IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2008-409-000063

GEORGIOS MANOLI AERAKIS
Appellant

v

THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES
Respondent

Hearing: 4 February 2009

Counsel: K W Clay for Appellant
T J Mackenzie for Respondent

Judgment: 9 February 2009

COSTS JUDGMENT OF FOGARTY J

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[1] Mr Aerakis applies for costs following a successful appeal against conviction of contravention of reg 4(a) of the Fisheries (South-East Area Commercial Fishing) Regulations 1986. He was convicted of using a trawl net in the waters of Pegasus Bay inside a straight line from Godley Head lighthouse (which is at the northern head of Lyttelton Harbour) to Beacon Rock (which is at the southern head of Port Levy).

[2] He had been observed by Fisheries officers fishing about the rocks at the head of Port Levy towing gear astern. They inferred he was using a trawl net. Contrary to normal practice he was not approached and so his gear was not

inspected. This was because he was observed as part of a wider observation of fishers which Fisheries officers did not want to have revealed.

[3] It is common ground that an essential element of the offence which required proof was that the gear being towed behind the boat was a trawl net as defined in reg 2. That included it being a net that:

> (b) Is weighted on the bottom edge;

None of the prosecution witnesses giving evidence could prove that the net used was in fact weighted on the bottom edge.

[4] However, the appellant had admitted in his Catch Effort and Landing Return that he was using a "*bottom trawl*" as distinct from a mid water trawl or mid water pair trawl net. This return was filed for the purposes of Fisheries (Reporting) Regulations (2001). The Judge then reasoned that although trawl net was not defined in these 2001 Regulation it had the same meaning as defined in the 1986 Regulation. Inferentially the Judge found that all the above types of trawl in the 2001 Regulations were weighted on the bottom edge. This was notwithstanding that the witnesses for the prosecution were not able to tell the Court whether the net was weighted on the bottom edge.

[5] This reasoning was rejected on appeal, for the principal reasoning that the Judge could not assume that the definitions of trawl net used in the 2001 Regulations were consistent with the definitions in the 1986 Regulations made some 15 years earlier. For these reasons I concluded that an essential element of the prosecution was not proved beyond reasonable doubt.

[6] I do not see a need in this judgment to set out any comprehensive analysis of the task entrusted to the Court when hearing an application for costs. I have set out my understanding of that task in the decision of *R v Connolly and Ors* High Court Auckland CRI 2004-004-000988 1 December 2005. I do not think any of the authorities cited to me are either inconsistent or materially change that analysis.

[7] In this case the principal criteria relied upon is Costs in Criminal Cases Act 1967 s 5(2)(b), (c), (d) and (e) which I set out:

> **5 Costs of successful defendant**
>
> …
>
> (2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—
>
> …
>
> (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:
>
> (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
>
> (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:
>
> (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:
>
> …

[8] In his argument for costs Mr Clay relied upon the failure of the Ministry to conduct a proper investigation into what was a key ingredient of the offence, namely, the characteristics of the gear being towed behind the boat and as to whether or not it was a trawl net. He drew attention to the following comments made by the District Court Judge about this failure. Judge Neave said at paragraph [18], [23] and [40]:

> [18] To establish the charge it must be proved beyond reasonable doubt that the defendant, Mr Aerakis:
>
> a) Is a commercial fisher;
>
> b) On the day in question he used a trawl net; and
>
> c) Was inside the area described in the introduction to this decision.
>
> This case suffered because insufficient attention was paid to the second of these basic propositions.
>
> …

[23] Of more difficulty is the fact that a trawl net is defined in the following way:

> "means any net or part of a net (including any warp, rope, chain, material, or devise [sic] used in conjunction with or attached to the net), that –
>
> a) has a buoyancy system on the top edge; and
>
> b) is weighted on the bottom edge; and
>
> c) is operated by being drawn over the bed of any waters or through any waters by one or more vessels under way – but does not include a Danish seine net."

It seems to me insufficient attention has been paid to this aspect of the charge but I will return to that issue later.

…

[42] The next issue (which ought to have been one of the most simple in the case) is the one that causes the greatest difficulty. As will be seen from the earlier recital, the prosecution has to prove that the fishing that occurred involved using a trawl net. A trawl net is defined in the Fisheries (South-East Area commercial Fishing) Regulations 1986 as set out earlier in the judgment. It seems to me the prosecution has simply failed to address its mind to this issue. I think it is significant that it was not even addressed in the prosecution's opening. For some reason although a trawl net is defined, trawling is not defined in the regulations, nor the fisheries Act 1996, nor the Fisheries Act 1983 which remains in force for some purposes. To some extent the definition of "trawl net" in the regulations refers to the method of operation required. The Shorter Oxford Dictionary describes "trawling" as:

> 1. To fish with a net the edge of which is dragged along the bottom of the sea to catch the fish living there, especially flatfish; to fish with a trawl net or in a trawler.
>
> 2. To drag a seine net behind and about a shoal of herring etc in order to drive, enclose and catch them.

