

PAPUA NEW GUINEA
[In the National Court of Justice]

APPEAL NO. 63 OF 1996

BETWEEN:

KEMP ADA
Appellant

AND:

LIN WEN BEAU,
LIN MENE BEE AND
CHEN CHIN TI
Respondents

WAIGANI: ANDREW, J
12TH, 18TH MARCH, 1996

Appeal - Right of Appeal by the State to the National Court against the Dismissal of an information.

Fisheries Act 1994 - s 55 - Offence of fishing without a licence and fishing in breach of the conditions of a licence.

ANDREW, J: This is an appeal from the District Court wherein 21 counts of fishing in breach of licensing conditions, which were prosecuted under the Fisheries Act 1994, were struck out and the defendants discharged.

Although it was not argued in the hearing of this appeal there remains a preliminary issue of whether the appellant has standing to appeal to the National Court in this matter. Section 219 of the District Courts Act provides:

"219. Appeal to National Court

- (1) Subject to subsections (2) and (3), a person aggrieved by a conviction order or adjudication of a Court, including an adjudication or order dismissing an information or complaint, may appeal to the National Court from the conviction, order or adjudication, in accordance with this part.
- (2) Except as provided in subsection (3), subsection (1) shall not be deemed to authorize an appeal by the State against the dismissal of an information,

- (3) Where, in the opinion of the National Court, the matter is one of such public importance that leave should be granted, the Secretary for Justice may -
 - (a) appeal against a decision of a District Court on behalf of a party; or
 - (b) intervene in an appeal to the National Court.
- (4) The Public Prosecutor may appeal to the National Court against any decision of the District Court as to sentence in respect of any indictable offence triable summarily under Section 420 of the Criminal Code."

The appeal in this matter is against the dismissal of an information. Under s 219(2) there can be no such appeal by the State unless the conditions of s 219(3) are satisfied. That raises the question of whether or not this is an appeal by the State.

The informant in this matter at the District Court was an officer of the National Fisheries Authority. Under s 65(1) of the Fisheries Act 1994 (The Act) an offence against the Act shall be prosecuted summarily before a Magistrate Grade 5 and by s 65(3) of the Act, an officer may lay informations and conduct prosecutions for fisheries offences. The Act established the National Fisheries Authority which by virtue of s 4(2) of the Act is an Authority which is a body corporate with perpetual succession.

The issue is therefore whether the National Fisheries Authority, for the purposes of this appeal is 'The State' or a servant or agent of the State. The general question of whether a public corporation is a servant or agent of the State is often a complex one. I think that the whole intent of the Act and its terms, show that the National Fisheries Authority is an agent of the State. The objectives are to manage, develop and protect the Nations fisheries resources and marine, coastal and aquatic environment. It is subject to the policy directions of the Minister and the National Executive Council (Section 8 of the Act) and by s 6(a), one of its functions is "to give advice to the Minister and maintain dialogue with other government agencies, on fisheries policies and legislation pertaining to fisheries matters". Thus while the Act is not explicit on the question of whether the Authority is an agent of the State, I am satisfied for all of these reasons that it is, and that therefore this is an appeal lodged by 'The State'.

The Attorney-General, who is the Secretary for Justice, appears on the record and I am satisfied that the matters raised in this appeal are of such public importance, that leave should be granted, within the meaning of s 219(3) of the District Courts for the State to appeal against the decision of the District Court in this matter. The two main grounds of appeal are that:

- "1. The learned Magistrate erred in law in finding that s 55 of the Fisheries Act 1994 applies only to offences of fishing without a licence and not fishing in breach of a term or condition of a license.
2. The learned Magistrate erred in law in finding that the phrase "in accordance with a licence" in Section 55(1) of the Act refers only to a requirement to have a licence to fish and not to act in accordance with the terms and conditions of a licence."

There is no dispute that the defendants were prosecuted for 21 offences of fishing in breach of the terms and conditions of their licence to fish. The informations were laid under s 55 of the Act which is as follows:

"55. Fishing without a licence, Etc

(1) A person who -

- (a) on his own account, or as the partner, agent or employee of another person, engages in; or
- (b) causes or permits a person acting on his behalf to engage in; or
- (c) uses a boat to engage in, fishing or a related activity of a kind or type, or at a time, or in a place or manner, upon which a licence is required under this Act, except under and in accordance with a licence granted under this Act, is guilty of an offence.

In interpreting the effect of this section the learned Magistrate in his reasons for decision found that:

"Section 55 of the Fisheries Act 1995 applies to fishing without licences. In the case of this defendant his fishing boat was licenced to fish in P.N.G. Fisheries waters. If there is any offence committed it would be for breach of licence conditions and not as an offence of fishing without licence. I find therefore that the defendant was charged with the wrong offence or none at all."

In my judgment the learned Magistrate was in error in interpreting s 55 in this way. It is true that the heading or head - note "**FISHING WITHOUT A LICENCE, ETC**", would lend to the view that s 55 was concerned with the offence of fishing without a licence. But the head - note itself is not confined to 'fishing without a licence' because it also contains the word 'ETC'. In any event the head - note does not form part of the section by virtue of s 26(3) of the Interpretation Act, namely that 'the headings or head - notes to the various sections of a statutory provision do not form part of the provision'.

Section 55 of the Act clearly creates two general kinds of offences; that is, fishing without a licence and fishing in breach of a licence. The first offence is committed where a person either on his own account or through the medium of other persons engages in, or causes or permits or uses a boat to engage in fishing or a related activity for which a licence is required under the Act, but for which that person or medium of persons is not licensed under the Act. The second offence created is committed where a person either on his own account or through the medium of other persons, engages in, or causes or permits or uses a boat to engage in fishing or a related activity for which a licence is required under the Act, but does not fish or engage in a related activity in accordance with the Terms of the licence.

The section is quite clear in its terms, that it is an offence to fish where a licence is required under the Act and it is an offence to fish where a licence is required "except under and in accordance with a licence granted under this Act".

In this case the informations alleged that the defendants were in fact licensed to fish in P.N.G. fisheries waters but that they did not fish in accordance with the terms of the licence. The intention of the Act is, inter alia, to regulate, protect, manage and control the fishing industry in Papua New Guinea and the fisheries resources are to be developed in accordance with the licensing guidelines and the management principles and objectives of the Act. The regulation and control of all forms of fishing activities ensures that all boats engaged in fishing must be licensed under the Act. The regulation and control of fishing activities includes fishing whilst licensed to do so but in breach of the licensing conditions. Section 55 of the Act creates the offence of fishing in breach of the conditions of a licence.

For all of these reasons I am satisfied that the District court was in error in its finding that the Fisheries Act did not create an offence of fishing in breach of licensing conditions.

The appeal is upheld and the matter is remitted to the District Court for hearing before another Magistrate.

Lawyer for the Appellant: *Department of Attorney-General*

Lawyer for the Appellant: *A.C. Corren & Co., Lawyers*