IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP.306/93

94/435

BETWEEN ADRIAN PHILLIP ASTON

Appellant

A N D MINISTRY OF AGRICULTURE AND FISHERIES

Respondent

Hearing: 16 and 17 March 1994

Counsel: J.R. Parker for Appellant
G. Burston for Respondent

Judgment: 30 March 1994

JUDGMENT OF GALLEN J.

This is an appeal against sentence in respect of various charges brought under the provisions of the Fisheries Act 1983. The appellant pleaded guilty in the District Court at Wellington to 36 charges under the Act, on a prosecution which followed a complex surveillance investigation conducted by the Ministry of Agriculture and Fisheries (referred to as "MAF") known as "Operation Roundup". Those offences included 18 offences of taking fish other than under the authority of quota, 14 offences of making false statements in a catch effort and landing return and 4 offences of failing to supply a catch effort and landing return. In some cases the entire landing of fish was sold for cash and no catch effort and landing return returns were completed. In other cases, particular species of fish were sold for cash and omitted from the

catch effort and landing returns which were completed. On some occasions, fish were misdeclared as to the area from which they were taken. On other occasions the species of fish caught was misdeclared.

There is a dispute between counsel as to the quantity of fish, the subject of the charges. It was contended for MAF, that the total weight of fish was in the vicinity of 127 tonnes. For the appellant it was contended that the weight was 103 tonnes. The difference depended upon a contention that the varying nature of the charges meant there was a certain doubling up in the MAF calculation as to total fish. It is unnecessary for the purposes of the appeal for me to resolve this aspect of the matter. I am prepared to proceed on the basis that however it is looked at, the quantities of fish were substantial. There is no disagreement between the appellant and the respondent as to the value, which was agreed at $159,939.66.

I am informed that as a result of an error, the sentencing Judge was led to believe that 16 of the charges carried a maximum fine of $10,000 and on each of those charges, the appellant was fined $2,000 with Court costs of $95. In actual fact, the true maximum was $250,000. For the purposes of the appeal, Mr Burston for the Ministry conceded that nothing turned on the fact that the sentencing Judge had proceeded on a maximum substantially lower than that provided by the Act and no argument was directed to me on this aspect of the matter. On the remaining 20 charges, it was accepted that the maximum penalty was $250,000 and on each of those charges, the appellant was fined $8,000 with Court costs of $95. On one information the appellant was ordered to pay solicitor's fees of $5,000. Taken together, the total amount of fines, costs and solicitor's fees imposed was $200,420.

It is contended for the appellant that the sentence imposed is manifestly excessive and that the approach of the Judge to sentencing is flawed in principle.

The principles which apply to sentencing in cases of this kind were analysed and set out in some detail by Fisher J. in the case of *Ministry of Agriculture and Fisheries v. Lima* (Auckland Registry, AP.146/93, judgment delivered 26 August 1993). The comments made

in that case were accepted by a Full Court in the case of *Ministry of Agriculture and Fisheries v. Equal Enterprise Limited and Others* (Wellington Registry, AP.232/93, judgment delivered 21 February 1994). Fisher J. drew attention first to the seriousness of the offending affecting as it does significant National assets. Secondly, to the Legislative messages conveyed by the very substantial increases in maximum fines. Thirdly, to a contention that deterrence is the dominant consideration and fourthly, when a commercial context is involved, financial penalties must be set at a level which will make the offending patently uneconomic. He also referred to five aggravating features (p.8):-

> "(a) A high degree of commercialism, as distinct from amateurish or part-time activity.
>
> (b) The involvement of substantial quantities of fish.
>
> (c) The making of substantial profits.
>
> (d) A long-standing, settled pattern of conduct, as distinct from isolated incidents.
>
> (e) Knowledge by the offender that an offence was being committed, especially if accompanied by deliberate attempts at concealment."

All are present in this case. The only one about which there was any degree of discussion was that which related to whether or not substantial profits were involved.

Mr Parker for the appellant submitted that it was unreasonable to take the value of the fish as indicating the profit. From this it is necessary to deduct expenses, wages and running costs, none of which were before me. I agree that it would be unrealistic to assess the profit at the value of the fish, but I also in the circumstances of this case, proceed on the basis that having regard to the context the enterprise was sufficiently attractive in terms of profit to make it worth the appellant's while to engage in it and to that extent at least, the profit may be regarded as substantial.

