Colless v Trenerry [2000] NTSC 9

PARTIES:	COLLESS, Steven
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 18/99
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE

Circumstantial evidence – inference – intermediate fact – onus of proof – standard of proof – log book entry – "greatest catch"

Fisheries Management Act 1991 (Cth), s 107

Shepherd v R (1990) 170 CLR 573, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr P Elliot
Respondent:	Ms T Van Gessel

Solicitors:

Appellant:	James Noonan
Respondent:	DPP (Cwth)

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Colless v Trenerry [2000] NTSC 9
No. JA 18/99

BETWEEN:

STEVEN COLLESS
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 10 March 2000)

[1] Appeal against conviction. On 5 March 1999 the appellant was convicted in the Court of Summary Jurisdiction sitting in Darwin, after trial, for that on 9 December 1996 he knowingly gave a return which was false in a material particular to the Australian Fisheries Management Authority, namely that he returned a page of a log book which contained false information in relation to which fishing ground he was at between 22 and 23 August 1996.

[2] The focus of the trial narrows down somewhat when it is understood that the appellant was the master of a prawn trawler operating in the Gulf of Carpentaria at the relevant time, and that trawling is permitted by law only between the hours of midnight and 8am and 6pm to midnight. It is not

suggested that the appellant infringed those restrictions. The return relates to the position at which the "greatest catch" was taken during the course of each of the days in question. In brief, prawn trawling is carried out by lowering nets from the trawler, pulling them through the water and then bringing them in and removing the catch. Such an operation is called a "shot". Depending upon circumstances, there may be a number of shots during any trawling period. It was suggested by a witness for the prosecution that there could be three, four, five or even more shots during such a period. The shot may thus extend over an extended period of time, and the accepted practice is to state the time falling in the middle of the period of the shot as being that at which the "greatest catch" was made.

[3] The return requires that the position at which the greatest catch was made be described by reference to latitude and longitude and the "Fishing Ground". The return in this case showed that on each of 22 and 23 August 1996 the greatest catch was made on the 22nd at latitude 15° 10', longitude 137° 10' and on 23rd at latitude 15° 10', longitude 137° 09'.

[4] The prosecution case was based on circumstantial evidence which, to succeed, must prove beyond reasonable doubt that the appellant was not at the position he recorded on the return at any time when trawling was permitted on each of those two days. There was no evidence to suggest that if he was there he could not have caught the quantity of prawns disclosed on the return at that point. As the case was presented, the complaint did not go to the description of the "Fishing Ground" said in the return to have been

"Vanderlin", but rather the description of latitude and longitude at the point at which the "greatest catch" was said to have been made. That point was to the north of a group of islands known as the Vanderlin Islands in the Gulf of Carpentaria. The prosecution case was that it should be concluded that the appellant could not have been at the point described at any relevant time because there was evidence to show that during the period in question he was elsewhere, namely, somewhat further to the north.

[5] The Court was required to apply the law relating to a prosecution based upon circumstantial evidence, and thus only find that the elements of the offence proved if guilt is not only a rational inference, but the only rational inference to be drawn from the proven circumstances. If an intermediate conclusion of fact is a necessary link in the chain of reasoning, then that fact should be identified and not used as a basis for a finding of guilt unless found beyond reasonable doubt. If there was any rational hypothesis consistent with innocence, then it was the duty of the court to acquit (*Shepherd v R* (1990) 170 CLR 573).

[6] The critical evidence, apart from the return itself, came from the mouth of the appellant, firstly in evidence he gave on behalf of his brother in a separate prosecution, and secondly what he told investigating police two days later. There were four periods of time to be considered by his Worship. The first between midnight and 8am on 22nd, the next between 6pm and midnight on that day, and during the same periods of time on

23 August. There was a chart in evidence showing the position of each of the features to which reference was made in the course of the evidence.

[7] The areas of interest were at the south west and tip of Groote Eylandt, a place marked as "Tasman Point", the Cumberlidge Reef, lying to the south of the southeastern end of Groote Eylandt, the point referred to in the return as the place of the "greatest catch" ("the Vanderlins") which was roughly south of Cumberlidge Reef at a distance of about 43 nautical miles. The distance between Tasman Point and the Vanderlins in a straight line is about 90 nautical miles according to the appellant. The distance from Tasman Point to Cumberlidge Reef was not given in evidence, but looking at the map it is less than the distance from Cumberlidge Reef to the Vanderlins. (The distances are approximate, but are sufficiently accurate to convey the relative positions of each area). When steaming and not trawling the vessel travels at about 11 knots per hour according to the appellant.

