a) and (b). Consequently the charges that were laid and convictions that were entered under s.57(2)(a) were wrong. They were convicted under the wrong section which meant that they were convicted of an offence not defined by law.

The submission by Mr Kawi for the Respondent regarding this ground is consistent with the views I express to know so I need not mention it here.

With respect, I cannot see any merit in the arguments presented by the appellants. Section 57(1) says that *"No foreign boat shall enter, be in or be used for fishing or related activities in fisheries waters ....."*. Each of the appellants were *"a person who on his own account "caused the boat to engage in"* the act of entering, fishing, being in or being used in fishing or related activities in fisheries waters which are action(s) prohibited by subsection (1).

In my view sub-section (1) of s. 57 was sufficiently incorporated through the use of words such as "fish", "be in" or "being used for fishing" which appear in that sub-section. It is not the section of Act that should be looked at but the facts or actions that constituted the offence. It was the facts or actions that are alleged to constitute the offence that were put to the appellants to plead to. Not the section of the law. Similar arguments were raised and rejected by the court in *JOHN WOROFANG -V- PATRICK WALLACE* [1984] PNGLR 144. This was an appeal against conviction and sentence imposed by a Grade V magistrate for break enter and stealing. At p. 145 Bredmeyer, J. said:

> "The first point argued on appeal is that the section does not disclose an offence. The offence is created by s. 395(1) and the information refers to s. 395(2). That is true enough but I consider that the point is without merit. If there is any variation between the words of an information and the section number, the words prevail. After all a defendant pleads guilty to the words of the charge put to him and not to the section number. On getting an information a magistrate should check that the charge is correctly worded, that it follows the section properly, and then put the charge to the defendant. He should not read the section number to the defendant. A defendant can only plead to facts for example "that he did on the 1 December 1983 break and enter the property of A and while therein stole the properties etc." A defendant cannot plead to law. Whether or not those facts constitute an offence under s. 395(1) or (2) or any other section is for the magistrate to decide. In this case the section mentioned in the information was wrong but the defendant pleaded to facts as alleged in the text of the information and the wrong section number is in itself of no consequence. It is not a "substantial miscarriage of justice".

Furthermore, in view of the clear provisions of s.30 of the District Courts Act no error was made by the Magistrate or the Respondent in relation to the wording or the general contents of the various informations brought against the appellants.

> "30. Description of persons, property and offences

(1) Such description of persons or things as would be sufficient in an indictment is sufficient in an information.

(2) The description of an offence in the words of that Act, order or instrument creating the offence,or in similar words, in sufficient in law".

I cannot find any substantial miscarriage of justice in the case before me. As I said above, it was the facts or actions that were alleged to constitute the offence that were put to the appellants to plead to. Not to section 57(1) or s. 57(2)(a) of the Act.

In my view, if such an argument is accepted, offenders who commit offences such as this so many kilometres out to sea where Papua New Guinea does not have the resource to police, would escape punishment. They would escape punishment just because the keyboard operator punched the wrong number into the computer. Furthermore, such a narrow or strict application of the law on trivial matters such as wrong section numbers would defeat the purpose and intent of the legislation.

I accordingly dismiss this ground of appeal.

GROUND 2

This ground relates to conviction for "being in" Papua New Guinea fisheries waters without a licence.

Mr Yalo submits at the outset that a licence to enter PNG waters as well as to process fish is not required.

The Act, he submits, defines licence to mean "an authority, permit or other form of authorization under this Act". See Subsection 1 of the Act. Section 49 of the Act says a licence issued to a foreign boat may have the additional conditions prescribed. Fisheries Regulations of 1994, Section 2 (2)(a) - (h) specifies the activities that require a licence. Clearly entry is not a prescribed activity that requires a licence. If the Legislators had intended that a foreign boat entering PNG would need a licence, this would have been clearly added in Section 2(2). This view is confirmed by Schedule 1 of the Fisheries Regulation. There are total of 21 forms. Entry into PNG fisheries waters does not have a licence form.

The intention of Parliament regarding entry can be found in Section 57(1)(a) and Section 57(3) of the Act. These two subsections recognise the international law of Innocent Passage. Article 17 of the Geneva Convection recognises right of entry and passage through jurisdictional waters of any coastal country provided, the fishing gear is stowed and secured and is not readily available or accessible for use for fishing. The Legislators have therefore given due recognition to the international law of Innocent Passage. Clearly a licence is not required for entering PNG fisheries waters. Schedule 1 of the Regulations reinforces this argument.

