Fa v Naniura [1990] PGNC 97; [1990] PNGLR 506 (14 December 1990)

Papua New Guinea Law Reports - 1990

[1990] PNGLR 506 - Chern Jin Fa v Kingsford Naniura

[1990] PNGLR 506

N928

PAPUA NEW GUINEA

[NATIONAL COURT OF JUSTICE]

CHERN JIN FA

V

NANIURA

Waigani

Los J

11 July 1989

14 December 1990

FISHING - Offences - Evidence - "Equipment" used or capable of being used for fishing - Whether includes catch record of gilnetters - Legislative intention - Fisheries Act (Ch No 214), s 9.

STATUTES - Interpretation - Legislative intention - Use of - Legislation to protect and control fishing industry - Fisheries Act (Ch No 214), s 9.

INTERNATIONAL LAW - International customary law - Fishing industry - Exclusive economic zones - Declaration of fishing zones by PNG - Whether acceptance of international customary law - Consideration of local legislation - Preamble to Constitution - United Nations Convention on the Law of the Sea, 1982 - Constitution, Preamble.

The *Fisheries Act* (Ch No 214), s 9, provides:

N1>"9. Powers of officers

An officer may:

(a) board or enter on a boat that he has reason to believe has been used, is being used or is intended to be used for fishing, and search the boat for fish and for equipment used or capable of being used for fishing; and

(c) examine any equipment that is found in or on any boat, vehicle, premises or place, being equipment that he has reason to believe has been used, is being used or is intended to be used for fishing; and

(d) seize, take, detain, remove and secure any fish, boat, net, trap or equipment that he has reason to believe has been taken or used, is being used or is intended to be used in contravention of this Act; and

(j) require the master or other person in charge of a boat in respect of which a licensee under this Act is required:

(i) to produce the licence for the boat (and he may take copies of, or extracts from, the licence); and

(ii) to give information concerning the boat and her crew and any person on board the boat; ..."

Held

N1>(1) Taking into account the legislative intention of the *Fisheries Act* to protect and control fishing in Papua New Guinea waters other than by licence, the word "equipment" in pars (a), (b) and (c) of s 10 of the *Fisheries Act* includes anything either required for fishing or used when fishing in Papua New Guinea waters contrary to the Act.

SCR No 1 of 1985; Inakambi Singorom v Klaut [1985] PNGLR 238, applied.

N1>(2) Accordingly, for the purposes of proving an offence under the *Fisheries Act*, a catch record of gilnetters, is admissible as being "equipment" under s 9 of the Act.

N1>(3) The acceptance, policing and enforcement of exclusive economic zones as defined in Art 55 of the *United Nations Convention on the Law of the Sea* 1982, by a large number of States, gives the exclusive economic zone status as part of international customary law.

N1>(4) The preamble to the *Constitution*, to municipal laws including the *Fisheries Act* (Ch No 214), the *Tuna Resources Management Act* (Ch No 224) and the *Continental Shelf (Living Natural Resources) Act* (Ch No 210) the declaration, policing of "fishing zones" under the *National Seas Act* (Ch No 361) and the signing (but not as yet ratification) of the Law of the Sea Convention evidenced an intention to accept the exclusive economic zone as part of international customary law under which Papua New Guinea was therefore entitled to exercise jurisdiction over unlicensed fishing within the declared fishing zones.

Cases Cited

Anglo-Norwegian Fisheries Case (1951) ICJ Reports 116.

R v Regos and Morgan [1947] HCA 19; (1947) 74 CLR 613.

SCR No 1 of 1985; Inakambi Singorom v Klaut [1985] PNGLR 238.

Stewart v Lizars [1965] VR 210.

Tillmans & Co v SS Knutsford Ltd [1908] 2 KB 385.

Appeal

This was an appeal from a conviction by a District Court magistrate of an offence contrary to the *Fisheries Act* (Ch No 314).

Counsel

Pato, for the appellant.

Kuemlangan, for the respondent.

Cur adv vult

14 December 1990

LOS J: This appeal came before me on 11 July 1989 and soon after I reserved the appeal for decision the appellant escaped in the boat to the high seas. There was no necessity therefore to deliver any decision sooner.