[8] There was no clear evidence as to where the appellant was located between midnight and 8am on 22 August, other than the return. That the "greatest catch" was not made during this period on 22 August at the Vanderlins cannot be excluded.

[9] As to the period from 6pm to midnight on 22 August, the appellant's evidence at his brother's trial was that "early on" on that evening he was working off Cumberlidge Reef and that at about 11pm he arrived at Tasman Point. He was referred to the return and acknowledged that the Vanderlins

and Tasman Point were not close, but affirmed that he was with his brother that night. He did concede that the log was not exactly right.

[10] Given the distances between those places and the speed of the vessel when steaming, it cannot be held that the vessel could not have travelled from the Vanderlins to Tasman Point via Cumberlidge Reef during the hours of the day when trawling was not permitted.

[11] As to the period from midnight to 8am on 23 August, the appellant's evidence at his brother's trial was that he was trawling in the Tasman Point area, that he moved behind the Point, a journey of one to one and a half hours to meet the barge which collected the catch and provided fuel. He said that he left there at about 3 or 4 o'clock in the afternoon and sailed to Cumberlidge Reef where he was the day before.

[12] For the period from 6pm till midnight on 23 August, there was no evidence given at the brother's trial. When interviewed by police two days afterwards the appellant maintained that he was in the position described in the return, "at a certain time" on the 23rd.

[13] Cross-examination directed to showing that there was inconsistency between the return and the appellant's evidence at his brother's trial was not to the point for these purposes. The return goes only to the point at which the "greatest catch" was taken during the permitted trawling hours, not during the whole of the day covered by the entry in the return. It does not matter that there is evidence that the trawler was in a position on a particular day

which is different from that given as the place of the "greatest catch", provided, of course, it was possible for the trawler to have been in both places during the day in question. It is possible that his Worship's reasoning did not take account of these factors.

[14] It was sought to show, by reference to the evidence given by the appellant at his brother's trial, that he was not anywhere near the Vanderlins on either of the 22 or 23 August. This Court is not aware of the charge brought against the brother, but it is clear enough that it centered around activities at or near Tasman Point on the morning of the 23rd. The appellant's evidence was apparently directed to showing where his brother then was and what he was doing. In cross-examination he said that he had been fishing the Cumberlidge Reef area for a few days before the 22nd, he had been there for a couple of weeks, but "we move around quite a bit". He referred to the Vanderlins only in the context of a question directed to where he was fishing prior to going to Cumberlidge Reef. No reliance should be placed on evidence given in a separate trial against another person directed to different issues where the mind of the witness is not directed to the issue raised in the subsequent proceedings. He was not then asked where he had been fishing on the morning of 22nd, nor what he meant when he said that he moved around quite a bit. There are indications in the evidence that the appellant would not be keen to reveal in open court all of his movements, the prawn trawling industry appears to be quite competitive.

[15] The focus at trial was upon the entry made for 23 August. The argument was that if what the appellant told the court during his brother's trial was true, then he could not have made his way to the Vanderlins on the evening of the 23rd in time to make the "greatest catch" of that day. That firstly assumes that what he told the court in the course of his brother's trial was true, but that proposition has not been called in question here. As to the taking of the "greatest catch", the evidence allows a rational inference that the appellant reached the Vanderlins on the evening of the 23rd at about 11pm at the latest, that he could then have commenced a shot, the period for which divided in half, could have resulted in a calculated time of the "greatest catch" falling at or before midnight. The prosecution bore the onus of excluding those rational hypotheses and thus establish that the return was false in the material particular specified in the charge. His Worship held that it did, but I am not able to agree

[16] It was further put that the process of this Worship's reasoning, and the ambiguous manner in which he expressed his ultimate findings, left doubt as to how he arrived at the guilty verdict. In this regard reference was made to *Sun Alliance Insurance Ltd v Massoud* (1989) VR8 at p 18. Given that the other ground of appeal has succeeded I need not go into this issue.

[17] The appeal is allowed and the conviction set aside.