It also refers to catching or taking with a trawl or trawl net, all of which is a little bit circular from a legal definition point of view. The main difficulty, to which the prosecution has failed to address its mind, is whether or not the only way in which a vessel may be trawling is by using a trawl net as defined in the regulations. The dictionary definition alone seems to confirm that that is not the case with its reference to a seine net which echoes one of the exclusions in the definition. Reference can also be had to the terms of the fishing permit. It may well be that the only way in New Zealand that vessels conduct trawling operations is with the type of net described in the regulations. However, I do not know that. No evidence was called on the point at all. None of the prosecution's witnesses directly addressed this question in their briefs. In cross-examination, Mr Griffiths addressed the issue at page 29 under questioning from counsel:

> "Q: You made no investigations about the nature of the net that was used did you?
>
> A: I noted that a net had come on board or been pulled up at the rear of the vessel.
>
> Q: You never obtained the net from the Elenai [sic] and examined it?
>
> A: No I didn't.
>
> Q: Don't know whether it had a buoyancy system on the top edge?
>
> A: No I don't.
>
> Q: You made no investigations as to whether it was weighted on the bottom edge did you?
>
> A: No I never sighted the net afterwards.
>
> Q: So you can't say whether this net was a Danish seine net either can you?
>
> A: The manner in which it was pulled on board, no it wasn't a Danish seine net from my experience.
>
> Q: You'd only had two years of experience. What's your experience of Danish seine nets?
>
> A: I know what one looks like and how they are hauled on board."

[9] Mr Clay also relied upon my comments in paragraph [11] of the judgment:

> [11] This appeal is allowed on the ground that the prosecution has not proved beyond a reasonable doubt that the appellant was using a trawl net as defined in the 1986 regulations. It is quite likely that the trawl net used was weighted on the bottom edge. It is another question as to whether or not that was proved beyond a reasonable doubt. This issue was described by the trial Judge as the most difficult part of the case. He said the prosecution seemed to be taken by surprise by the need to prove this element.

[10] Mr Clay submitted that these circumstances demonstrated a failure on the part of the prosecution to investigate the matter properly. He said it was a failure to investigate the key element of the offence when an aspect of that offence was given a specific statutory definition. This failure of the prosecution entitled the Court to make an order for costs.

[11] Although Mr Clay did naturally not dwell on the fact, the appellant as defendant put the Crown to the proof on this essential matter. The appellant did not give evidence.

[12] Mr Mackenzie argued that the applicant for costs needs to show that the conduct of the prosecution was at a standard something less than that that would be adopted by a reasonably prudent prosecutorial authority and that this would necessary be a difficult burden to surmount. He cited Hammond J in *Long v R* [1996] 1 NZLR 377, 381:

> It is true that s 5(2) specifically provides that the Court must consider the bona fides of a prosecuting authority in commencing a prosecution; but of course it will be a rare case where such can be challenged. Paragraphs (c) and (d) of s 5(2) do enable a Court to look at the police conduct of a prosecution. But obviously the test there is an objective one. The language used is "proper steps" and "in a reasonable and proper manner". By all the standard approaches to statutory construction that must mean something less than would be adopted by the reasonably prudent prosecutorial authority; and of course the burden of establishing such would rest on the applicant. It will necessarily be a difficult burden to surmount.

[13] Mr Mackenzie submitted that it was a reasonable inference by the officers observing Mr Aerakis that he was trawling and that they could be said to have been caught by surprise, indeed, ambushed, by being put to proof that the bottom edge of the net was weighted. In that regard he relied upon both sub-paragraphs (b), (d) and (e) of subs (2).

[14] Mr Mackenzie submitted that prior to the trial the defendant had flagged a couple of issues and pursued some discovery but significantly had not raised the question of whether or not the net being used was a trawl net.

[15] Mr Clay countered by saying that he had put the prosecution on notice by saying that he required all essential elements of the offence to be proved.

[16] The prosecution was criticised by Judge Neave with justification. He had to rescue it. It does not follow, however, in the particular circumstances that the successful appellant is entitled to costs. I think in context it can be fairly said that the appellant succeeded by putting the prosecution to proof on a technical detail which they had assumed would not require detailed proof. Second, the appellant did not alert the prosecution to the aspects of the definition of trawl net which they were going to seize upon and challenge as to proof. Had they done so, the case may either have been withdrawn or might have succeeded.

[17] If the former the appellant would have avoided significant costs and if the latter would not be entitled to costs.

[18] In my judgment this is not a case where costs should be awarded to the successful party. I do not think it would be reasonable to do so in the circumstances.

[19] The application is dismissed. Costs will lie as they fall.

Solicitors:
MDS Law, Christchurch, for Appellant (Counsel: K W Clay)
Raymond Donnelly & Co, Christchurch, for Respondent