

MUELLER V VIGILANTE

Supreme Court of Western Australia (McKechnie J)
1 November 2007
[2007] WASC 259

Criminal law – totally protected fish under s 45, *Fish Resources Management Act 1994* (WA) – claim of right – right to fish under s 211, *Native Title Act 1993* (Cth) – whether right to possess crabs is a right in respect of property under s 22, *Criminal Code* (WA) – whether non-Aboriginal person can rely on claim of right of Aboriginal persons

Facts:

On 30 July 2006, the respondent, who is not of Aboriginal descent, organised to go fishing in his boat with several people, including two Aboriginal boys. A number of crabs classified as 'totally protected fish' under s 45 of the *Fish Resources Management Act 1994* (WA) were caught and stored on the boat the respondent and the boys were fishing in. The crabs were discovered by Fisheries Officers when the boat returned to the harbour. Under s 46 of the Act, a person must not have in their possession any totally protected fish. However, s 211 of the *Native Title Act 1993* (Cth) ('NTA') provides that the law does not prohibit or restrict native title holders from carrying on particular classes of activity, including fishing, done in the exercise or enjoyment of native title rights and interests. Furthermore, under s 22 of the *Criminal Code* (WA), a person is not criminally responsible for an offence relating to property if the person acted with respect to any property in the exercise of an honest claim of right.

Three issues arose in this appeal: firstly, whether a claim for the right to possess the crabs is part of a traditional right within the meaning of s 211 of the NTA; secondly, and subsidiarily, whether the right to possess crabs is a right in respect of property under s 22 of the *Criminal Code* (WA); and thirdly, whether the respondent, who is not Aboriginal, may take the benefit of the claim of right.

Held, dismissing the appeal:

1. The Aboriginal boys are entitled to mount a claim of right to possess fish under s 211 of the NTA: [13].

2. In asserting a claim of right under s 211 of the NTA, Aboriginal persons do not have an unfettered immunity from s 46 of the *Fish Resources Management Act 1994* (WA). The exercise of the right must satisfy personal, domestic, or non-commercial needs and be done in exercise or enjoyment of native title rights or interests. Furthermore, it is necessary for an Aboriginal person claiming the right to in fact assert the right: [14]; *Wilkes v Johnson* [1999] WASC 74 cited.

3. Traditional rights coming under s 211 of the NTA are not created by that Act but rather existed before it. The NTA preserves traditional rights in some circumstances and does not diminish those rights; and, in the circumstances specified in s 211, it removes Commonwealth and State prohibitions in the exercise of those rights: [14]; *Wilkes v Johnson* [1999] WASC 74 cited.

4. Possession of the crabs by an Aboriginal person in the facts of this case constitutes a claim of right in respect of property: [26]; *Walden v Hensler* (1987) 163 CLR 561 distinguished, *Molina v Zaknich* 24 WAR 562 cited, *Stevenson v Yasso* (2006) 2 Qd R 150 considered.

5. Section 22 of the *Criminal Code* (WA) may apply in circumstances where the claimant is acting pursuant to a claim of right held by another person. In the present case, the Aboriginal boys had a claim of right to possess the crabs and were entitled to possession. The respondent's possession of the crabs was in exercise of an honestly held belief in the Aboriginal boys' right or entitlement to fish for the crabs, and was an incident of the Aboriginal boys' possession: [43]–[45]; *R v Boden* (1844) 174 ER 863 cited, *R v Skivington* (1968) 1

QB 166 cited, *Anderson v Nystrom* (1941) St R Qd 56 cited, *R v Pollard* (1962) QWN 13 cited, *Olsen v Grain Sorgham Marketing Board; Ex parte Olsen* (1962) Qd R 580 cited, *Walsh v The Queen* (1984) 2 Qd R 407 cited, *R v Waine* [2005] QCA 312 cited, *R v Jeffery & Daley* [2002] QCA 429 cited.