Rigby v Taing [2015] NTSC 16

PARTIES:	RIGBY, Kerry
	v
	TAING, Chea May
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 48 of 2014 (21317506)
DELIVERED:	20 March 2015
HEARING DATES:	28 November 2014
JUDGMENT OF:	HILEY J
APPEAL FROM:	J LOWNDES CM

CATCHWORDS:

APPEAL – Justices Appeal – Appeal against dismissal of a complaint - Jurisdiction – *Justices Act 1979* (NT) s 163(3)

APPEAL –Justices Appeal – Offence under *Fisheries Act 1988* (NT) - Possession of commercially unsuitable mud crabs – Need to prove knowledge – Need to prove knowledge that the mud crabs were commercially unsuitable – Knowledge can include constructive knowledge and wilful blindness

CRIMINAL LAW – *Criminal Code* (NT) – Regulatory offences – Common law requirements of voluntariness and mens rea still apply – Effect of *Criminal Code* (NT) s 31 and other provisions in Part II not applying to regulatory offences

CRIMINAL LAW AND PROCEDURE – Proof – Knowledge as an element of proof - Relevance and effect of statutory defences – Defences in *Fisheries Act 1988* (NT) s 38(2)(b)

Criminal Code (NT) s 22, s 21, s 21(1), s 32, s 43ACA, s 47, s 154

Criminal Code (Qld) s 1, s 24

Drugs Misuse Act 1986 (Qld) s 9, s 57

Fisheries Act 1988 (NT) s 4, s 38(1), s 38(2)(b), s 42

Fisheries Regulations 2014 (NT) Regulations 107KA(2), 107X(2), 107Y(4), 107Z(2), 141JDA(2), 141JP(2), 141JQ(4), 141JR(2), 149

Misuse of Drugs Act 1990 (NT)

Justices Act 1979 (NT) s 163(1), s163(3)

He Kaw Teh v The Queen (1985) 157 CLR 523; *Kruger v Kidson* (2004) 14 NTLR 91; *Rosas v Cahill* [2013] NTSC 65; *Tabe v The Queen* (2005) 225 CLR 418; *Western Australia v R* (2007) 33 WAR 483, applied

Grosvenor v The Queen [2014] NTCCA 5; *Pereira v Director of Public Prosecutions* (1988) 35 A Crim R 382; *Wilson v Malogorski (No 2)* (2011) 30 NTLR 128, considered

Pregelj v Manison (1997) 51 NTR 1, distinguished

Balchin v Anthony [2008] NTSC 02; *Peach v Bird* [2006] NTSC 14; *Police v Chea Mey Taing* [2009] NTMC 015, referred to

REPRESENTATION:

Counsel:

Appellant:	R Murphy
Respondent:	A Abayasekara

Solicitors:

Appellant:	Northern Territory Department of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rigby v Taing [2015] NTSC 16
No. JA 48 of 2014 (21317506)

BETWEEN:

KERRY RIGBY
Appellant

AND:

CHEA MAY TAING
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 20 March 2015)

Introduction

[1] On 27 April 2013 Northern Territory police found nine commercially unsuitable mud crabs at the respondent's stall at the Parap Markets, Parap, where she was selling amongst other things, mud crabs. The respondent was the holder of a fish retailer licence. Clause 1.1 of the licence prohibited her from selling or possessing commercially unsuitable mud crabs. The respondent was charged on complaint with being in possession of commercially unsuitable mud crabs contrary to s 42 of the *Fisheries Act 1988* (NT) (**the Act**). The commercially

unsuitable mud crabs were in a box of mud crabs that another person had asked her to look after for him for a while until he returned to retrieve them.

[2] Following a contested hearing the respondent was found not guilty of the charge because the prosecution had failed to establish that the respondent was in possession of the mud crabs. The Chief Magistrate held that the prosecution had failed to satisfy the court beyond reasonable doubt that the respondent knew that she was in possession or control of the commercially unsuitable mud crabs.[1]

[3] The appellant appealed against the dismissal of the complaint on two grounds:

(a) Ground 1. That the learned Chief Magistrate erred in law by finding that the definition of "possession" as defined in s 4 of the Act required both a physical and mental element, namely knowledge.[2]

(b) Ground 2. That the learned Chief Magistrate erred in law by finding that there must be proof of specific knowledge that the respondent possessed for sale commercially unsuitable mud crabs.

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[1] Transcript 20/6/14 pp 102.5 & 103.7.

[2] This ground of appeal was added as a further ground of appeal pursuant to leave granted at the hearing of the appeal.

Jurisdiction to hear the appeal

[4] At the conclusion of the hearing of argument, counsel for the respondent contended that the Court does not have jurisdiction to hear and determine this appeal.

[5] This contention relied upon the provision pursuant to which most justices appeals are lodged, namely s 163(1) of the *Justices Act 1979 (NT) (**Justices Act**)*, which appears to preclude an appeal from "an order dismissing a complaint of an offence".

[6] However s 163(3) of the *Justices Act* provides that:

> A party to proceedings before the Court arising from a complaint or an information in relation to a minor indictable offence that the Court summarily disposes of may appeal to the Supreme Court from an order or adjudication of the Court dismissing the complaint or information.

