Aregar v Australian Fisheries Management Authority [2015] NTSC 61

PARTIES:	SARKAWIA AREGAR v AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 18 of 2015 (21421576)
DELIVERED:	17 September 2015
HEARING DATES:	30 July 2015
JUDGMENT OF:	HILEY J
APPEAL FROM:	G SMITH SM

CATCHWORDS:

APPEAL – Justices Appeal – appeal against conviction – use of foreign boat for commercial fishing in Australian Fishing Zone

EVIDENCE – evidentiary effect of averments and certificate made under *Fisheries Management Act 1991* (Cth) s 166 – obligations of defendant – proof of location of vessel within Australian Fishing Zone

EVIDENCE – admissibility – evidence of location produced by process, machines or other devices – GPS - presumption of accuracy of scientific or technical instruments - *Evidence (National Uniform Legislation) Act 2011* (NT) s 146

CRIMINAL LAW – strict liability - defence of honest and reasonable mistake of fact raised – subjective belief of mistake – evidential onus not discharged - *Commonwealth Criminal Code* 1995 ss 9(2), 13.3(2)

Australian Fisheries Management Authority v Su (2009) 176 FCR 95; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159; C*hief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; *Chiou Yaou Fa v Morris* (1997) 87 FLR 36; *CTM v R* (2008) 236 CLR 440; *DPP v Cummings* [2006] VSC 327; *E&J Gallo Winery v Lion Nathan Australia Pty Limited* [2008] FCA 934; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Hindrum v Lane* [2014] TASFC 5; *Mei Ying Su v Australian Fisheries Management Authority (No 2)* (2008) 251 ALR 135; *Ministry of Agriculture and Fisheries v Wallace* [1998] DCR 837; *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710; *Norvill v Stokes* [2006] NSWLEC 622; *O'Brien v Ostrowski* [1999] WASCA 184; *Police v Sherlock* (2009) 103 SASR 147; *Porter v Kolodzeij* [1962] VR 75; *PQ v Australian Read Cross Society* [1992] 1 VR 19; *R v Hush; Ex parte Devanny* (1932) 48 CLR 487; *Such v Police* [2011] SASCFC 4; *Von Lieven v Stewart* (1990) 21 NSWLR 52; *Wilgosh v Good Spirit Acres Ltd* [2007] SKCA 43, referred to.
Criminal Code Act 1995 (Cth), ss 9(2); 13
Evidence (National Uniform Legislation) Act 2011 (NT); s 146
Fisheries Administration Act 1991 (Cth), s 93
Fisheries Management Act 1991 (Cth); ss 100(2); 100(2A), 101(2); 101(2A), 166(2); 166(8)
Judiciary Act 1903 (Cth), ss 68(2), 68(7) and 79(1)
Justices Act 1928 (NT), s 163
Seas and Submerged Lands Act 1973 (Cth), s 10B

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC and T Lee
Respondent:	G Lynham

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Commonwealth Director of Public Prosecutions

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

Aregar v Australian Fisheries Management Authority [2015] NTSC 61
No. JA 18 of 2015 (21421576)

BETWEEN:

SARKAWIA AREGAR
Appellant

AND:

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 17 September 2015)

Introduction

[1] On 30 March 2015 the appellant was convicted of two offences contrary to the *Fisheries Management Act 1991* (Cth) ("FMA") relating to his being in charge of, and using for commercial fishing, a foreign vessel whilst within the Australian Fishing Zone ("AFZ") on 18 April 2014. He has appealed against those convictions.

[2] In short, the appellant contends that the prosecution did not prove beyond reasonable doubt that the appellant's vessel was located within the AFZ at the relevant time, alternatively that the appellant was not

excused of criminal responsibility because of honest and reasonable mistake.

Background

[3] The appellant is an Indonesian commercial fisherman. He was charged on the information of the respondent in relation to 3 alleged incursions across the southern boundary of the Indonesian Exclusive Economic Zone ("Indonesian EEZ") and into the AFZ on 18, 20 and 21 April 2014. For each incursion he was charged with 2 offences: using a foreign boat, the *Linggar Petak 69*, for commercial fishing contrary to s 100(2) of the FMA; and, being in charge of a foreign vessel equipped for fishing contrary to s 101(2) of the FMA.