Therefore, he submitted, the learned Magistrate convicted the Appellants of an offence not prescribed by law. In doing so Section 37(2) of the Constitution was violated. Hence, this conviction should be quashed.

The same line of argument is applicable for processing of fish, a related activity. The relevant issue is whether a licence is required for Processing Fish or does the Act provide for a licence for Related Activity. Again we refer to Section 2 of the Fisheries Regulations. Subsection 2 provides that a boat which is used in fisheries waters for processing of fish shall be licenced as a fishing boat under Section 20 with respect, I find this argument untenable. It has been misconstrued Section 57(1) is clear and in unambiguous terms.

From my reading of the Act, a foreign boat must have a licence. The words "No foreign boat" in subsection(1) when read with the words "unless it is authorised to do so by a licence granted under this Act" in sub-section (1)(b), clearly shows this mandatory requirement. The only way a foreign boat found or caught in PNG fisheries waters can

avoid prosecution or conviction is to prove that it falls within the exception in sub-section (1)(a) namely that his presence within PNG fisheries waters without a licence was for a purpose recognised by international law".

For the above reasons I dismiss this ground of appeal as well.

GROUND 3

In this ground Mr Yalo submitted that the learned magistrate erred in law and fact in convicting the appellants for three (3) separate offences which were artificially split up when the course of conduct was one and same conduct. He submitted that the ultimate fact or offence that needed to be proved was fishing in PNG fisheries waters without a licence issued by the National Fisheries Authority (NFA). The aspect of being in and processing of fish are part of a single conduct or action. There has therefore been substantial miscarriage of justice caused to the appellants. It was unjust for the appellants to be punished for the 3 offences arising out a single conduct or action. He relied on an observation by Kearney, J in *MICHAEL SIMI -V- JOHN BAYAM* [1980] PNGLR 300 at 302:

> "Attempting to deal with serious criminal conduct by artificially splitting up what is really one course of conduct, so as to enable a District Court to deal with it on the spot is wrong, and leads to the kind of difficulty experienced with this appeal. It is clear that where a person comes into premises without lawful excuse, and immediately steals, it is unjust to punish him for both those offences. I apply that principle here and I consider that, as between those two offences, the appellants should be punished only for stealing"

I note in the above case that two charges were laid under separate provisions of the Summary Offences Act and one charge was laid under the Criminal Code. The appellants pleaded guilty and were sentenced. They appealed against sentence.

In the present case, the argument that it was unjust to impose a sentence on all three offences under s.57(2)(a) when sentence should have been imposed for one offence only cannot stand because, unlike SIMI'S case where one of the offences was more serious and carried a higher penalty than the other two thus giving the court an option, in the case before me, each of the offences fall under s. 57 and are subject to the same penalty. None of the offences carry a higher penalty.

Furthermore what Kearney, J. said in Simi's case arose out of an appeal against sentence. In the case before me, although submissions have been made on penalty, I cannot find a single ground against sentence out of the appellants 16 grounds of appeal. There is a reference to sentence in ground 6 but that ground has been abandoned.

There is also the aspect of representation of both parties by counsel. No objection was raised by Counsel for the appellants at the commencement of trial regarding splitting of charges. I am of the view that care should be taken before a decision of the presiding judge or magistrate is overturned in respect of a point that was not brought to his attention at trial and thus given an opportunity to make a decision or rulling on it.

I accordingly dismiss this ground of appeal.

GROUND 5

The appellants submission in respect of this ground is based on the law against duplicity of information which is prohibited by s. 29 of the District Courts Act.

> "29. Information to be for one matter only
>
> An information shall be for one matter only, except that:
>
> (a) in the case of indictable offences, if the matters of the information are such that they may be charged in one indictment; and

(b) in other cases, if the matters of the information are substantially of the same act or omission on the part of the defendant; those matters may be joined in the same information".

In view of the charges having been brought by way of an information, s. 29(b) applies. From the wording of paragraph (b) however, it is clear that matters which are substantially of the same act or omission may be joined in the same information. The respondent has not obviously joined all the charges in one information and as such I cannot see how s. 29 was violated. In fact the respondent has avoided breaching s. 29 by laying separate informations.