[7] Section 163(5) provides that:

> An appeal under subsection (3) may be on a ground that involves an error or mistake on the part of the Justices whose decision is appealed against on a matter or question of law alone or a matter or question of both fact and law.

[8] The apparent inconsistency between s 163(1) on the one hand and ss 163(3) & (5) on the other was discussed by Southwood J in *Peach v Bird*.[3] His Honour concluded that there is in fact no inconsistency and that the right of appeal conferred by s 163(3) is not limited by s 163(1).

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[3] [2006] NTSC 14.

His Honour's conclusions were referred to and followed in *Balchin v Anthony*.[4]

[9] I agree that this court does have jurisdiction to entertain an appeal against the dismissal of a complaint in circumstances such as in the present matter.

The appeal

Relevant legislation

[10] Section 42(1) of the Act provides that:

> A person commits an offence who buys, sells, or has in possession any fish or aquatic life taken in contravention of this Act or any instrument of a judicial or administrative character made under it.

[11] It was and is common ground that the respondent held a fish retailer licence. Clause 1.1 provided that "the licensee shall not possess or sell commercially unsuitable mud crabs."

[12] Section 4(1) of the Act provides that unless the contrary intention appears:

> *possession* means possession of or control over any fish or aquatic life or possession of or control over a vessel, vehicle or other conveyance, fishing gear, container, package, thing, or place in or on which the fish or aquatic life is found, and includes joint possession or control.

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[4] [2008] NTSC 2.

His Honour's reasons

[13] On 19 May 2014 his Honour gave a ruling on a preliminary point raised by the parties concerning the element of possession in s 42(1). He said:

> The question that arises in this case is whether or not the element of possession includes a mental element. It is noted that the offence is a regulatory offence and by reason of that classification the provisions of sections 31 and 32 of the Criminal Code do not apply to the physical elements of the offence.
>
> However, it is trite to say that just because an offence is a regulatory offence that an offence does not include an element of a mental character. It is always a matter of statutory construction as to whether or not a particular offence contains a mental element.
>
> The argument put forward on behalf of the defendant is simply this, that the element of possession requires proof that the defendant had knowledge of the nature and quality of the aquatic life that is the subject of the prohibition. In other words, the defendant knew that she had in her physical possession crabs that were commercially unsuitable.
>
> The concept of possession, generally speaking, contains both a physical and mental element, and the mental element comprises the element of knowledge. The concept of possession is not defined under the relevant legislation, and therefore whether or not possession is to be construed to include a mental element such as that contended for by the defence is a matter of statutory construction.

[14] His Honour referred to and relied upon *Police v Chea Mey Taing*,[5] a decision of Ms Oliver, SM, delivered on 8 May 2009. He referred to her Honour's extensive analysis of relevant case law, including the High Court's decisions in *He Kaw Teh v The Queen (**He Kaw Teh**)*,[6] and *Tabe v The Queen (**Tabe**)*,[7] in which cases their Honours considered what degree of knowledge if any was a necessary component of the concept of possession.

[15] His Honour then said:

> In my view, I see no reason to read down the concept of possession. It has traditionally been construed to include a mental element, that is, knowledge of the nature of the thing being possessed, and I see nothing in the offence-creating provision or any other provision under the Fisheries Act which would permit the court to read down the concept of possession as generally understood. That is, as containing both a physical and mental element.

[16] His Honour then quoted what Oliver SM had said in *Police v Chea Mey Taing*:

> It was a condition of the defendant's licence that she not possess or sell commercially unsuitable crabs. There is nothing to indicate that possession in the context of a licence condition should be other than generally required under statute, that is, that she knew that she had commercially unsuitable crabs.

[17] His Honour then concluded his reasons for decision as follows:

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5 [2009] NTMC 015.
6 (1985) 157 CLR 523.
7 (2005) 225 CLR 418.

> With due respect, I agree with that analysis. So at the end of the day, I have concluded that in order to prove the charges with which the defendant has been charged, it is necessary for the prosecution, amongst other things, to prove beyond reasonable doubt that the defendant … possessed for sale commercially unsuitable mud crabs. That is, there must be proof of specific knowledge as to the nature and quality of the aquatic life in question.

[18] Although his Honour seems to have been unaware of the definition of possession in s 4 when he gave his reasons on 19 May, he did refer to that definition prior to embarking upon the hearing itself on 20 June 2014. He said:

> Significantly, that definition does not advert to the normal mental element that is usually considered to be part and parcel of the concept of possession, but on an earlier occasion I ruled that possession, in the context of this legislation, should carry its ordinary meaning and embrace a physical and mental element. And in relation to the latter, the prosecution must, in my opinion, prove beyond reasonable doubt that not only was the defendant aware of the existence of the subject matter of the charge, but also must have knowledge of the nature of the subject matter, which in this instance happens to be commercially unsuitable mud crabs.