[4] The charges were dealt with by trial before the Court of Summary Jurisdiction on 18, 19 and 22 September 2014. On 30 March 2015, Mr Smith SM acquitted the appellant of the charges in relation to the 20th and 21st (charges 1, 2, 5 and 6 respectively) but found him guilty of the charges in relation to the 18th April 2014 (charges 3 and 4). On 27 April 2015, his Honour convicted the appellant of counts 3 and 4 and levied fines of $2,000 and $3,000 respectively.

[5] Charges 3 and 4 and their averments were, as amended:

3. On 18 April 2014 at about 18.55 CST at a place in the Australian Fishing Zone, did use a foreign boat, namely the 'Linggar Petak 69' for commercial fishing

Contrary to subsection 100(2) of the *Fisheries Management Act 1991* (Cth)

AND THE INFORMANT AVERS that the said Sarkawai AREGAR was near position 11º26'46" South and 126º11'19" East at the time of the offence.

AND THE INFORMANT AVERS that the boat 'Linggar Petak 69' was near position 11º26'46" South and 126º11'19" East at the time of the offence.

4. On 18 April 2014 at about 18.55 CST at a place in the Australian Fishing Zone, had in his charge a foreign boat, namely the 'Linggar Petak 69' equipped for fishing

Contrary to subsection 100(2) of the *Fisheries Management Act 1991* (Cth)

AND THE INFORMANT AVERS that the said Sarkawai AREGAR was near position 11º26'46" South and 126º11'19" East at the time of the offence.

AND THE INFORMANT AVERS that the boat 'Linggar Petak 69' was near position 11º26'46" South and 126º11'19" East at the time of the offence.

[6] The *Criminal Code Act 1995* (Cth) ("the Code") applies, but as both offences attract strict liability,[1] its significance for this appeal is confined to the application of the honest and reasonable mistake defence in s 9(2) of the Code.[2] These Federal offences were triable in the Court of Summary Jurisdiction and appealable to this Court as if they were offences under Territory law by reason of ss 68(2), 68(7) and

[1] ss 100(2A), 101(2A) FMA.
[2] See also s 13 of the Code – proof of criminal responsibility.

79(1) of the *Judiciary Act 1903* (Cth). There is no issue as to the application of Territory laws or as to the use of Territory courts for the determination of the merits of this appeal.[3]

[7] The appeal is brought pursuant to s 163(1)(b) of the *Justices Act 1928* (NT) which permits an appeal against conviction if there has been an error or mistake on the part of a magistrate on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law.

Grounds of appeal and main issues

[8] The prosecution case included that:

(a) the vessel was at the location alleged, namely "near position 11º26'46" South and 126º11'19" East" (the "Location");

(b) the Location was inside the AFZ.

[9] The position of the vessel was derived from an "on-top fix" taken by Mr Morgan, electronic mission coordinator, on board Cobham Aviation Services aircraft VHZZA at about 18.55 CST on 18 April 2014. This was done by Mr Morgan clicking a button to obtain a GPS readout of the position of the aircraft as it flew past the vessel.

[3] The appellant submitted that, following determination of the appeal, an issue may arise as to the application of Part IV Division 5 of the *Justices Act 1928* (NT) concerning the power to award costs against the respondent in the proceedings below.

[10] The prosecution contended that the relevant part of the AFZ is delineated by straight lines drawn between 3 points set out in the Proclamation made under s 10B of the *Seas and Submerged Lands Act 1973* (Cth) ("SSLA") ("the s 10B Proclamation"), namely points w, x and y identified in the Schedule under the subheading "2. Timor and Arafura Seas".

[11] Apart from the primary issue as to whether the vessel was inside the AFZ and the possible operation of the defence of honest and reasonable mistake, there was no dispute about other elements of the offences, including for example whether the appellant's vessel was a foreign boat and whether the vessel was being used for commercial fishing purposes.

[12] Counsel for the appellant summarised the grounds of appeal as follows:

(a) erroneously finding that the position of the boundary of the AFZ had been proved at points w, x and y of the s 10B Proclamation – ground 1;

(b) erroneously admitting as evidence, and applying the presumption of regularity to, the s 166(2) certificate Ex 28 – ground 2;

(c) erroneously ignoring the significance of the different geodesic datum systems on the various longitude and latitude readings in the evidence – grounds 3 and 4;

(d) erroneously admitting evidence of the "output" of the on-top fix taken on VHZZA on 18 April 2014 which did not satisfy s 146 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("the UEA") – ground 5;

(e) erroneously finding that the respondent established beyond a reasonable doubt on the evidence that the appellant's boat was within the AFZ on 18 April 2014 – ground 6;

(f) erroneously rejecting the defence of honest and reasonable mistake – grounds 7 and 8.