The appellants further submitted that the learned magistrate failed to allude to the dangers from admitting evidence obtained in breach of their right to protection from arbitrary search and seizure and right to privacy guaranteed by ss.44 and 49 of the Constitution. They submitted that the evidence obtained were not in an immediate hot persuit but obtained two days after the vessels were arrested on the high seas and brought to Lombrum and as such a search warrant should have been obtained prior to the search.

I reject this argument for reasons similar to those I gave in relation to ground 3 above namely that the appellants were represented by counsels and that no objections were raised in relation to the manner such evidence was obtained. Admissibility of evidence allegedly obtained in breach of ss. 44 & 49 of the Constitution should have been challenged at trial in the District Court using the "voire dire" procedure.

For the foregoing reasons I dismiss this ground also.

GROUND 7

Mr Yalo submitted in respect of this ground that the learned magistrate erred in convicting the appellant for fishing illegally when there was no evidence offered by the appellant had his witness to show that the appellant were in the act of fishing when apprehended. He submitted that from the evidence of Stanley Terupo that he did not see them throw lines out and from the fact that the Respondent was not a member of the boarding party when the vessels were boarded out at sea; clearly shows that they were not fishing. Mr Kawi submits that "fishing" is comprehensively defend in s. 2 of the Act and encompus "related activity". Related activity includes "processing" and processing in relation to fish includes the work of cutting up, dismembering separating parts of, cleaning, sorting, packing, loining or canning fish. He in effect submitted that when all the evidence are considered together, in the circumstances, there can be no doubt that activity had taken place in Papua New Guinea fisheries waters.

Mr Kawi relied on the evidence of Manuai Poliap (who bounded the vessels) which showed that:

(i) branch lines were still wet

(ii) leader was still mounted

(iii) lights were still on display

(iv) hatches 1 and 2 had ice blocks, hatches 3, 4 and 5 had chilled tuna, hatch 6 had live bait and cartons of frozen squid under wheel house freezer.

(v) longhire was still mounted on the side of the vessel.

(vi) when approached, the vessel had bright lights switched on and was still steaming in the northerly direction.

Mr Kawi also relied on the evidence of Gisa Komangin who board the vessels at Lombrum and found that the vessel Man Tsai Fa 30 had been fishing and 5 days and had a board 125 fish comprising of 105 yellow find tuna, 13 big eye tuna gutted and chilled in water, 5 gutted and beheaded marlin in chilled water and 2 sharks gutted and frozen in freezer

compartment. Hatches 3 & 4 had chilled tuna which had then been shifted to freezer compartment No. 1 and Hatch No. 7 had line milk fish bait, stern freezer had squid and horse mackerel for bait. Four radio buoys were missing from the port side.

Mr Kawi further submitted that the only evidence given by the Defendant/appellants were that they had been fishing on the high seas and had only drifted in the PNG EEZ when vessels encountered engine problems and were being fixed. These evidences however, are refuted on the basis that at the time the boars were supposedly drifting, the tide and current was flowing where the wind was blowing in the north westerly direction. Hence, the boats would have gone with the direction of the wind and current which was north westerly towards Federated States of Micronesia. They were caught in the south in PNG fisheries waters and they could only have gone south against the current and wind through the empowering of the engines. There were no further evidences adduced from the Defendant/Appellants to corroborate their claim of fishing on the high seas.

Section 70(1) and (5) of the *Fisheries Act* deals with evidentiary matters. Subsection 1 of Section 70 provides that all fish found on board any boat which had been used in the Commission of a fisheries offence shall be presumed unless the contrary is proved, to have been caught in the commission of that offence.

Subsection 5 of Section 70 provides that where in proceedings under the *Fisheries Act*, an officer give evidence that he suspects that any fish to which the charge relates were taken in a particular area of waters or taken for a commercial purpose together with evidence of the grounds on which he so suspects, and the court thinks that, having regard to the evidence, the suspicion is reasonable, the fish shall in the absence of proof to the contrary be deemed to have been so taken.

There was not much proof to the contrary about the fish being taken in PNG fisheries waters, that is the PNG EEZ and about the fish being processed therein.

The whole case is based on circumstantial evidence. The law relating to circumstantial evidence is as stated in *PAULUS PAWA -V- THE STATE* [1981] PNGLR 498 namely that *"where a case against an accused person rests substantively circumstantial evidence, there should be a acquittal unless all the witnesses are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused"*

Under s. 70(1) of the Act "all fish found on board any boat which has been used in the commission of a fisheries offence shall be presumed, unless the contrary is proved, to have been caught in the commission of that offence.