[19] In the proceedings before his Honour, the prosecution had conceded that knowledge was a requisite component of possession as that term was defined in the Act, and contended that this requirement was satisfied if the respondent knew that she had mud crabs in her possession. The respondent had contended that the prosecution needed to prove that she knew that there were commercially unsuitable mud

crabs in her possession.[8] Thus it was that point of distinction that his Honour addressed in making his ruling and reaching his findings. It was this conclusion that was originally subject of this appeal, and which remains as Ground 2.

[20] However, by now raising and pursuing the new ground, namely Ground 1, the appellant is calling on this court to determine an issue that was not before the Chief Magistrate.

Ground 1.

[21] The appellant contends that "the learned Chief Magistrate erred in law by finding that the definition of 'possession' as defined in s 4 of the Act required both a physical and mental element, namely knowledge."

[22] The appellant advanced three main arguments in support of this ground:

(a) The first was that "had the legislature intended that a person possessing something under the Act needed to know that they were in possession of it, then it would have included reference to knowledge in the definition. The fact that the legislature has

[8] 'Appellant's Summary of Submissions' filed 20 November 2014 (***Appellant's Summary of Submissions***) [6].

chosen not to, indicates that no such mental element was intended."[9]

(b) The second point was that the offence provision relevant to this matter, s 42(1) of the Act, "contains no mental element and that all offences under the Act are regulatory offences."[10] Because most of Part II of the Criminal Code does not apply to regulatory offences,[11] it was contended that regulatory offences do not include a mental element, unless expressly stated.[12]

(c) The third contention referred to the defence in s 38(2)(b)(ii) of the Act.[13]

Definition of possession

[23] It is well established that the ordinary meaning of possession includes the mental element of knowledge unless there is a contrary intention. Per Gibbs CJ in *He Kaw Teh* at p 539:

> [W]here a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence ("in his possession") themselves necessarily import a mental element. In such a case it is unnecessary to rely on the common law presumption that mens rea is required. The question then is whether the words of

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9 Appellant's Summary of Submissions [10].
10 *Fisheries Act 1988* (NT), s 38(1).
11 *Criminal Code*, s 22.
12 Appellant's Summary of Submissions [11].
13 Appellant's Summary of Submissions [13] – [15], [16] – [18].

> the *Customs Act* contain a sufficient indication that the Parliament intended that knowledge should not be an ingredient of an offence against s 233B(1)(c), notwithstanding the prima facie effect of the words "in his possession". The provisions which might be thought to give such an indication are those of the clause "without reasonable excuse (proof whereof shall lie upon him)" and those of sub-s (1A).

[24] The first sentence in that passage has been applied in subsequent decisions including *Tabe*. The requirement for the Crown to prove knowledge in cases concerning possession of drugs in the Northern Territory, notwithstanding the provisions in s 40 of the *Misuse of Drugs Act 1990* (NT), was stated by Barr J in *Wilson v Malogorski (No 2)*[14] and recently by the Court of Criminal Appeal in *Grosvenor v The Queen.*[15]

[25] Although the legislation with which *Tabe* was concerned, the *Drugs Misuse Act 1986* (Qld), did not define "possession", s 1 of the *Criminal Code* (Qld) defines "possession" inclusively and without reference to knowledge as follows:

> includes having under control in any place whatever, whether for the use or benefit of the person of whom the term was used or of another person, and although another person has the actual possession or custody of the thing in question.

[26] All members of the High Court in *Tabe* proceeded on the basis that knowledge is normally an essential part of the meaning of the word

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14 (2011) 30 NTLR 128 [65].
15 [2014] NTCCA 5 [35].

possession. None of them suggested that there needs to be express reference to knowledge in the definition.

[27] Per Callinan and Heydon JJ at [143] – [145]:

> [143] It can be accepted, on the basis of the statements in this Court in *Williams* and *He Kaw Teh*, that the concept of "possession" in the criminal law, in the absence of statutory indications to the contrary, involves as an element, awareness, or at least constructive knowledge, in the sense that there would be an awareness, but for an abstention from enquiry, or the suspension of other human tendencies such a suspicion and ordinary curiosity, of the thing possessed.
>
> [144] The questions in this case therefore are whether there are legislative indications to the contrary, and the extent of knowledge, if any, of an aider, procurer or counsellor of a principal offender, that must be established to sustain a conviction of the former.
>
> [145] Neither s 9 of the Act nor the definition of "possession" in s 1 of the Code manifests a legislative intention to exclude knowledge as an element of possession.

[28] The Justices in *Tabe* were required to consider the meaning and effect of other provisions of the *Drugs Misuse Act 1986* (Qld), namely parts of s 57(1) which provided that:

> (c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;
>
> (d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable

belief in the existence of any state of things material to the charge.

[29] The majority, Gleeson CJ, Callinan and Heydon JJ, held that the concept of possession in s 9 of the *Drugs Misuse Act 1986* (Qld) did not involve, as an element, knowledge that the thing possessed was a dangerous drug. The effect of s 57(c) & (d) was to reverse the onus of proof so as to oblige an accused person, who claimed to be unaware that the thing he or she possessed or attempted to possess was a dangerous drug, to prove that claim.[16]

[30] In issue in *Tabe* was what kind of knowledge it was necessary for the Crown to prove. The minority (McHugh & Hayne JJ) were of the view that the Crown must establish not only that the accused knew that he or she was in possession of the substance which was in fact a dangerous drug, but also that he or she knew that the substance was a dangerous drug (without necessarily knowing what kind of drug it was).

