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IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

M42/84

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BETWEEN THE MINISTRY OF AGRICULTURE

Appellant

AND P. FOWLIE & W. SHERMAN

Respondents

Hearing: 31 July 1984

Counsel: Mr P.I. Treston for Appellant
Mr B.M. Kain for Respondent

Judgment: 31 July 1984

ORAL JUDGMENT OF HILLYER J

This is an appeal by way of case stated against a decision of District Court Judge Paul given in the District Court at Dargaville on 26 May 1983.

The learned District Court Judge dismissed two informations in which it was alleged that the respondents, William Sherman Jnr and Paul Fowlie, on 31 July 1982 at Mahuta Beach, Dargaville, being one of an association of three persons, without lawful excuse possessed more than 450 tuatua. This was said to be a breach of regulation 106 K of the Fisheries General Regulations 1950.

The relevant portions of that regulation provide :-

> "106 K (2) No association of persons shall on any one day without lawful excuse (of which the proof shall lie on them) take, bring ashore, convey by any means whatsoever ... or in any way possess more than the number of each species of shellfish specified in the following table..."

And the table provides that for an association of three people the maximum number of tuatua shall be 450.

On the day in question a Mr David Raymond Welsh, an honorary

fisheries officer at Dargaville was at the Mahuta Gap at about 2 pm. He saw three people in the tide picking tuatuas. One he recognised as a commercial digger. Another one he recognised through his binoculars as Mr Fowlie; he did not recognise the third at the time. He stood for about 5 minutes observing them and then decided to move off. As he was doing so, he saw two of the pickers pick up their bags out of the water and move slowly towards the edge of the water. As soon as they got out of the water they ran to their Landrover, got in and left. There had been a little boy playing in the sandhills. When the two pickers got out of the water the child ran to the Landrover and got in with them.

Apparently on the principle that the wicked flee when no man pursueth, the fisheries officer decided there was something suspicious in the way they left, so he turned round and gave chase. He caught up with the Landrover and asked the occupants to stop, which they did. There were three persons in the vehicle, the two respondents, Fowlie and Sherman and the little boy. On inspecting the contents of the vehicle with the permission of the respondents, the officer found a large number of tuatua, such that after giving a generous 150 to each of the respondents and 150 for the boy, the remaining tuatua numbered 950. The explanation given by the respondents was that they were getting them for their golf club. This explanation did not appeal to the fisheries officer who gave it as his opinion that it would not matter if they were getting them for the NZ Rugby Union, they would still have to have a permit which they did not have. Mr Sherman then indicated that he had never been picked up for excess tuatua, and it was a known thing that everybody took more than their quota.

On behalf of the defendants when the matter came before the learned District Court Judge, it was submitted that they should have been charged with being one of an association of four persons. The commercial digger had been associated.

On behalf of the informant it was submitted that there was no evidence that the two defendants were in association with the commercial fisherman. The learned District Court Judge determined, he says, that the actual position of the three persons digging in the sea was somewhat imprecise and that the distance varied between the persons from 100 yds down to about 7 yds. He said he determined that what must be regarded as an association of four persons was at that location at all times under observation by the fisheries officer. He held that in those circumstances it would be dangerous to enter a conviction in respect of the alleged offences, and he did not consider such conviction could possibly survive if appealed. Accordingly he found that there was no case to answer and dismissed the informations.

The question for the opinion of the Court was whether his decision was erroneous in law as follows :

> "Was I correct in my determination,in finding for a charge of possession of an excessive number of tuatua the time for determining the number of persons in association under regulation 196 K (2) of The Fisheries General Regulations, 1950, was when the picking took place rather than later when the persons were actually apprehended in their vehicle away from the picking area?"

The word "association" is not defined in the regulations, but I am advised by counsel that the Oxford Dictionary defines it as being "An organised body of persons for a joint purpose." At no stage was it suggested that the commercial fisherman was part of an organised body comprising himself and the two respondents, nor was it suggested - nor could it be suggested in my view on the evidence - that they had a joint purpose. They both certainly had the same purpose, they were both picking tuatua, but that does not amount to a joint purpose.

At the time they were in the water it may well have been that there was no association between any one of the three.

They might all have been separately engaged in the same activity. The fact that one person is doing the same thing as another in the same place does not necessarily mean that that person is doing it in association with the other person.

In discussion with counsel I put for example, the possibility that I might go to the pictures tonight. That did not mean that I would be in association with the others who were at the picture theatre, even though I was doing the same thing. The question of whether two or more persons are an organised body of persons for a joint purpose is a matter which has to be determined at the particular time at which they are alleged to be an association. In this case an association was alleged by the prosecution to be the two respondents and the little boy. In terms of regulation 106K(2) the two respondents and the little boy were an association of persons who on any one day without lawful excuse ... conveyed by means of their vehicle more than 450 tuatua.

It was when the respondents were in the motor vehicle that they could be guilty of the offence charged. At that time they were conveying or possessing, in the words of the regulation, more than 450 tuatua.

The learned District Court Judge therefore in my view was not correct in his determination in finding for the charge of possession that the time for determining the number of persons was when the picking took place rather than later when they were apprehended in their vehicle. It may be that if it had been established that at the time the respondents were in the water they were engaged in a joint enterprise with the commercial fisherman and with their little boy in collecting tuatua, the fact that later there were only three of them in the vehicle would not mean that they were not still part of an association of four people. There is no evidence that when they were in the vehicle there was any connection then, or indeed at any other time between them and the other person

who remained in the water. As far as the evidence goes he appeared to be a completely independent picker.

The question is answered therefore that the decision was erroneous in point of law and the informations are remitted back to the District Court Judge to be further dealt with in accordance with this ruling.

At the request of both counsel in light of the determination, I direct that the hearing continue in Whangarei rather than Dargaville, because I am told sittings are infrequent in Dargaville, and the matter would be disposed of more rapidly here.

P.G. Hillyer J

Solicitors

Marsden Wood Inskip & Smith for Appellant
Webb Ross & Co for Respondents.