Whether the vessel was within the AFZ

[13] In order to establish that the vessel was inside the AFZ the respondent relied primarily upon the averments as prima facie evidence of the Location,[4] and the Certificate purportedly made under s 166(2) FMA (Ex 28) (the "Certificate") as prima facie evidence that the Location was within the AFZ.[5] The respondent also called a number of witnesses who gave evidence about those matters and counsel for the appellant

[4] s 166(1) FMA.
[5] s 166(2)(b) & (7)(a) FMA.

relied upon some of their evidence as creating doubt about the conclusions expressed in those documents.

[14] The Certificate stated inter alia that: “During the period 17 April 2014 to 22 April 2014 the area of waters being 11º26’46” South and 126º11’19” East was part of the AFZ.”

[15] The appellant contended that the Certificate was not admissible. The appellant also contended that even if the Certificate was admissible, the evidence concerning the Location and whether or not it was inside the AFZ was such that his Honour should not have found beyond reasonable doubt that the vessel was inside the AFZ.

Grounds 1 and 2

Admissibility and effect of the Certificate

[16] For the following reasons I conclude that the Certificate was admissible and therefore appropriately marked as an exhibit.

[17] The Certificate was originally marked as MFI 28 and its author, Peter Venslovas, gave evidence. Counsel for the appellant had requested production of the delegation pursuant to which Mr Venslovas had purported to act when signing the Certificate. That delegation was never produced. Mr Venslovas was cross-examined and counsel for the appellant conceded that even if the delegation had been produced there

would have been no further cross-examination of him as the document would speak for itself.

[18] The relevant provisions of s 166 FMA provide as follows:

> (1) In any proceedings for an offence against this Act, an averment of the prosecutor, contained in the information or complaint, that:
>
> (a) the defendant was at a particular place at the time of the alleged offence; or
>
> (b) the boat, aircraft or other thing referred to in the information or complaint was at a particular place at the time of the alleged offence; or
>
> (c) …
>
> is prima facie evidence of the matter of averred.
>
> (2) AFMA may give a certificate:
>
> (a) …
>
> (b) that, at a time or during a period specified in the certificate, an area of waters specified in the certificate was part of the AFZ; …
>
> …
>
> (7) In proceedings for an offence against this Act or the regulations, a certificate given under this section is:
>
> (a) in all cases—prima facie evidence of the matters stated in the certificate; and
>
> (b) …
>
> (8) A document purporting to have been signed, issued or given under this Act is, on mere production, admissible in any proceedings as prima facie evidence of the fact that it was duly signed, issued or given.

[19] Counsel for the appellant submitted that because a certificate made under s 166(2) FMA is made by the Australian Fisheries Management Authority (AFMA) it must be made under the seal of AFMA or by the CEO of AFMA or a person delegated by the CEO, by signed writing, under s 93 of the *Fisheries Administration Act 1991* (Cth) ("FAA").

[20] Mr Wyvill QC contended that s 166(8) did not apply to make the Certificate admissible. He pointed out that certificates of this kind must be strictly construed. Counsel contended that unless the delegation of Mr Venslovas was produced the Certificate had "no status" and was thus inadmissible. He also contended that the Certificate did not meet the requirements of s 166(8) because it was not a "document purporting to have been signed, issued or given *under this Act*." (My emphasis). This is because Mr Venslovas derived such authority as he may have had under another Act, namely the FAA.

[21] In my view the Certificate does purport to have been signed, issued or given under the FMA.[6] The Certificate includes in its heading the words "Australian Fisheries Management Authority", "*Fisheries Management Act 1991*" and "Certificate under Section 166(2)". Moreover the opening words state that "I, Peter Ernest Venslovas, delegate of the Australian Fisheries Management Authority, certify

[6] *DPP v Cummings* [2006] VSC 327 at [10].

under subsection 166(2) of the *Fisheries Management Act 1991* that …".

[22] Thus the Certificate was admissible as prima facie evidence of the fact that it was duly signed and issued (s 166(8) FMA) and of the matters stated in it (s 166(7)(a) FMA).

[23] Mr Wyvill QC contended in the alternative that if admissible it would only be admissible as prima facie evidence that it was "duly signed, issued or given" under the FMA. Even if this were so, the Certificate was only relied upon in these proceedings for the purposes of the FMA, not some other Act. He also contended that some kind of estoppel arose as a result of the Crown resiling from its undertaking to produce the delegation, and also that a *Jones v Dunkel* inference should be drawn to the effect that the delegation would not have assisted the prosecution's case. There was no elaboration concerning the estoppel point and I fail to see how estoppel principles could apply.