[31] The appellant in the present matter tried to distinguish the authorities on the basis that the definition in s 4 of the Act extends possession to include situations where the person has control over a relevant fish or other item. I do not consider that is a relevant point of distinction. In any event it is not uncommon for definitions of possession to include references to control. See for example the definition of possession in

[16] The *Misuse of Drugs Act 1990* (NT) has similar evidentiary provisions, in s 40(c) & (d). See the discussion in *Grosvenor v The Queen* [2014] NTCCA 5 at [29] – [37].

s 1 of the Criminal Code (Qld), which was the subject of the High Court's decision in *Tabe*, and the definition of possession in s 3 of the *Misuse of Drugs Act 1990* (NT). The concept of control is also involved in the ordinary meaning of possession at common law.[17]

[32] The appellant has not shown any authority which supports her contention (quoted above in [22](a)) that knowledge does not need to be established because it is not expressly referred to in the definition of possession. The contention is inconsistent with the High Court authorities of *He Kaw Teh* and *Tabe* and with the Court of Appeal's decision in *Grosvenor*. I reject that contention.

Regulatory offence

[33] The appellant contended that "regulatory offences do not require the prosecution to prove that a person charged with such an offence possessed any mental element at the time of committing that offence."[18]

[34] In support of this contention the appellant relied upon the decision of the Court of Criminal Appeal in *Pregelj v Manison*,[19] a matter concerning the offence of offensive behaviour under s 47 of the

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[17] See for example the observations in *Tabe* (2005) 225 CLR 418 at [7], [57], [100] & [137].

[18] Appellant's Summary of Submissions [11].

[19] (1997) 51 NTR 1.

Summary Offences Act 1978 and whether it involved a mental element similar to mens rea, an element not expressly required under s 47.

[35] At p 12, Nader J said that because Part II of the Criminal Code applied to such an offence "Parliament intended [the Code] to codify the law pertaining to criminal responsibility to the extent that it intended to lay down minimum exculpating criteria. The common law has no role." His Honour proceeded to discuss s 31 of the Code. At p 19, Kearney J also referred to s 31, referring to this as "a third element which is not apparent from the wording of s 47. He pointed out that the "effect of s 31(1) is that the appellants are not criminally responsible for this offence unless they either intended the punishable act … or foresaw it as a possible consequence of their conduct."

[36] In my opinion this case is not relevant. Unlike the offence the subject of *Pregelj v Manison*, the present matter concerns a regulatory offence, as a consequence of which most of Part II of the Code, and in particular s 31, does not apply. See s 22 of the *Criminal Code*. Consequently provisions such as s 31(1) which have the effect of requiring the Crown to prove intent or foreseeability as an element of most offences, or provisions within the Part IIAA of the Code which

specify "fault elements" which are intended to cover all mental elements,[20] do not apply to regulatory offences.

[37] Although the effect of s 22 of the *Criminal Code* will be to deprive an accused of particular defences identified in Part II (in summary defences of "authorisation", "justification" and "excuse") that does not mean that regulatory offences become offences of absolute liability.

[38] *Kruger v Kidson*[21] was an appeal concerning a regulatory offence and required consideration of the effect of provisions such as s 31 not applying. At [12] Mildren J noted that there had previously been "at least two decisions of this Court where it has been held that an offence to which the provisions of s 31 do not apply must be the result of a voluntary act on the part of the accused." Although those decisions concerned offences under s 154 of the *Criminal Code* (now repealed) which were not regulatory offences, his Honour did not consider that this made any difference in principle. His Honour said:

> At common law, there is no doubt that a person is not guilty of a regulatory offence unless the person has voluntarily committed the relevant act … This is because, shortly put, the act for which the accused must be held responsible in order for there to be a finding of guilt is not his act at all. In my opinion the same applies to regulatory offences in the Northern Territory, notwithstanding that the criminal law in this Territory is, to the extent indicated by s 5 of the *Criminal Code [Act]*, the relevant law of the Territory.

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20 See s 43ACA of the *Criminal Code*.

21 (2004) 14 NTLR 91.

[39] Counsel for the respondent in that case submitted the exclusion of s 31 and other defences in Part II of the *Criminal Code* removed the need for the prosecution to prove voluntariness with the result that the offence was one of absolute liability. Mildren J rejected that submission and said, at [17]:

> Although cases of absolute liability exists, the Courts are extremely reluctant to draw the conclusion that this was the intention of the legislature, as this would mean that even those who are utterly blameless will be caught by the legislation. In *Schmid v Keith Quinn Motor Co Pty Ltd* (1987) 29 A Crim R 330 at 339, Bollen J said: In deciding whether legislation is so absolute, one must examine the objects of the legislation, the words of the whole Act, the scheme of the Act and the words of the relevant section or sections. One should, too, stand back to consider whether by the imposition of absolute liability you will readily assist the object of the legislation and not merely catch a luckless victim."