The first point upon which Mr Parker placed real reliance was an allegation that in approaching the levels of sentence which he considered appropriate, the Judge is said to have adopted an arbitrary and mechanical standard and one which was disapproved by the Full Court in the *Equal Enterprise case*. The basis for this submission comes from the fact that the Judge indicated during the course of his remarks on sentencing, that an appropriate starting point was a figure represented by three times the value of the fish. Counsel contended that this was the very kind of mechanical approach which was condemned in the *Equal Enterprise case* and in that decision this case was cited as an example of an approach not accepted by the Court in its discussion of the approach to sentencing.

I agree of course that in sentencing for offences of this kind as indeed for most, arriving at a sentence which may be regarded overall as appropriate, depends upon a careful balancing of a large number of factors and that generally speaking some mechanical and mathematical approach will be inappropriate because it cannot take into account the necessary balancing aspects of the various relevant factors. When the Judge's decision in this case is looked at in detail however, I think it is an over-statement to say that he approached the matter on an arbitrary or mechanical basis and in any event, this was not the ultimate way in which he arrived at the sentence under appeal. The comment appeared in the context of a discussion as to the profit which the offender might be said to have obtained by the activities the subject of the charges. This was one of the factors enunciated by Fisher J. in the *Lima case* (supra) and it was clearly appropriate that the Judge should take it into account. As he says, he did not have figures which revealed the amount of profit, but concluded it was not unreasonable to consider this as bearing some relation to the turnover. He noted that the total of fines was likely to be greater than the value of the fish taken and that it could even be a multiple of 2-4 times the value of the fish. Clearly enough that indicates that a consideration of the relevant factors may lead to differing results. Put another way, it was necessary to ensure that the fines were such that they could not be regarded as merely an acceptable risk or a kind of licence fee for breaking the law.

Having arrived at a figure of $450,000 which represented approximately 3 times the value of the fish taken, the Judge then tested this by reference to the aggravating features of the case and the maximum fines contemplated by the Act itself. In this regard it may be noted in passing that the maximum fines themselves are arbitrary, not being fixed in relation to any other factors at all, other than the clear intention to provide a considerable degree of deterrence.

I accept that there is an element of mechanical assessment involved in what he said, but when that is considered in context, the Judge tested it in relation to factors which were important and I do not think that the isolated comment as to a multiple of the value of the fish would have been sufficient to justify interfering with his decision. In context the Judge was endeavouring to ensure that no element of profit remained and he did this by considering the value of the fish as a starting point. Further, the Judge in fact did not in the end arrive at the sentences imposed on this basis. He looked at the sentences imposed on other offenders charged in the same operation and considered that when those fines were taken into account, a calculation based on three times the value of the fish would have been out of line. He clearly put therefore a greater emphasis on consistency than any mechanical computation. I do not think that the first contention put forward in support of the appeal justifies interfering with the conclusion at which the Judge arrived.

Secondly it is contended that the Judge was wrong in not taking into account the forfeitures which had occurred as a result of the offending. Property with a value of $235,000 was forfeited in this case as a result of the application of the appropriate sections of the statute. The Judge said that the forfeitures which followed conviction were not to be taken into account when fixing the fine, but noted that they would to some extent offset MAF's costs incurred to the stage of the proceedings where sentence was imposed. It is contended by counsel that this approach was wrong and is sufficient of itself to justify allowing the appeal.

There has been some dispute as to the extent to which forfeiture under this Act may properly be taken into account in

considering the penalties which are ultimately imposed. S.107C (4) of the Fisheries Act 1983 is in the following terms:-

> "Any further forfeiture directed or redemption payment imposed pursuant to this section shall be in addition to, and not in substitution for, any other penalty that may be imposed by the Court or by this Act."

An immediate reading of this sub-section would suggest that a sentencing Judge is not entitled to regard a forfeiture as part of the penalty. In *Ministry of Agriculture and Fisheries v. Sutherland* (Invercargill Registry, AP.36/88, judgment delivered 2 August 1988), Tipping J. took the view that the effect of the sub-section was that he should not take into account forfeiture of a vessel in that case when considering the appropriate fines to be imposed. He noted that the Minister could no doubt take that into account when looking at the overall effect. Fraser J. in *MacDuff v. Ministry of Agriculture and Fisheries* (Invercargill Registry, AP.52/90, judgment delivered 10 December 1990), referred to the decision of Tipping J. in *Sutherland's case* and indicated that he did not differ from the view expressed by Tipping J. in principle but in the particular case said:-