[24] Further, in view of my conclusion that the Certificate was admissible by force of s 166(8) FMA, nothing relevant flows from the failure to produce the delegation.

[25] It follows that there was prima facie evidence of each of the two matters referred to in paragraph [8] above, namely that:

(a) the vessel was at the location alleged, namely "near position 11º26'46" South and 126º11'19" East"; and

(b) the Location was inside the AFZ.

[26] The evidentiary effect of averments under s 30B of the *Crimes Act 1914* (Cth), which provides that averments shall be prima facie evidence of the matters averred, was described by Dixon J in *R v Hush*[7]:

> It is to be noticed that this provision, which occurs in a carefully drawn section, does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.

[27] This passage has been applied on numerous occasions since then including in relation to similar averment provisions in s 255 of the *Customs Act 1901* (Cth) and s 144 of the *Excise Act 1901* (Cth). See too the discussion by Hayne J in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[8] and by McHugh, Gummow, Hayne and Heydon JJ in *Chief Executive Officer of Customs v El Hajje.*[9]

[7] (1932) 48 CLR 487 at pp 507-8.
[8] (2003) 216 CLR 161 at [140] – [145]
[9] (2005) 224 CLR 159 at [31] – [38].

[28] As prima facie evidence, an averment or certificate of this kind must be considered along with all other evidence to determine whether the prosecutor has proved the relevant fact beyond reasonable doubt.[10] An accused might create a doubt about such a fact or call into question the conclusion expressed in a certificate or averment by tendering contrary evidence,[11] pointing to other evidence in the Crown case or casting doubt on the credibility of certain witnesses.[12]

[29] The appellant contends that notwithstanding the prima facie effect of the averments and Certificate, the other evidence is such that his Honour should have had a reasonable doubt about one or both of the facts in [8] above.

Boundary of the AFZ

[30] The prosecution's case was that the vessel was located near position 11º26'46" South and 126º11'19" East. This position was referred to as point "a".

[31] Mr Mark Simpson, a Data Analyst employed by AFMA, plotted point a, and several other locations (referred to as points "b" to "m"), the coordinates for which had been provided by Mr Cox, onto 2 maps

[10] *Norville v Stokes* [2006] NSWLEC 622 at [26] citing inter alia *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507-8.
[11] See for example *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 per Hayne J at [144].
[12] See for example *Such v Police* [2011] SASCFC 4 at [16] – [19].

showing the AFZ in an area to the west of the Joint Petroleum Development Area, north-west of Australia.[13] He performed that task by importing the data for each position into ArcGIS GIS software. He plotted points w, x and y and produced the green line joining those points on those maps thereby depicting the relevant part of the AFZ boundary by using the AFMA database and a shapefile produced by GO Science Australia. He then used the ArcGIS GIS software to measure distances between each point and the AFZ. By that process he found that point a was 900 m (0.48 NM) inside the AFZ boundary.[14]

[32] Mr Simpson had been employed by AFMA since 1992. At the time when he made his statutory declaration his main duties included the extraction of information from AFMA's logbook databases and production of maps using Geographic Information System (GIS) software. He had an Honours Degree in Science and a Graduate Diploma in Computing Studies. His training and work experience gave him a good understanding of AFMA fisheries data and computer systems. He had been trained in the use of ESRI GIS software and had used ESRI's Arc View and ARCGIS applications extensively for the previous six years.[15]

[13] The maps are drawn to 2 different scales and form part of Exhibit P16.
[14] Ex P16.
[15] Ex P16.

[33] I find that he was well qualified to perform the tasks of plotting positions, such as points a, w, x and y, onto the maps, and ascertaining the distance between point a and the AFZ boundary so plotted.

