IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.141/84

BETWEEN RONALD LINDSAY CAMERON
of Coromandel, Fisherman

Appellant

A N D MINISTRY OF AGRICULTURE AND FISHERIES

Respondent

AND

M.142/84

BETWEEN RAYMOND NEIL STRONGMAN
of Coromandel, Skipper

Appellant

A N D MINISTRY OF AGRICULTURE AND FISHERIES

Respondent

Hearing: 17 July 1984

Counsel: C.M. Earl for Appellants
R.G. Douch for Respondent

Judgment: 2 - 8 - 84

JUDGMENT OF GALLEN J.

The appellants faced charges under the provisions of the Fisheries (General) Regulations 1950. Those Regulations have been subsequently repealed but that has no bearing on the present appeal. Two of the charges related to the use of a Danish seine net. Those were dismissed by the learned District Court Judge. The remaining charges were based on the provisions of Regs.16 and 114 of the Regulations which are in the

following terms:-

> "16. (1) No person shall pull or haul any drag net or any rope or warp attached to, or used with, any such net by any method other than by pulling or hauling by hand.
>
> (2) No person shall use any fish scaring device in the vicinity of, or with, any drag net."

> "114.(1) Subject to the provisions of the Fisheries Act 1908 and of these regulations, every person commits an offence who, without lawful justification (of which the proof shall be on him), does any act in contravention of any provision of these regulations or fails to comply with any such provision......"

The charges arose out of incidents which were alleged to have occurred on 23 March 1983. On that occasion, two Fisheries Officers observed the appellants over a period and eventually confronted them on the shore. The learned District Court Judge substantially accepted the evidence which was given by the Fisheries Officers and accordingly made a number of findings of fact, as a result of which he entered convictions against the appellants. His findings of fact and his conclusions as to credibility are not in issue on this appeal which is concerned solely with a small but difficult and important point. The charges are in the following terms:-

> "Ronald Lindsay CAMERON (within the space of twelve months last past, namely) on 23rd day of March 1983 at Sandspit Channel Pakihi Island did commit an offence against Regulation 16 and 114 of the Fisheries (General) Regulations 1950 in that he without lawful justification (of which the proof shall be on him) contravened a provision of the Fisheries (General) Regulations 1950 in that he did pull or haul a rope attached to a drag net by a method other than by pulling or hauling by hand namely by towing the rope attached to the dragnet on the vessel "Coral C" and by using a winch on board the vessel "Coral C"."

> "Raymond Neil STRONGMAN (within the space of twelve months last past, namely) on 23rd day of March 1983 at Sandspit Channel Pakihi Island did commit an offence against Regulation 16 and 114 of the Fisheries (General) Regulations 1950 in that he without lawful justification (of which proof shall be on him) contravened a provision of the Fisheries (General) Regulations 1950 in that he did pull or haul a rope attached to a drag net by a method other than by pulling or hauling by hand namely by towing the rope attached to the dragnet on the vessel "Coral C" and by using a winch on board the vessel "Coral C"."

For the prosecution to succeed, it was necessary to establish that the appellants had pulled or hauled a "drag net". The term "drag net" is defined in the Regulations in the following terms:-

> "'Drag net' means any net which is operated by being drawn over the bed of any waters or through any waters; and includes a beach seine net; but does not include a trawl net, purse seine net, Danish seine net, hoop net, drift net, ring net, or lampara net."

While the evidence is clear and there were findings of fact as to what the appellants were doing when observed by the Fisheries Officer, there was no evidence as to the nature of the net which was used. The appellants say that following the wording of the definition, it is not sufficient for the prosecution to establish the nature of the net by reference to the means of operation. It must exclude the possibility that the net used was one of those specifically excluded from the definition.

The respondent on the other hand, says that all that is necessary for the prosecution to do is to prove that a net

was used and that by the method of operation, it came within the general definition of "drag net". The respondent contends that if the appellants wished to escape responsibility, the onus was on them to establish that the net used was one of those excluded from the definition.

The resolution of this matter therefore, depends entirely on determining upon whom the burden of proof lies. If it lay on the prosecution, then it has not been discharged and the appellant is entitled to succeed. If the onus of proof lay on the appellants or even if the onus was an evidentiary one only, then it has not been discharged and the appeal should be dismissed.

The history of provisos and exceptions in the criminal law was considered in detail by Sir Francis Adams in his material entitled "Criminal Onus and Exculpations". He draws attention to the clear distinction between a proviso on the one hand and on the other, the circumstances which in the body of the Act make up the offence. Common law, at least in respect of summary offences, has been varied by Statute. The relevant provision in New Zealand is s.67 (8) of the Summary Proceedings Act 1957 which is in the following terms:-

> "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant."