> ".....it is difficult at least in this particular case to adequately consider the means and responsibilities of the offender and take them into account in fixing a fine without having regard to the fact that the undersized crayfish tails seized by the Ministry had been paid for by the factory and the appellant has a liability of $1,300 in respect thereof, and the vessel and equipment from which he makes his living are forfeit to the Crown. He will be left with a liability equivalent to the whole of the purchase price. He will either have no vessel with which he can carry on his former business and be unemployed or he will have to raise whatever money is required by the Minister by way of redemption fee to enable him to get it back and resume his fishing operation. What the amount of that redemption fee will be is unknown."

Those decisions were referred to by the Full Court in the *Equal Enterprise case* and at p.19 of that decision, the Judges stated that they agreed with the approach of Fraser J.. The Judges in that case went on to refer to a submission made on behalf of the Crown that the

Judge was not permitted to take into account the question of forfeiture when setting the level of fines, but the Judge might consider the fact of forfeiture and have regard to its effects on the means of the defendant to pay any fine. The decision does not contain any immediate comment upon that submission, but goes on to consider the decision in *R. v. Hoar and Noble* [1981] 34 ALR 357, a judgment of the Federal Court of Australia which went on to the High Court where it was reported in [1981] 148 CLR 32. In the Federal Court, Muirhead J. said (at p.367):-

> "The sentencing discretion is a wide one in which the situation of the accused himself must always be relevant. It would be wrong, in my view, for a judge deciding an appropriate sentence to put out of his mind that the prisoner had by seizure or a concurrent forfeiture order been deprived of substantial property or means of legitimately earning his living by utilization of his equipment and plant."

In the High Court of Australia at p.39 it is stated:-

> "Had forfeiture been authorized by the Act, the Chief Justice would have been entitled to take its impact on Hoar into account in assessing the penalty to be imposed on him, despite the provision under s.48 (2) that forfeiture 'shall be in addition to and not a part of a penalty'."

Mr Parker submitted that the Judges in the Full Court in the *Equal Enterprise case*, accepted as a matter of principle that in assessing the level of penalty, the impact of forfeiture could be taken into account and that this went beyond the conclusion of Fraser J. in *MacDuff's case*. The final conclusion of the Full Court in the *Equal Enterprise case* is not wholly clear. On the one hand the Court accepted the approach which Fraser J. had adopted in *MacDuff's case*, but it could be contended that when the references in *R. v. Hoar* (supra) are taken into account, the Court went rather further.

It should not be overlooked that the *Equal Enterprise case* was in fact an appeal by MAF suggesting that the fines imposed in that case were inadequate. In the *Equal Enterprise case*, property had been

forfeited under the provisions of the Act, with the value of some $5m. and by the time the appeal was heard, it was known that the Minister in exercising the discretion reposed in him with respect to such forfeitures, had determined not to make any concessions in respect of this. The Full Court noted as a result of the convictions, the respondents had not only been fined, but had lost their livelihood as well as very substantial assets and took this into account in considering the adequacy or otherwise of the fines which were imposed.

I should have thought that the statutory pattern required a sentencing Judge first to ascertain what is an appropriate penalty taking into account all the relevant factors and proceeding on the basis that any forfeiture or any equivalent consequence of the offending is not to be seen as a part of the penalty. There is a logic in that approach because the Minister has a discretion with regard to forfeiture and at the time of sentencing, decisions with respect to the actual consequences of forfeiture will be unlikely to have been made. The Minister however when he comes to exercise the discretion reposed in him, will be aware of the penalties imposed by the Court and in a position to take that into account in considering to what extent the forfeiture provisions should be insisted upon.

Having arrived at a preliminary conclusion as to the appropriate levels of penalties which reflect the seriousness of the offences under consideration, the Judge must take into account the provisions of s.27 of the Criminal Justice Act, which require a Judge fixing a fine to take into account the means of the offender and his or her ability to pay. In that context, the comments of the Full Court in the *Equal Enterprise case* which relate to loss of livelihood as well as very substantial assets, provide an illustration of an appropriate approach. That seems to me to be in accord with the approach adopted by Fraser J. in *MacDuff's case* and accepted by the Full Court in the *Equal Enterprise case*.