The appellant was convicted by the Port Moresby District Court on 3 May 1989 for using a foreign boat namely the Sheng Fu No 16 to fish in the Health Bay area, a declared fishing zone. His grounds of appeal are:

N2>(1) The learned magistrate erred in law and fact or alternatively erred in the exercise of his discretion when his worship allowed to be tendered in evidence exhibit "A" (the Catch Record of Gilnetters) on the basis that the document be construed as equipment in Section 9 of the Fisheries Act, Chapter 314 of the Revised Laws of Papua New Guinea;

N2>(2) That the learned magistrate erred in law and fact or alternatively erred in the exercise of his discretion when his Worship allowed to be tendered in evidence a chart obtained on boat the Sheng Fu No 16 when the same had been plotted out of the court room;

N2>(3) The learned magistrate erred in law when he ruled that he had jurisdiction in that the declaration of a fishing zone is not contrary to customary international law;

N2>(4) The learned magistrate erred in law and fact when he found that an element of the offence in s 12 namely declared fishing zone had been proved on the relevant evidentiary standard; and

N2>(5) Such other ground as may be apparent when the magistrate's transcripts of evidence become available.

In the first ground of appeal the appellant attacks the legality of acceptance by the Court as evidence of the catch record of gilnetters taken from Sheng Fu. The record contains the dates, and the location of the boat, the depth and the temperature of the sea, hence making the chart highly incriminating to the appellant. The appellant says that pursuant to s 9 of the *Fisheries Act* (Ch No 214) numerous pieces of equipment found on board may be seized and tendered as evidence but not the chart. Section 9 provides:

N2>"9. Powers of officers

An officer may:

(a) board or enter on a boat that he has reason to believe has been used, is being used or is intended to be used for fishing, and search the boat for fish and for equipment used or capable of being used for fishing; and

(c) examine any equipment that is found in or on any boat, vehicle, premises or place, being equipment that he has reason to believe has been used, is being used or is intended to be used for fishing; and

(d) seize, take, detain, remove and secure any fish, boat, net, trap or equipment that he has reason to believe has been taken or used, is being used or is intended to be used in contravention of this Act; and

(j) require the master or other person in charge of a boat in respect of which a licensee under this Act is required:

N5>(i) to produce the licence for the boat (and he may take copies of, or extracts from, the licence); and

N5>(ii) to give information concerning the boat and her crew and any person on board the boat; ...”

It is argued that applying the ejusdem generis rule of statutory construction, equipment in each of the paragraphs cannot include a catch record which is a document. The ejusdem generis rule presupposes the identification of a like group of matters. The things listed must possess some common dominant feature. On this he refers to the statement by Latham CJ in *R v Regos and Morgan* [1947] HCA 19; (1947) 74 CLR 613 at 624.

The word “equipment” is used in the three paragraphs (a), (b) and (d). “Equipment” in par (c) can fall in with par (a) and par (d) when the meaning has been ascertained. The word “equipment” in par (b) is preceeded by the words “fish”, “boat”, “net”, and “trap”. By the nature of each word, there is no common category such as animals, solid material or liquid, or vessels. The definitions in s 1 of the *Fisheries Act* add to this point: “boat” means steamer, launch, vessel etc, “fish” includes turtles, dugongs etc, “net” means fabric of rope, cord, twine etc, and “trap” means an enclosure designed to catch fish. These items cannot be put into one category and therefore I conclude, in the words of Farwell LJ in *Tillmans & Co v SS Knutsford Ltd* [1908] 2 KB 385 at 403, “unless you can find a category, there is no room for the application of the ejusdem generis doctrine”. The meaning of the word “equipment” in my view therefore cannot be limited by the words preceding it. Consequently, the catch record cannot be excluded on this basis.

Can it still be put in category if looked at from the users’ point of view, that is, is it a thing that is used by fishermen when fishing? All the enlisted things enable fishing. Therefore any unspecified “equipment” must be capable of helping the fishermen to look for fish and enable them to catch fish. The point becomes clearer if put differently. If a fishing vessel leaves without a catch chart, can it catch any fish? Of course it can. But if it goes out to sea without nets, traps and any other like equipment but brings with it only a catch chart, can it catch any fish. The answer is definitely no. However, I think, that is frustrating the intent of the *Fisheries Act*. The Act regulates fishing. The control of fishing is exercised by the issuing of licences. In respect of foreign fishermen, they cannot fish in the waters of Papua New Guinea, unless they have been granted a licence to do so. The appellant had no licence to fish in Papua New Guinea waters. So that anything that “has been used” “in contravention of this Act”, (the *Fisheries Act*), in my view, falls into the general word “equipment” used in the three paragraphs, (a), (c) and (d). This approach was followed in a Victorian case, *Stewart v Lizars* [1965] VR 210 where Winneke CJ said (at 211):

“In my judgment, the definitions of ‘litter’ and ‘public place’, and the operative provisions of the Act, show that the mischief the legislation is intended to prevent is the creation of untidiness in any public place as defined, and I can see no justification for frustrating such legislative intent by placing upon the general words contained in the definition of ‘litter’ any interpretation short of that required by their ordinary grammatical meaning.”