[34] In the process of performing that exercise Mr Simpson plotted all the coordinates on the maps which were part of Exhibit 16 by relying upon the coordinate system Geocentric System Datum of Australia 1994 ("GDA94"). He was asked to prepare another map plotting the points w, x and y using the Australian Geodetic Datum 1966 ("AGD66"). Although AGD66 has effectively been preferred and superseded by the more recent GDA94 the coordinates in the s 10B Proclamation are expressed in terms of the AGD66. He used a blue line to depict the relevant part of the AFZ boundary using AGD66.[16] A composite map was tendered showing both the green and blue lines, and also point a and other relevant points (which were still plotted using GDA94).[17] Although this exercise showed that the relevant part of the AFZ boundary, using AGD66, was to the south of that depicted using GDA94, point a was still inside the boundary - approximately 815 metres inside the boundary using AGD66, compared to the 900 metres using GDA94. (Had point a and the other coordinates provided by Mr Cox also been re-plotted using AGD66, the distances between those points and the AFZ boundary using AGD66 would have been the same

[16] See Exhibit P29.
[17] Exhibit P30.

as those originally derived when Mr Simpson used GDA94 to plot all of the coordinates. Relevantly, the distance between point a and the AFZ boundary would still have been 900 metres.)

[35] The appellant contended that the prosecution did not prove beyond reasonable doubt that the lines drawn between points w, x and y delineated the boundary of the AFZ, and thus that point a was within the AFZ.[18] I agree that although those points w, x and y, are identified in the relevant part of paragraph (b) of the s 10B Proclamation, in order for those points to delineate the boundary of the AFZ it is necessary that they be less than 200 international nautical miles seaward of the baselines determined by Proclamation under s 7 of the SSLA or established under international law. Although one would expect most of the points identified in paragraph (b) to be within 200 international nautical miles of the baselines, the apparent purpose of paragraph (b) being to deal with the possibility that a boundary 200 international nautical miles seaward of the baselines might overlap and conflict with the exclusive economic zone of an adjacent country, that is not necessarily the case. By way of example the appellant referred to the Agreement on Maritime Delimitation between Australia and France which identifies the boundary between New Caledonia and Australia by reference to a number of coordinates that appear in the 10B

[18] Ground 1.

Proclamation but which are outside the 200 international nautical mile limit.

[36] My conclusion that the Certificate was valid and admissible makes it unnecessary to determine the precise location of the relevant part of the AFZ and thus whether points w, x and or y are within the 200 international nautical mile limit, unless the other evidence causes me to doubt the accuracy of any relevant part of the Certificate. Such a doubt might arise for example if there was some evidence, or evidence or circumstances from which an inference might be drawn, that any of points w, x and or y are beyond the 200 international nautical mile limit. There was no such evidence.

[37] His Honour was entitled, as he did, to regard the averments and the Certificate as being sufficient proof that point a (ie the Location) was within the AFZ. Further, both the maker of the Certificate (Mr Venslovas) and the person on whose information he relied for the purpose of plotting the relevant coordinates (Mr Simpson) gave evidence and were cross-examined. There is no evidence to suggest that when Mr Simpson plotted the coordinates on the maps in Exhibit 16 he did so erroneously or that the AFMA fisheries data and computer systems which he used were inaccurate.

[38] Contrary to the appellant's submissions in relation to grounds 1 and 2, there was no need for his Honour to rely upon some presumption of regularity to find that points w, x and y mark the relevant boundary of the AFZ or that the Certificate was valid and admissible.

[39] In relation to ground 2 counsel for the appellant put two other contentions in the alternative to the submissions regarding the admissibility of the Certificate. The first was that the Certificate was based upon the unproven assumption that the points w, x and y mark the relevant boundary of the AFZ. I reject that contention. The very point of provisions such as those contained in s 166(1), (7) & (8) FMA is to save the prosecution the time and expense that would be involved in proving each of the underlying facts and circumstances.

[40] The second contention is that:

> … at most the Certificate is evidence that the waters at the point 11º26'46" South and 126º11'19" East are in the AFZ, but not any of the adjacent waters. A second is about 31.25 metres. Given what is said in relation to ground 5 and 6 below, there is no basis on which the court could reasonably conclude that the Prosecution had established beyond a reasonable doubt that the Linggar Petak 69 was within this 31.25 metres by 31.25 metres box on 18 April 2014 at about 18.55 CST. The Certificate therefore has no relevance.

[41] Even if I were to accept what is said by the appellant in relation to grounds 5 and 6 below, and or that there is a reasonable doubt as to whether the vessel was in fact "near" 11º26'46" South and 126º11'19"

East, that would not render the Certificate irrelevant. More importantly, it would not render it inadmissible or gainsay what it certifies. I reject that alternative contention.

[42] Accordingly grounds 1 and 2 are not made out.