Under s. 70(5) of the Act "where...

(a) an officer gives evidence that the suspects that any fish to which the charge relates were:

  (i) taken in a particular area of waters, or

  (ii) taken for commercial purposes; or

  (iii) taken by the use of drifters

  together with grounds on which he so suspects; and

(b) and the court thinks that having regard to the evidence the suspicion is reasonable, the fish shall, in the absence of proof to the contrary, be deem to have been so taken "

With both presumption under s. 70(1) and (5) being in favour of the prosecution (respondent and his witnesses) it was incumbent upon the appellants to show the contrary. The best evidence that would have rebutted the presumption would have been the ships log book which, ironically, was not produced in respect of both vessels. The engine log book if produced would have assisted the appellants. The log book would have clearly shown the position of the ship between 8th and 13th August 1997. It would have clearly shown where the fish found in the vessels were caught. There was nothing

produced to show the contrary thus rebutting the evidence of the prosecution. I therefore accept the submission by Mr Kawi for the respondent. I find that based on the circumstantial evidence before him, the only reasonable hypothesis open to the learned magistrate was the guilt of the accused. The learned magistrate did not make an error.

I accordingly dismiss this ground of appeal.

GROUND 8

What I said in ground 7 regarding circumstantial evidence and the failure to produce the ships' log books which would have rebutted the evidence of prosecution also applies to this ground.

I dismiss this ground as well.

GROUNDS 9, 10 AND 11

I dismiss these grounds for reasons I gave in relation to Ground 7.

GROUND 12

It has been submitted by the appellants that the documents produced by the appellants in compliance with the Respondents request under s. 63(1)(c) of the Act included a log book.

> *"Log-book"* is defined in Oxford Advanced Learner's Dictionary, 4th Edition to mean *"detailed record of a ship's voyage or aircraft's flight".*
>
> "Log or Log-book" is defined in Osborne's Concise Law Dictionary, 6th Edition as "A record of happening in and to a ship, including its speed and progress".

From the above definitions, none of the documents produced or seized contained detailed records of the ship's voyage including what was happening in and to the ship and its speed. If the log-book was produced it would have shown the position of the ship at various dates and times, it would have shown its speed or if it was shut down as claimed by the appellants, then I would have shown a nil recording up to the time they started sailing again. A single piece of paper with entries that do not include even the speed and what was happening on the vessels cannot be a log book in my view. Even the radio log, engine log and freezer log books were not produced. These would have thrown some light on the assertions by the appellant that they were not fishing but had drifted into PNG fisheries waters due to engine trouble. I find no error in the learned magistrate's decision.

I dismiss this ground also.

GROUND 13

This ground attacks the learned magistrate's failure to accept the appellant's right in international law of innocent passage. In other words they submit that their being in PNG fisheries waters without a licence was excepted or excused by s. 57(1)(a) of the Act.

I think that the words in sub-section (1)(a) need to be looked at closely. In doing so I find that the word "purpose" is significant. That section does not say "except for reasons" recognised by international law. To avail themselves of the exception the appellants must show that they were travelling through PNG fisheries waters for a "purpose" recognised by international law. Section 57(1)(a) also does not say "unless excused" by international law-so as to enable them to sustain an argument based on their assertion that they shut down their engines due to one of the vessels overheating and the other developing a leak, thus resulting in their drifting into PNG fisheries waters. Consequently they do not come with the ambit of the exception.

I dismiss this ground.

In case I am wrong on my decision above, I would still dismiss this ground for reasons advanced by Mr Kawi at page 11 of his extract of submissions (which I accept) that under the United Nations Convention on the Law of the Sea (UNCLOS) the appellants actions (on the basis of evidence adduced by prosecution witnesses) did not fall within the requirements of innocent passage.

Due to inadequacy of library facilities in Kavieng, I have not been able to peruse the actual text of UNCLOS, but since Mr Yalo has not (inspite of his having referred to international law of innocent passage) referred me to any specific provision of a Convention to the contrary, Mr Kawi's submissions on page 11 succinctly summarises the position relating to innocent passage.