[40] During the hearing of this appeal counsel for the appellant contended that an offence under s 42 of the Act, being a regulatory offence, was one of absolute liability. Accordingly the respondent would be criminally liable for the offence charged even if a stranger unbeknownst to the respondent had put the box of mud crabs in her stall. In supplementary written submissions counsel for the appellant withdrew this contention (that the offence was one of absolute liability), properly so in my opinion.

[41] Counsel for the appellant also referred to the following passage in the second reading speech for the Fisheries Bill (Serial 151):

> The bill defines all offences as regulatory offences. This is in keeping with the evidentiary difficulties which are often a part of fisheries enforcement. Considerable attention, however, has been given at the same time to defining the defences to a prosecution for an offence. These are quite extensive and consistent with the preservation of the rights of defendants. [22]

[42] Counsel contended that this passage shows an intention to simplify prosecutions by removing the need for proof of knowledge or other mental elements for offences under the Act. On the contrary, I consider that the Minister was referring to the consequences of an offence being specified as a regulatory offence. By dis-applying most of Part II, the prosecution would not have to prove intent or foresight as would normally be required by s 31, but the accused would not be able to avail himself of any of the defences provided by Part II (except for those in ss 26(1)(c) & (d)). It is for that reason that it was necessary to specify defences in the Act, such as those in s 38.

[43] *Rosas v Cahill*[23] was a matter that also concerned regulatory offences, namely the possession of liquor and bringing it into a prescribed area, contrary to s 75(1) of the *Liquor Act*. At [18] Blokland J pointed out that although the prosecution would not have to prove the mental elements in s 31 of the *Criminal Code*, and that most of the excuses and defences provided in Part II would not apply, "for the prosecution to succeed, all relevant constituent elements of the offence must still be

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[22] Northern Territory, Parliamentary Debates, Legislative Council, 13 October 1988, p 4570 (Mr Reed).

[23] [2013] NTSC 65.

proven." Her Honour said that "for some time it has been settled that a person is not guilty of a regulatory offence in the Northern Territory unless they have voluntarily committed the act."[24]

[44] Her Honour proceeded on the basis that knowledge was required to be proven not only in relation to the possession charge but also in relation to the other charge of bringing liquor onto a prohibited area. At [23]:

> In common with the possession charge where knowledge is required to be proven, to prove the prohibited act of "bring liquor", knowledge is similarly required. It is a matter of language and common usage. A person does not generally speak of "bringing" an item unless they have knowledge of that item. The word 'bring', like 'possession', in its ordinary sense connotes knowledge or awareness of the thing being brought. Although "possession" has a lengthy historically developed common law definition that includes proof of 'knowledge', in my view, in the context of this statutory offence, the same applies to the offence "bring liquor". It follows that only those persons who know they are bringing liquor into a restricted or prescribed area would be guilty of an offence. In this context 'knowledge' and 'awareness' may be used interchangeably. On behalf of the respondent it is accepted proof of knowledge of the substance is an element of the charge.

[45] Like her Honour in *Rosas v Cahill* I consider that a regulatory offence concerning possession would ordinarily require knowledge to be established by the prosecution. I have not been able to find anything in the *Criminal Code* that suggests that regulatory offences which do not expressly stipulate a mental element do not in fact include such mental elements as the common law would usually require.

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[24] *Rosas* [2013] NTSC 65 at [22] citing inter alia *Kruger v Kidson* (2004) 14 NTLR 91.

[46] More relevantly and in any event, "because the words describing the offence ('in his possession') themselves necessarily import a mental element… it is unnecessary to rely on the common law presumption that mens rea is required."[25]

[47] I reject the appellant's contention that because the defence is a regulatory offence knowledge does not need to be established.

Effect of defence in s 38(2)(b)

[48] Section 38 of the Act provides as follows:

> (1) An offence against this Act is a regulatory offence.
>
> (2) It is a defence to a prosecution for an offence referred to in subsection (1) if the defendant proves on the balance of probabilities that:
>
> (a) any contravention or failure to comply constituting the offence occurred in an emergency and was necessary to preserve life or prevent injury or to protect property in the defendant's possession;
>
> (b) the defendant did not intend to commit the offence, and that:
>
> (i) in any case where it is alleged that anything required to be done was not done, the defendant took all reasonable steps to ensure that it was done; or
>
> (ii) in any case where it is alleged that anything prohibited was done, that the defendant took all

[25] *He Kaw Teh* (1985) 157 CLR 523 at p 539.

reasonable steps to ensure that it was not done; or

(c) any contravention or failure to comply constituting the offence was authorized by being:

(i) in the exercise of a right granted or recognized by law;

(ii) in execution of the law or in obedience to, or in conformity with, the law;

(iii) in obedience to the order of a competent authority whom the defendant is bound by law to obey unless the order is manifestly unlawful (the determination of which is a matter of law); or

(iv) pursuant to an authority, permission, or licence lawfully granted.

(3) Subsection (2)(b) applies only to an offence prescribed in the Regulations or a fishery management plan to be an offence to which that subsection applies.