Grounds 3 & 4

[43] As I have already noted in [34] above, Mr Simpson prepared a second map plotting the coordinates of points w, x and y and thus depicting the relevant part of the AFZ boundary using AGD66.[19] This resulted in differences between the positions, relevantly, of points a and x, depending on which coordinate reference system was used. Using AGD66 to plot the co-ordinates of points w, x and y, the position of point x would be approximately 200 m south-west of the position that was shown using GDA 94,[20] and point a would be approximately 810 metres within the AFZ rather than 900 metres.

[44] Counsel for the appellant pointed out that there was no evidence as to whether the geodesic datum systems which were used by the navigation equipment on the Cobham Aviation Services aircraft VHZZA were AGD66 or GDA94 or some other, for example “WGS 1984” referred to

[19] Exhibit P29.
[20] Reasons p 9.2.

in the margin of Exhibit P8, a map showing depths of sea-beds. [21] Apart from a reference to that description being a shorthand reference to the World Geometric Survey of 1984 there was no other questioning or evidence about what that meant and what if any relevance it may have in these proceedings. Counsel also referred to Mr Simpson's inability to explain the significance of recasting the AFZ boundary from the data system GDA94 to the data system AGD66 and the relevance of that change for the purpose of understanding the evidence. It was submitted that the prosecution therefore failed to "reliably relate [the GPS] reading" used for the on-top fix to the points w, x and y of the s 10B Proclamation which are in AGD66.[22]

[45] In my opinion his Honour was able to find beyond reasonable doubt that point a was inside the AFZ, irrespective of which data system was used to plot the AFZ boundary. Assuming that the boundary was that shown by the blue line on Exhibit P29, namely that plotted using AGD66, point a was still approximately 810 metres inside the AFZ if plotted using GDA94 and 900 metres if using AGD66. There was no reason for his Honour to speculate that some other geodesic datum system might have been used by the GPS on aircraft VHZZA. Nor was there any need for evidence about the significance of recasting the

[21] Appellant's Submissions filed 27 July 2015 ("Appellant's Submissions") [33]; Reasons 9.5, 9.9, 16.6.
[22] Appellant's Submissions [34].

ADZ boundary from the data system GDA94 to the data system AGD66. Either way, point a fell well within the AFZ.

[46] The appellant also contended that his Honour appeared to rely on the same concerns in dismissing charges 1, 2, 5 and 6. With respect this is not correct. A major reason for dismissing those charges was based upon the fact that rather than locating the vessel by use of an on-top fix obtained as the aircraft was flying past the vessel, the operators of the aircraft used on those occasions, VHZZB, used more complex and less reliable methods, namely a combination of GPS and radar. His Honour also expressed concern about conflicting evidence between two of the main witnesses involved with VHZZB. These and other factors, coupled with the fact that the points plotted as being the locations of the vessel on those two occasions were somewhat closer to the AFZ boundary than point a, created a reasonable doubt such as to require his Honour to dismiss those charges. The prima facie effect of the averments concerning the location of the appellant and the vessel on those two occasions had been displaced.

Ground 5

[47] This ground relates to the admissibility of the evidence of location derived from the on-top fix using the GPS on aircraft VHZZA. The evidence was that contained in and based upon the Sighting Report

(Exhibit P12) which was the GPS readout of the position of the aircraft obtained when Mr Morgan clicked a button as the aircraft flew past the vessel. The appellant contended that that evidence was inadmissible because it did not satisfy the requirements of s 146 of the UEA.

[48] The Sighting Report recorded that at 18092448ZAPR14 (namely 18.54.48 CST) the aircraft was located at 11º26'46" South and 126º11'19" East, was at an altitude of 193 feet, heading 65º (approximately ESE) and travelling at 155 knots. It also stated that the target, namely the vessel, was located at 11º26'46" South and 126º11'19" East. Mr Morgan said that he recorded the position of the vessel (and the aircraft) and took the photograph of the vessel (Ex P10) out of the left window of the aircraft "at the nearest point, which is the beam of the vessel, 90 degrees of course" at about 18:55 CST. The document also contains an entry "updated on" opposite which was "18092545ZAPR14" (namely 18.55.45 CST). According to Mr Morgan, the vessel was heading in a south-westerly direction when the recording and photograph were taken.