> "Innocent passage is defined under Article 17 of the United Nationals Convention on the Law of the Sea (UNCLOS). Under this convention, ships of all States enjoy the right of innocent passage through the territorial sea.
>
> Article 18 of UNCLOS defines passage as navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at roadstead or port facility outside internal waters or proceeding to or from internal water or a call at such roadstead or port facility. Subsection 2 of the same Article provides that passage shall be *continuous* or expeditious. Passage includes stopping and anchoring but only in so far as they are incidental to ordinary navigation or are rendered necessary by force major or distress etc..
>
> Article 19 provides for meaning of Innocent Passage and circumstances in which Passage can be rendered as not innocent. Article 19(1) states that passage is innocent so long as it is not prejudical to the peace, good order or security of the coastal state. Article 19(2) states that passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea, it engages in *"any fishing activities"*.

From the provisions in the above Articles, it is clear that innocent passage must be *continuous* and *expeditious* and that no other activity such as fishing shall be engaged in. It is our submission that in this case, passage of a vessels was not innocent because circumstantial evidence of state witnesses showed that fishing had occurred. From evidence given it was shown that branch lines were still wet, hauler and mounte, lights were switched on and in one of the vessels, four (4) radio buoys were missing on the portside and the longline was still mounted on the side of the vessel. Clearly, their fishing equipment were not stowed indicating that fishing had taken place with PNGEEZ."

GROUND 14

Under this ground the appellants say that the HMPNGS Tarangau 01 was not entitled in law to pursue the vessels and arrest them on the high seas and in doing so arrested them illegally.

I cannot see any merit in this argument. The appellants said that they drifted into PNG waters because they had shut down their engines and that after they repaired their engines they were sailing away from PNG fisheries waters when the HMPNGS Tarangau 01 persued them and arrested them. Having picked up the vessels on the its radar and discovering that the vessels were in PNG fisheries waters and that they were proceeding towards international waters, could the HMPNGS Tarangau resonably be expected to stop? Certainly not. It is permitted by the principle of hot pursuit in international law to persue it even into international waters and effect arrest and that is what happened.

I also dismiss this ground.

GROUNDS 15 & 16

Under these grounds the appellants say that they had a good reason to be in PNG fisheries waters without a licence. Their reason is that they had shut the engines and

drifted into PNG fisheries waters and since that evidence was not rebutted by the prosecution they should have been acquitted.

The learned magistrate had the benefit of observing the demeanour of both the appellants and prosecution witnesses in the witness box. He was in a better position than me to form an opinion as to who he should believe. In light of the evidence before him he decided to believe the prosecution witnesses.

To my mind their assertion that they had engine trouble was a mere assertion without any evidentiary basis. It was just an exculpatory statement particularly when considered in light of the rather odd situation where both vessels had engine problems at the same time. If it was genuine so that the principle of "force majeure" should apply to enable them to escape prosecution, then it was incumbent on them to have produced the engine log-book to show evidence of repairs done to the engine of the vessels. What they were involved in was serious and the appellant Huang Xian knew about this as is apparent from paragraph 16 of his affidavit.

> "When we relay out our fishing gear, we make sure it was well within safety distance from any countries exclusive fishing zone, we know the consequence of fishing in other countries exclusive fishing zone. When we retrieve our fishing gear, especially when we shut down the main engine form (sic) repair works. The boat will drift with the current. I believe this made us approach close to the PNG fishing zone on this occassion."

Being aware of the consequences of fishing in the exclusive fishing zone of other countries, it was incumbent on him when found in PNG fisheries waters to show that he had a genuine reason to be there by producing evidence of repair through production of engine log-book etc.. which I mentioned above. He has said that they must have drifted with the current but the evidence from prosecution witnesses is that the wind was blowing in the northerly direction but they were found south in PNG fisheries waters which renders the appellants' assertion difficult to believe which I also do.

For the above reasons I find that the learned magistrate did not make any error when he decided not to accept the appellants' assertion that the reason for their being in PNG fisheries waters was that they had engine trouble.

I accordingly dismiss these grounds as well.

The effect of having dismissed all grounds of appeal by the appellants is that the conviction and sentence imposed by the District Court on both appellants are confirmed. I further ordered that the order granting a stay of the District Court Order be set aside.

Costs to the Respondent

Lawyer for the Appellants: Karl Yalo & Associates Lawyers

Lawyer for the Respondent: Solicitor General