That is the approach which Judge Gaskell used in *Ministry of Agriculture and Fisheries v. Saunders* (Wellington, DC CRN Nos.2091003831, judgment delivered 18.12.92) and it is not dissimilar from the approach which a Court will take where the number of offences

upon which fines may be imposed, may result in a reduction of individual fines from the level which would otherwise have been considered appropriate.

Counsel contends that in this case the Judge did not take into account the effect of forfeiture and this results in a fatal flaw in the sentencing process. There are a number of reasons why I do not think this is correct. The Judge did indicate that forfeitures were not to be taken into account in fixing the fine, but he went on to observe they to some extent offset the costs of the Ministry, which would suggest that he has taken the impact of forfeitures into account in respect of the order for the payment of costs, although this is not clear. More significantly however, he went on to say that the forfeitures had not had the effect of reducing the appellant's assets below the level required to meet reasonable fines commensurate with the seriousness of the offences. In coming to that conclusion, the Judge no doubt had in mind that he had before him an agreed statement of facts signed by counsel for both appellant and respondent, indicating that the appellant was in a position to meet the payment of "appropriate" fines. The Judge did not rely entirely upon this material in coming to his conclusion, but set out a schedule of the assets of the appellant and in addition he stated that the appellant's current fishing income was approximately $180,000 p.a. and that he earned $27-30,000 from a commercial building syndicate investment.

Mr Parker in connection with this aspect of the matter submitted first that the acceptance of ability was qualified by the use of the adjective "appropriate" in connection with fines and that the fines imposed in this case could not be considered as appropriate. That argument involves some assumptions as to appropriateness, that being the question the Court was required to determine looking at all the relevant factors. The Judge has in any event made an assessment himself of the ability of the appellant to pay.

In this Court, an affidavit as to the assets of the appellant was filed. The only substantial difference which this indicates from the figures before the sentencing Judge is that the $20,000 which the Judge understood was held by the appellant in a bank account and which was

so held at the time, has since been spent on tax liabilities. I do not think that this could be said to make very much difference.

Mr Parker also contended that the assets were all matrimonial property and that the interests of the appellant could not be regarded as exceeding one half. He contended that once the assets were considered in this light, then the fines exceeded the assets of the appellant as distinct from the joint matrimonial assets. The submissions with regard to this aspect of the matter were largely assertion. It is not clear that any assessment has been made for the purposes of the Matrimonial Property Act. It does not take into account income which the Judge did consider.

In any event, the Judge noted that a submission was before him that the appellant was not in a position to liquidate assets immediately and would require time to pay fines. He did not further pursue this aspect of the matter for the obvious reason that such a proposal would need negotiation with the appropriate authorities. Looked at all in all, I do not think that the Judge was wrong in the approach which he adopted to this matter.

Next Mr Parker submitted that the Judge had failed to take into account the role of an employee of the appellant a Mr Lines, who had acted as skipper of the vessel concerned on a much larger number of occasions than the appellant had himself and who had been granted immunity because of the assistance he provided to the prosecution. Mr Lines was acting under the control of the appellant. I do not think that in the circumstances any question of apportionment properly arose. There is no suggestion that Mr Lines' responsibility reduced that of the appellant and I do not think this submission is entitled to weight.

Finally there is the question of consistency. The Judge considered that the penalty imposed ought to be consistent with others which were imposed in similar circumstances and in particular, other persons who were charged in connection with the same operation. It was for this reason that he reduced the fines which he had initially considered appropriate, to the level which were ultimately imposed. There was a considerable amount of argument before me as to whether

or not there was consistency. Mr Burston for MAF, produced two charts which made comparisons between the various persons who had been prosecuted in connection with the investigation. On the whole I find these charts of somewhat limited value. The conclusions to which they lead, depend upon what comparisons are actually taken. Mr Burston contended that an appropriate comparison was the total cost of fines, costs and forfeiture in terms of dollars per fish taken and pointed out that on this basis, the appellant had received the lowest comparative penalty of $2.72 per dollar of fish taken, by comparison with $6.26 in the *Equal Enterprise case*. Mr Parker considered it more appropriate to compare the value of the fish taken with the fines and costs, leaving aside any question of the value of the forfeiture. There is a certain inconsistency in this approach bearing in mind the argument of the significance of the forfeiture, but leaving that aside for the moment I accept as Mr Parker said, that the quantity of fish taken in terms of value by *Equal Enterprise* was some 5-6 times that taken by the appellant, whereas the fine imposed was approximately three times that imposed on the appellant and he suggests that this is out of proportion.