[49] Prior to that, Mr Morgan, the mission coordinator, and Graeme Porter, an electronic observer, had been undertaking a surveillance mission north-west of Darwin on board the aircraft VHZZA on behalf of Border Protection Command. At about 1840 the aircraft radar system detected

an object, namely the *Linggar Petak 69,* which appeared to be "very close just on the inside of the Australian Economic Exclusion Zone". After ebbing to the south-west of the vessel the aircraft turned and homed in back towards the vessel on a north-easterly direction, the intention being to descend to a level below 200 feet and take photographs as the aircraft approached the vessel and passed it on its left-hand side. As the aircraft was approaching the vessel Mr Porter took video images of the vessel by operating an electro-optics camera situated in the electro-optical turret which was situated underneath the front of the aircraft and Mr Morgan operated a digital camera to photograph the vessel as the aircraft passed it.

[50] Mr Morgan described two ways in which the position of a vessel can be ascertained. One is to take a GPS fix through the electro-optics camera, called a VO fix, which can fix the position of the vessel from a distance by pointing the camera at it. This was in fact done on two occasions as the aircraft was approaching the vessel, one at about 2 miles away and the other at about half a mile away. The other way is to take a GPS fix by photographing the vessel with a digital camera as the aircraft is flying past the vessel. That is what is commonly referred to as an on-top fix.

[51] The GPS reading for the on-top fix reflects the actual location of the aircraft, not the vessel. It would not reflect the exact location of the vessel unless the aircraft was immediately above the vessel at the relevant time. Mr Morgan explained that the aircraft was not permitted to fly within a certain distance of the vessel. He calculated that the vessel was less than 135 metres away from the location of the aircraft when he pressed the button which enabled the photograph to be taken and the Sighting Report to be generated. This was a simple trigonometric exercise which was based upon the height of the aircraft and the angle between it and the vessel.

[52] It seems that his Honour relied upon the common law evidentiary presumption of accuracy of scientific or technical instruments in accepting the accuracy of the GPS system and the recordings generated by it, in particular the Sighting Report. His Honour referred to *Chiou Yaou Fa v Morris*[23] where Asche J discussed the presumption at some length. Asche J observed that the presumption is based upon the concept of judicial notice and that once an instrument gains sufficient recognition the law will permit shorthand of judicial notice. In some cases expert evidence must be given to establish that the instrument is

[23] *Chiou Yaou Fa v Morris* (1997) 87 FLR 36.

of such a kind that it may be expected to be trustworthy, before the presumption of its working accuracy can be relied upon.[24]

[53] The presumption has been referred to in numerous other decisions and conveniently summarised in *Porter v Kolodzeij*.[25] The presumption of accuracy of GPS systems has been recognised in other jurisdictions.[26]

[54] In the present case his Honour also had the benefit of the evidence of Mr John Head who had been a missions system specialist for 15 years. His primary role was the oversight and support of mission equipment on board aircraft including surveillance radar, the electro-optics and the missions systems. He was familiar with the operation of the GPS system utilised as part of an aircraft's on-board systems. He gave expert evidence on the latter point and that the GPS system was accurate to generally less than 30 metres with a degree of confidence of 95 percent. Although his opinions were largely based upon information derived from other sources, including information provided by the manufacturer of the GPS system and the United States Department which is responsible for GPS accuracy, his specialised knowledge was such as to make his opinions admissible.[27]

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[24] *Chiou Yaou Fa v Morris* (1997) 87 FLR 35 at pp 43-47.
[25] [1962] VR 75.
[26] See for example *Ministry of Agriculture and Fisheries v Wallace* [1998] DCR 837, and *Wilgosh v Good Spirit Acres Ltd* [2007] SKCA 43.
[27] See for example detailed discussion in *PQ v Australian Read Cross Society* [1992] 1 VR 19 from p 34.

[55] In my opinion the common law presumption of accuracy of the GPS system on the aircraft and the on-top fix readings derived thereby and recorded in the Sighting Report applied in the present matter.

[56] The appellant contended that even if it may once have been admissible at common law the evidence contained in the Sighting Report, in particular the evidence of the location of the aircraft and the vessel at the time of the on-top fix, is not admissible. This is because s 146 of the UEA would apply to such evidence and has superseded the common law in relation to this topic. The appellant did not offer any authority in support of this contention. I reject it.

[57] Section 9 of the UEA expressly provides that the "Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment." In my opinion there is nothing in s 146 or elsewhere in the Act which so provides.[28] Like many other statutory provisions which expressly create presumptions, indeed those such as the averment and certificate provisions involved in the present case, I consider that s 146 is a facultative provision designed to facilitate proof of "the working

[28] Similarly s 144 UEA dealing with matters of common knowledge would not subsume the common law concept of judicial notice.

accuracy of a particular device or process in producing (information)"[29] without the additional processes that may have been required under the common law.