In this jurisdiction the Supreme Court has come down hard against the slavish use of and application of e*xpressio unius personae vel rei, est exclusio alterius* rule in many cases, for example, *SCR No 1 of 1985; Inakambi Singorom v Klaut* [1985] PNGLR 238. I quote what Kidu CJ said (at 241):

“Rules or maxims of interpretation of statutes are only guides and must not be thought of as substantive law. They are not inflexible rules to be applied without question. In this jurisdiction these rules are subject to two very important constitutional provisions: (a) fair and liberal interpretation (Sch 1.5(2)); and (b) the paramountcy of justice (s 158(2)). Schedule 1.5(2), I know, relates to the interpretation of constitutional laws, but if constitutional laws, which are higher laws than Acts of Parliament, must be given their fair and liberal meaning, it is my view that that means that ordinary laws must be given their ‘fair and liberal meaning’. Section 158(2) says that in interpreting laws the courts must ‘give paramount consideration to the dispensation of justice’.

Whatever the rules or maxims of statutory interpretation say, one thing must not be lost sight of and that is that a clear parliamentary intention in legislation cannot be ignored or overruled by the courts. The courts cannot and must not frustrate clear parliamentary intention in any legislation so long as such legislation is constitutionally valid. For Parliament is empowered by the *Constitution*, s 100, to exercise the legislative power of the people and not the courts. In fact Parliament’s legislative power, subject to the *Constitution*, is unfettered (the *Constitution*, s 109(1)), and laws made by Parliament ‘shall receive such fair, large and liberal construction and interpretation as will best ensure that attainment of the object of the law according to its true intent, meaning and spirit’ (s 109(4)). I have said the above to emphasise that a court cannot go beyond its powers by using maxims of interpretation or rules of interpretation to override clear and explicit parliamentary intent in legislation. This is not saying that I support ‘*the strict literal and grammatical construction of the words, heedless of the consequences*’ approach to statutory interpretation: see *PLAR No 1 of 1980* [1980] PNGLR 326.”

With the caution of the Supreme Court in mind and with the intent of the *Fisheries Act* in mind, I consider that the catch record is "equipment", apart from the nets, traps and radio equipment. All these were either required for fishing or used when fishing without licence in Papua New Guinea waters in contravention of the *Fisheries Act*.

Ground 3 of the appeal has not been proceeded with and so I proceed to deal with ground 4. The appellant says that Papua New Guinea could not exercise its criminal jurisdiction over the appellant. The reason is that Papua New Guinea has not claimed an exclusive economic zone (EEZ) to be able to exclude foreign nationals and boats from fishing in the area. It is argued that Papua New Guinea has declared a fishing zone but that is conceptually different from the EEZ.

The exclusive economic zone is defined by Art 55 of the *United Nations Convention on the Law of the Sea*, 1982 as:

"The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

Article 56 relates to the rights, jurisdiction and duties of the coastal State in the exclusive economic zone. Paragraph 1(a), for example, says:

"In the exclusive economic zone, the coastal state has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea -bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, current and wind; ..."

Article 57 gives the breadth of the exclusive economic zone:

"The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

Article 58 defines the rights and duties of other States in the exclusive economic zone.

It is not disputed that Papua New Guinea has not ratified the *United Nations Convention on the Law of the Sea*. Unlike other nations, Papua New Guinea does not have any municipal legislation that contains the exact wording as is contained in Art 55 of the Law of the Sea, or a declaration of an area of the sea as the exclusive economic zone. For instance the declaration by Indonesia of 21 March 1980. Paragraph 1 of that declaration states:

"The Exclusive Economic Zone of Indonesia is the area beyond the Indonesian Territorial Sea as promulgated by virtue of Law No 4 of 1960 concerning Indonesian Waters, the breadth of which extends to 200 nautical miles from the baselines from which the breadth of the Indonesian Territorial Sea is measured ..."