Making a comparison on an individual charge basis is difficult, but I note that in the *Equal Enterprise case*, on the charges for which the maximum fine was $250,000, each defendant was convicted and fined $8,000. On those charges which the Judge believed carried a maximum penalty of $10,000, a fine of $1,000 was imposed. In the case of Mr Stephens, he was fined $1,000 on each of the charges for which there was thought to be a maximum penalty of $10,000 and on those with a maximum penalty of $250,000, he was convicted and fined $5,000. The differences in respect of the other cases are greater. I note however that in the case of *Saunders*, the Judge accepted that the level of offending was lower than that of the others and in the case of Stephens, the Judge had accepted there was a major difference in responsibilities. The appellant by comparison was fined $2,000 on each charge, which was believed to carry a maximum fine of $10,000 and $8,000 on each charge believed to carry a maximum fine of $250,000.

Making comparisons in cases of this kind will always impose difficulties. After giving the matter anxious consideration, it does not seem to me that there is a sufficient disparity to justify intervention.

Looked at overall then, I arrive at the conclusion that taken neither singly nor together, do the points made by Mr Parker for the appellant, justify intervention and the appeal will accordingly be dismissed.

12 JJ 12-1

Solicitors for Appellant: Messrs Oakley, Moran, Wellington

Solicitor for Respondent: Crown Solicitor, Wellington

FISHERIES
- QUOTA, CATCH OFFENCES
- MULTIPLE APPROACH TO FINES
- FORFEITURE

12 18/7

In ASTON v MINISTRY OF AGRICULTURE Wellington, AP 306/93; 30/3/1994), totalling over $200,000 for numerc Act 1983 (taking without quota, f involving fish to the value of $j marks by the DC that an appropri

569 — Fishing quota and statement offences — Appeal — Total pecuniary penalty $200,000 — Whether sentence manifestly excessive — Whether sentencing approach flawed in principle — Starting point related to value of catch — Whether approach was mechanical and arbitrary — Whether and how forfeiture to be taken into account — Fisheries Act 1983, s 107C(4) — Criminal Justice Act 1985, s 27 — The appellant pleaded guilty to 36 charges under the Fisheries Act, including taking fish other than under the authority of quota, making false statements in a catch effort and landing return, and failing to supply a catch effort and landing return. The substantial quantities of fish involved were worth $159,939. On 20 charges having a maximum penalty of $250,000 the appellant was fined $8,000. The total amount of fines, costs and solicitor's fees was $200,420. The appellant contended this was manifestly excessive and the DCJ's approach was flawed. Aggravating features listed in earlier cases were all present here. The appellant attacked the DCJ's statement that an appropriate starting point was a figure three times the value of the fish. Gallen J considered the DCJ had not approached the matter on an arbitrary or mechanical basis. It was necessary to ensure that the fines were such that they could not be regarded as merely an acceptable risk. The maximum fines themselves were arbitrary, not being fixed in relation to any other factors. The DCJ tested the figure in relation to other important factors. The appellant next criticised the DCJ's failure to take into account the

[illegible] sentencing. Gallen J examined cases on this issue. A sentencing Judge was to ascertain an appropriate penalty on the basis that forfeiture was not part of the penalty. Section 27 of the Criminal Justice Act then required a Judge fixing a fine to take into account the offender's means and ability to pay. In this context loss of livelihood and/or very substantial assets would be relevant. Gallen J held the DCJ's sentencing process here was not flawed. The DCJ had noted that the forfeitures had not reduced the appellant's assets below the level required to meet reasonable fines commensurate with the seriousness of the offence. Arguments relating to apportionment with an employee, and inconsistency, failed. The appeal was dismissed. *Aston v MAF* (High Court, Wellington AP 306/93, 30 March 1994, Gallen J). [12 pp]

the value of the fish taken did not amount to use of an arbitrary and mechanical approach to sentencing (of the kind disapproved of in *MAF v Equal Enterprises* 17 TCL 9/6) as in the context here the DC was ensuring the fines did not merely amount to a licence fee for law breaking, and (ii) the DC had not erred by not taking into account the effect of forfeiture ($235,000 of property) when setting the fine (on the material the DC had considered the impact of forfeiture). Overall, the HC held that there was not sufficient disparity between the fines here and in other cases to justify intervention. (12 pp)