[49] The appellant relied on s 38(2)(b) and noted that "the evidential onus of raising this defence lies with the respondent." The appellant submitted that "this defence is consistent with the legislature's intention to overcome the difficulties of enforcing the Act whilst at the same time providing protection to the respondent. We further submit that this defence provision is consistent with the legislative intention to

exclude any mental element from the definition of possession and from the offence provisions under the Act."[26]

[50] I have already discussed the first point (which is based upon the second reading speech) in [42] above. As has been pointed out in various decisions including *He Kaw Teh*[27] and *Pereira v Director of Public Prosecutions*,[28] knowledge may be established in various ways and may include "wilful blindness".[29]

[51] I turn now to discuss the second point, namely that the existence of the defence provided under s 38(2)(b) implies an intention by Parliament to exclude any mental element from the definition of possession and from the offence provisions under the Act.

[52] I pause here to query whether the defence in s 38(2)(b) applies to an offence under s 42(1) of the Act, or for that matter any other offence under the Act itself. Subsection 38(3) seems to limit the application of the defence in s 38(2)(b) to "offences prescribed in the Regulations or a fish management plan to be an offence to which that subsection applies." Whilst there are (only) a small number of offences under the *Fisheries Regulations 2014* (NT) (**the Regulations**) where s 38(2)(b)

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26 Appellant's Summary of Submissions [15].
27 (1985) 157 CLR 523.
28 (1988) 35 A Crim R 382.
29 See too the extract in [68] below from *Rosas* [2013] NTSC 65.

has been prescribed to apply,[30] I have not found anything in the Regulations or in the Northern Territory Mud Crab Fishery Management Plan which purports to prescribe any offence in the Act as an offence to which s 38(2)(b) applies. Following my request for further submissions from counsel for the appellant on this point, counsel contended that the defence in s 38(2)(b) will not be available for offences under the Regulations or a fishery management plans, unless that subordinate legislation specifically provides that the defence applies, and "on this reading, s 38(3) would have no application to offences under the *Fisheries Act* thereby enabling a person charged with offences under the *Fisheries Act* to rely upon the s 38(2)(b) defence."[31] With respect, I do not consider this to be the correct construction of s 38(3). However, in light of my other conclusions in these reasons concerning the relevance and effect of the defence in s 38(2)(b), there is no need for me to determine this question and I shall proceed on the assumption that the defence in s 38(2)(b) can apply to offences under s 42 of the Act.

[53] It is well established that "mens rea is an essential element in every statutory offence unless, having regard to the language of the statute

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[30] See for example Regulations 107KA(2), 107X(2), 107Y(4), 107Z(2), 141JDA(2), 141JP(2), 141JQ(4) and 141JR(2).

[31] Appellant's Supplementary Submissions dated 26 February 2015.

and to its subject matter, it is excluded expressly or by necessary implication."[32]

[54] The appellant contended that because s 38(2)(b) refers to mental elements, which must be raised and satisfied by a defendant by way of defence, the offence provisions, relevantly s 42 of the Act, should be interpreted as not requiring any mental element.

[55] This contention is analogous to the main points considered in *He Kaw Teh* and *Tabe*. As I have already observed, neither the defence in s 233B(1)(c) of the *Customs Act 1901* (Cth) the subject of *He Kaw Teh*, nor ss 57(c) & (d) of the *Drugs Misuse Act 1986* (Qld) the subject of *Tabe*, were considered by any members of the High Court to remove knowledge from the concept of possession, and thus as a matter requiring proof.

[56] Apart from the fact that the appellant's contention seems contrary to High Court authority, there are a number of other difficulties with it.

[57] First, the defence in s 38(2)(b) does not refer to knowledge. It refers to intent, and the taking of reasonable steps (to ensure that the act was not done). Compare this with the situations considered in *He Kaw Teh* and *Tabe* where the statutory defences expressly referred to knowledge, and even then knowledge was still a necessary element for the prosecution

[32] Brennan J in *He Kaw Teh* (1985) 157 CLR 523 at p 566. See also *He Kaw Teh* at p 570 & 598-9.

to establish. Compare this too with s 40 of the *Misuse of Drugs Act 1990* (NT) which expressly excuses a person who "neither knew nor had reason to suspect" that the drug or precursor was in or on [the] place which he or she occupied, managed or controlled.[33]

[58] Secondly, the appellant's construction could lead to absurdity and gross unfairness, for example where the defendant did not in fact have any knowledge that he or she was in possession of the relevant items. It would be difficult if not impossible for a defendant to prove the second element of the defence in s 38(2)(b), namely that he or she "took all reasonable steps to ensure that it was not done".

[59] Thirdly, subject to the limitations expressed in s 38(3), the defences in s 38(2) apply to all offences under the Act, not just to offences for unlawful possession. The Act creates numerous offences, both within its own terms, and for contravention or non-compliance with other instruments, directions, restrictions, requirements or conditions given made or imposed under the Act or such other instrument.[34]

[60] The effect of the appellant's construction would be that s 38(2) removes all mental elements from all offences under the Act, absent express inclusion of a mental element of a particular offence in the provision creating the offence. This would be a rather strange way for

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[33] See discussion about this by Barr J in *Wilson v Malogorski (No 2)* (2011) 30 NTLR 128 at [57] to [67].