The *Cook Islands Act* No 16 of 1977, s 8(1), says:

"The exclusive economic zone of the Cook Islands comprises those areas of the sea, seabed, and subsoil that are beyond and adjacent to the territorial sea of the Cook Islands, having as their outer limits a line measured seaward from the baseline described in s 5 of this Act, every point of which line is 200 nautical miles from the nearest point of the baseline."

Despite non-ratification of the *United Nations Convention on the Law of the Sea*, certain action by Papua New Guinea shows that Papua New Guinea has accepted, in substance, the concept of the EEZ. Whether or not this contention can stand, I will have to look at the actions of the State of Papua New Guinea as well as whether the concept of EEZ has been accepted around the world to the extent that it has come into existence, whether Papua New Guinea has decided consciously to accept the concept or not. First, I look at the *Constitution* and the

municipal laws of Papua New Guinea in this subject. The *Constitution* of Papua New Guinea through the Fourth Goal calls for wise use of the natural resources on the land, air and in the sea:

N2>"(1) wise use to be made of our natural resources ... in the sea ... in the interests of our development and in trust for future generations

N2>(2) ...

N2>(3) all necessary steps to be taken to give adequate protection to our valued ... fish ..."

Those calls have been translated into the regulatory form and they appear for example in the *Fisheries Act* (Ch No 214), the *Tuna Resources Management Act* (Ch No 224) and the *Continental Shelf (Living Natural Resources) Act* (Ch No 210).

The area over which Papua New Guinea can exercise its jurisdiction has been defined. Section 1(2) of the *Fisheries Act* says that the Head of the State may declare, by publication in the National Gazette, "the offshore seas or part of the offshore seas to be the declare fishing zone". In 1978, the Head of State declared, in the Government Gazette No G24 of the 30 March 1978, the "whole of the offshore seas to be declared fishing zone". The "offshore seas" is described by s 6 of the *National Seas Act* (Ch No 361) as, "a distance of 200 miles seaward from the baseline".

I consider that from the preambles to the *Constitution*, and to the Acts of the Parliament to which I referred, the intent of the State of Papua New Guinea is clearly to do what is intended by the regime of the exclusive economic zone in the Law of the Sea Convention.

The State of Papua New Guinea has gone as far as to sign the Law of the Sea Convention. This step has no ambiguity, though a ratification has yet to take place as required by the *Constitution* (s 117). It is no secret that Papua New Guinea has been vigorously policing its resources in the sea waters by arresting foreign fishing vessels including the vessel the subject of this appeal.

I am not unmindful that the delimitation of the sea areas cannot be dependent merely upon the will of a coastal state as expressed in its municipal law. I refer in this respect to the statement by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116 at 132:

"The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law."

However, the exclusive economic zone is a relatively new concept. As of March 1986, some 105 states claimed 200 mile maritime zones. Some called it territorial sea, others called it economic zone, still others called it fishing zone: see, R W Smith, *Exclusive Economic Zone Claims; An Analysis and Primary Documents* (1986), p 1. Most of Papua New Guinea's neighbouring States recognise the EEZ. They extend their jurisdiction over it and enforce it. Others claim fishing zones regulate them and enforce them. Just as Papua New Guinea acknowledges their practice, they too acknowledge Papua New Guinea's practice of declaring 200 miles as fishing zone and putting it under its jurisdiction.

I conclude therefore that through the actions of acceptance and practice by many States, the exclusive economic zone has become part of the international customary law. By the actions of acknowledgement and supervision of 200 miles fishing zone Papua New Guinea has also accepted the concept of the exclusive economic zone. Papua New Guinea therefore was entitled to exercise its jurisdiction over the appellant.

If I am wrong in that regard the appeal cannot be successful for that reason. The appellant came before a domestic court. A domestic court cannot extend its jurisdiction beyond the country's territorial limits. But the District Court acted under the powers given to it by an Act of the Parliament of this country, namely the *Fisheries Act*. Unless there is anything constitutionally wrong with that Act, the District Court was bound to

apply it. In this regard I am fortified, with respect, by an old statement of Cockburn CJ, in *R v Keyn* (1876) 2 Ex D 63 at 160:

"This rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of this country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations."

I therefore order that the appeal be dismissed.

Appeal dismissed

Lawyers for the appellant: *Steeles*, Lawyers.

Lawyer for the respondent: State Solicitor.