The Australian equivalent of that section was considered in the case of Barritt v. Baker 1948 V.L.R. 491. In that case, Fullagar J. drew a distinction between the proof of any fact which is an essential element in the specification of the prohibited act and a general prohibition subject to an exception. In the first case, he held that the obligation lay on the prosecution to prove every ingredient of the offence and in the second, the person charged had an obligation to bring himself within the exemption. The decision has been criticised on the basis that it involves a determination which depends upon form rather than substance. This particular criticism was raised in the case itself and dealt with forcibly by the learned Judge. The decision was approved and followed by the High Court of Australia in Dowling v. Bowie (1952) 86 C.L.R. 136 and there is now little doubt that this approach represents the accepted view in Australia. The case involved allegations of betting in a street. The term "street" was widely defined, but specifically excluded a racecourse which was separately defined. The prosecution did not prove that the area where the incidents occurred was not a racecourse and it was accordingly held that an essential ingredient of the charge had not been made out. Sir Francis Adams in the work already referred to, considered that the decision in Barritt v. Baker was erroneous and should not be followed in New Zealand. He did so substantially because he considered that if the definition of the term "street" had been put in in full, then it would have been clear that the racecourse

reference was an exception and the onus should have been on the person charged to establish that he came within the exception. Whether that view is accepted or not, there is still a distinction between an exception as such and an exception which is descriptive as part of the definition.

The most recent decision in New Zealand is the decision of Barker J. in McFarlane Laboratories Limited v. Department of Health (1978) 1 N.Z.L.R. 861. In that case, Barker J. was dealing with a prosecution brought under the provisions of s.33 (1) of the Food and Drug Act 1969. That section applied to packages which had not since purchase been opened by the person selling it. There being no proof that the package was in the condition required by the section, Barker J. considered that the prosecution failed. He stated that the analysis of Fullagar J. in Barritt v. Baker was helpful and pointed out that it had been approved by the High Court of Australia in Dowling v. Bowie. Effectively he followed that case. With all due respect to the view expressed by Sir Francis Adams, I prefer that adopted by Barker J..

The prosecution is obliged to prove the elements of the offence which is charged. In Barritt's case, one of those elements was that the actions took place on a street. The Legislature may choose to define such a term in any way which seems appropriate to it. This may equate with the popular meaning or it may not; it may define it by description; by inclusion or by exclusion. In any case, a "street" could

have been defined by location, dimension or description. The Legislature chose to do it, inter alia, by reference to an exclusion. For the purposes of the prosecution, it was necessary to establish that the action occurred in a "street" as that term was contemplated by the Legislature.

The starting point in what is effectively a matter of statutory interpretation is the wording of the provision under consideration. An exemption or a proviso is frequently recognisable from the language used, one example being the use of the word "unless", see the discussion in Nimmo v. Alexander Cowan and Sons Limited 1968 A.C. 107. In this case, there are no terms which would normally be appropriate for an exemption and indeed, the form of the provision concerned equates much more closely to that which was considered in Barritt v. Baker, to involve the specification of essential elements of the charge. The substance of the enactment is also to be considered. In this case, the Regulation is clearly designed to ensure that certain fishing equipment is not used in a particular way. There are two essential elements - the method of fishing and the device used. In my view, it would be straining language to consider the prohibited conduct as being primarily the method of fishing. The device used is from the definition, of significance. It is not enough for the prosecution to have shown that a net was operated or that it was drawn over the bed of the waters. The net might have been one of those devices which were excluded from the definition, which therefore it

might not have been unlawful to pull or haul other than by hand.

The situation is not one of those where conduct is prohibited generally, but a particular characteristic or qualification of the offender may provide an excuse and where at least an evidentiary onus might rest upon the person charged because of the practical consideration that he is in the best position to provide information which deals with his own specific situation, see Turner (1816) 5 M and S 206.

Reg.114 of the Fisheries (General) Regulations 1950 places an onus of proof upon defendants in cases where they seek to establish lawful justification for the act under consideration. This merely raises the same problem in a slightly different guise, but it reinforces my conclusion because this does not seem to me to be a case where the appellants are seeking a special justification, but saying in effect that there is no proof that they carried out conduct for which justification might be required.

In my view then, the offence contemplates a method of fishing using a particular device. That device is defined partly by excluding certain similar devices which might be used in a similar way. Both aspects are essential elements of the charge and the onus of proof was therefore on the Crown to establish them.

In the absence of any sufficient evidence to establish the nature of the device which was used and bring it within the definition, the prosecution could not in my view succeed. The learned District Court Judge was satisfied as to the actions which took place. It does not appear from the decision as though he was requested to determine the nature of the device used and there is nothing on the notes of evidence produced to me which would justify a conclusion that it came within the definition.

Accordingly, the appeal must be allowed. Having regard to the circumstances, there will be no order for costs.

Solicitors for Appellants: Messrs McCaw, Lewis, Chapman, Hamilton

Solicitor for Respondent: Crown Solicitor, Hamilton