[34] s 37(1).

a legislature to achieve such a purpose, particularly having regard to the careful steps taken when enacting other legislation, for example the *Criminal Code*, to clearly and expressly identify all mental elements and defences.

[61] Fourthly, in my opinion, the defence in s 38(2)(b) only applies to an offence prescribed in the Regulations or a fish management plan to be an offence to which that subsection applies.[35] The legislature has left it to others, namely those who make the Regulations and those who make fish management plans, to determine when the defence in s 38(2)(b) applies. I have difficulty seeing how a court can conclude that this demonstrates an intention on the part of the legislature to dispense with the mental elements of offences, such as voluntariness and knowledge. Had the legislature intended to remove such elements from offences created under the Act, it could and would have done that in the Act itself, expressly or by necessary implication.

[62] I conclude that Ground 1 is not made out.

Ground 2

[63] Having concluded that the prosecution must establish knowledge on the part of the respondent, the question raised by Ground 2, and subject of

[35] s 38(3).

his Honour's decision, concerned the extent of knowledge that needs to be proved.

[64] The respondent contended that the prosecution needs to prove that she knew that she was in possession of commercially unsuitable mud crabs, this being the offence with which she was charged. The appellant contended that if knowledge is to be imported into the definition of possession, the prosecution need only prove the respondent's knowledge that she was in the possession of crabs, and not that they were commercially unsuitable crabs.

[65] The appellant argued that a requirement for her to prove knowledge that the crabs were commercially unsuitable would leave the defence in s 38(2)(b) with no work to do. The appellant's argument seems to assume that in order to prove such knowledge, she would have to prove that the respondent had actual knowledge that the crabs were commercially unsuitable, probably by physically inspecting them herself. If that was proven, a defendant in the position of the respondent would not be able to prove the two relevant requirements in s 38(2)(b), namely that she did not intend to possess the commercially unsuitable crabs and that she had taken all reasonable steps to ensure that she was not in possession of them.

[66] This submission is misconceived. It wrongly assumes that the prosecution would have to prove actual knowledge on the part of a

defendant. It is well established that knowledge can exist in various other ways, and can include constructive knowledge and wilful blindness.[36]

[67] Questions as to the kind and extent of knowledge required to be established have been subject of numerous judicial decisions, including those of the High Court in *He Kaw Teh* and *Tabe*, the Court of Appeal of the Supreme Court of Western Australia in *Western Australia v R*[37] and this Court (Blokland J) in *Rosas v Cahill.*[38]

[68] In *Rosas v Cahill* Blokland J provided a convenient summary:

> [24] As to what is meant by knowledge, there are some similarities with how 'knowledge' is defined in the context of the common law '*mens rea*' applicable to charges of importation and possession of narcotics. As is well known, in *He Kaw Teh v The Queen*,[39] when declaring importation and possession of narcotics to be offences of full *mens rea*, the High Court held knowledge must be proven beyond reasonable doubt. Chief Justice Gibbs, (with Mason J agreeing), held the prosecution bears the onus of proving beyond reasonable doubt that an accused knew he was importing a narcotic substance or that he was wilfully blind in that he shut his eyes to the probability that he was importing narcotics; Brennan J held importation required knowledge of the nature and character of the object imported, (such that when the goods are imported in a container the prosecution must prove that the accused knew that it contained or was likely to contain, an object that was, or was likely to be,

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[36] See for example *He Kaw Teh* (1985) 157 CLR 523 at p 536; *Tabe* (2005) 225 CLR 418 including at [10], [57], [143]; *Western Australia v R* (2007) 33 WAR 483 at [27] to [67] especially [47], [50] & [67] (Steytler P, Pullin JA agreeing).

[37] (2007) 33 WAR 483.

[38] [2013] NTSC 65.

[39] (1985) 157 CLR 523.

narcotic goods); Dawson J held that an intentional importation of narcotic goods was required.[40]

[25] A majority accepted that in appropriate cases, (an example might be narcotics concealed in containers), it is sufficient for the Crown to prove that the accused knew that it was likely that he or she was involved in dealing with prohibited narcotics. In *Pereira,*[41] members of the High Court referred to this as 'lawyers shorthand'; that it is sufficient for the Crown to prove 'wilful blindness' in the sense that one is wilfully blind when one suspects a fact but closes one's eyes to avoid confirmation of the suspicion. In *He Kaw Teh*, with regard to "wilful blindness" Gibbs CJ said:

> "..... if the suspicions of an incoming traveller are aroused, and he deliberately refrains from making any inquiries for fear that he may learn the truth, his wilful blindness may be treated as equivalent to knowledge. If he is given a bag or parcel to carry into Australia and is suspicious about the appearance, feel or weight of his own baggage, and he deliberately fails to inquire further, the jury may well be satisfied that he wilfully shut his eyes to the probability that he was carrying narcotics and for that reason should be treated as having the necessary guilty knowledge".[42]

[26] In the later cases of *Kural* [43] and *Pereira*, [44] the position of 'wilful blindness' was clarified as being an evidentiary means of arriving at actual knowledge when proof of nothing less is required. In *Pereira*, the High Court said that when knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. The combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the prohibited substance. Where the trier of fact is invited to draw an inference, a failure to make inquiries, may, as a 'lawyers shorthand' be referred to as wilful blindness; however, the court

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40 Wilson J dissented.
41 (1988) 35 A Crim R.
42 (1985) 157 CLR 523 at 536.
43 (1987) 162 (LR 502).
44 (1988) 35 A Crim R 382.

> has stressed that "care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt".
>
> [27] As with other relevant mental states, unless there are admissions, knowledge can generally only be proven by inference from the surrounding proven facts. So called 'wilful blindness', if found, is really but one of a number of circumstances from which an inference of knowledge may be drawn.

[69] Many of the cases that discuss the kind of knowledge required to be shown are cases concerning possession of prohibited drugs. The weight of authority is to the effect that the prosecution would normally have to prove that the accused had knowledge that he or she was in possession of a prohibited drug, but not that the accused knew what kind of prohibited drug it was.[45]

[70] The authorities were considered at some length by each of the three justices in *Western Australia v R.*[46] At [50] Steytler P (with whom Pullin JA agreed, Wheeler JA disagreeing) said:

> … It seems clear enough that in Western Australia, on the current state of authority, the knowledge required under s 9 of the WA Act is knowledge by the accused person that he or she had possession of a prohibited drug of some kind, even though that person did not know what prohibited drug he or she possessed.

[71] At [67] Steytler P concluded with the following:

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[45] See for example *He Kaw Teh* (1985) 157 CLR 523 at pp 582, 585-7 & 589 (Brennan J), cf Dawson J at p 602.

[46] (2007) 33 WAR 483.

> … it seems to me that knowledge (which might be equated with awareness, in this context) is established if there is proof of a belief by the accused in the likelihood (in the sense that there was a significant or real chance) that he or she had a prohibited drug in his or her physical possession or otherwise in his or her control or under his or her dominion. Whether the accused had such a belief is, of course, a question of fact, and whether or not it existed will ordinarily be a matter of inference from the circumstances surrounding the commission of the alleged offence, often a combination of suspicious circumstances and a failure to make inquiry.

[72] In *Rosas v Cahill* the liquor the subject of the charges comprised two bottles of rum. Although the respondent's knowledge that she was possessing the rum would have constituted knowledge that she was possessing liquor, the relevant subject matter of the offences was liquor. In order to prove the relevant knowledge, the prosecution only needed to establish her knowledge that she was in the possession of and was bringing in liquor. The offence would have been made out irrespective of the kind of liquor.

[73] The relevant subject matter of the present charge is commercially unsuitable mud crabs, that being the kind of seafood which clause 1.1 of the respondent's licence prohibited her from selling or possessing. The prosecution would not have to prove that she had knowledge of particular ways in which the mud crabs were commercially unsuitable – for example because they were undersized or had some other particular characteristic of the kind described in Schedule 2 of the Northern Territory Mud Crab Fishery Management Plan.

[74] However the prosecution must prove that the respondent had knowledge that she was in the possession of commercially unsuitable mud crabs.

[75] Accordingly Ground 2 is not made out. The appeal will be dismissed.

Possession of fish for sale

[76] In her written submissions the respondent contended that even if the prosecution was not required to prove knowledge that she possessed commercially unsuitable mud crabs, the appellant could not establish that she possessed them for sale, that being part of the complaint the subject of the appeal.[47]

[77] The appellant's immediate response to this contention was that the crabs were deemed to be fish for sale by force of regulation 149 of the Regulations. Regulation 149 provides that "[f]ish at a place specified on a licence shall be deemed to be fish for sale."

[78] Because this point was raised so late I gave the parties leave to provide supplementary written submissions. The appellant provided supplementary written submissions which explained why regulation 149 falls within the regulation making power in s 47 of the Act, and how regulation 149 operates with other provisions of the Act

[47] Count 3 on the complaint was that "Being the holder of fish retailer licence … and Parap Markets being a place for sale of fish under the said fish retailer licence, you possessed fish for sale in contravention of the *Fisheries Act*, namely 9 commercially unsuitable mud crabs."

including s 44(8).[48] In her supplementary written submissions, the respondent contends that regulation 149 is invalid, in that it purports to impermissibly extend the scope of the Act and is not covered by the regulation making power in s 47 of the Act.[49]

[79] Because of my conclusion that the appeal should be dismissed, there is no point in further delaying the finalisation of the appeal in order for the appellant to respond to that contention and for further submissions to be made. For example it is not readily apparent to me that the prosecution of this offence, namely being in possession of the commercially unsuitable mud crabs, does require proof that they were for sale. Moreover, I would require more detailed submissions, and perhaps the intervention of a third-party such as the Attorney-General, before embarking upon a serious challenge to the validity of the regulation.

Orders

[80] I order that the appeal be dismissed.

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48 Appellant's Supplementary Submissions provided 5 December 2014.

49 Respondent's Additional Submissions on Regulation 149 provided 19 February 2015.