[58] Even if, contrary to my opinion, s 146 does have the effect of removing the common law presumption of accuracy, I do not agree with the appellant's contention that the presumption contained in s 146(2) would not apply.

[59] Section 146 of the UEA states:

> (1) This section applies to a document or thing:
>
> (a) that is produced wholly or partly by a device or process; and
>
> (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.
>
> (2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

[60] Per Beazley JA in *North Sydney Leagues' Club Ltd v Synergy Protection Agency Pty Ltd* (2012) 83 NSWLR 710 at [63]

> Section 146 is directed to evidence produced by the application of a mechanical or technological process. Photocopied

[29] *E & J Gallo Winery v Lion Nathan Australia Pty Limited* [2008] FCA 934 at [128]; (2008) 77 IPR 69.

> documents, computer generated material and material generated from data stored in a computer are typical examples.

[61] The appellant contended that s 146 applies to the GPS readout of the position of the aircraft as it flew past the vessel. Counsel for the appellant said that:

> In this matter, the specific question is whether the Magistrate was entitled to find that the 'process' employed here - the on-top fix process described by Mr Morgan … is one that, "if properly used, ordinarily produces" the latitude and longitude of the vessel the subject of the process to an accuracy sufficient to enable the Court to conclude beyond a reasonable doubt that the *Linggar Petak 69* was within the AFZ at about 18.55 CST on 18 April 2014.[30]

[62] Counsel submitted that in *Norvill v Stokes*[31] Jagot J refused to apply s 146 to admit location evidence provided by a GPS device in the prosecution of the defendant for unauthorised clearing of protected land.[32] This is not correct. Her Honour did admit the evidence but expressed concerns about its utility in the particular case given some of the expert evidence led in that case. At [77] her Honour said:

> I consider that it is reasonably open on the evidence (particularly the evidence of Mr Norvill) to find that a GPS device is a device that is of a kind that, if properly used, ordinarily produces an outcome, being a coordinate expressed as an easting and northing identifying the location of the device.

[30] Appellant's Submissions [41].
[31] [2006] NSWLEC 622.
[32] Appellant's Submissions [47].

[63] For the most part counsel's argument was based on the assumption that the "outcome" was the position of the vessel "to an accuracy sufficient to enable the Court to conclude beyond a reasonable doubt that [it] was within the AFZ." Counsel asserted a number of uncertainties and possible errors or anomalies, mainly arising out of other evidence concerning the position of the vessel shortly before the time when the on-top fix was taken. These assertions erroneously conflate the two parts of s 146(2).

[64] If one were to consider the position of the aircraft as recorded on the Sighting Report, rather than the position of the vessel, as a "particular outcome", I consider it was "reasonably open to find that the [on-top fix] devise or process" – namely the process set in train by Mr Morgan when he pushed the button to photograph the vessel as the aircraft flew nearby – "is one that, or is of a kind that, if properly used, ordinarily produces that outcome." His Honour was clearly satisfied that the process by which Mr Morgan came to record the position of the aircraft as it flew past the vessel was properly used by him.[33] Accordingly, "unless evidence sufficient to raise doubt about the presumption [was] adduced", "it is presumed … that, in producing the [Sighting Report] the device or process produced that outcome."[34]

[33] Reasons pp 10-11.
[34] s 146(2) UEA

[65] Counsel for the appellant asserted a number of uncertainties in relation to the on-top fix process, namely the possibility of "processing delays" such as the time it takes for the operator to press the optic button as the aircraft flies past the vessel (in this case in the opposite direction) and uncertainties about the satellite system and the US defence system which runs the GPS system. Counsel also referred to other uncertainties caused by the combination of the judgment required by the operator, the speed at which the plane is flying[35], its height[36], its distance and bearing from the subject vessel[37] and the fact that, in this instance, VH-ZZA was travelling in the opposite direction to the vessel.[38] Counsel attempted to demonstrate the impact of those uncertainties by pointing out the absurd anomaly that would result if the vessel locations suggested by the electro optics readings taken on the two occasions from a distance of about two nautical miles and half a nautical mile respectively were correct.

[66] Only the uncertainties asserted in relation to the on-top fix process would be relevant to the presumption concerning the location of the aircraft. The others relate to conclusions about the location of the vessel. There was no evidence or other basis for his Honour to feel any degree of uncertainty about the plane's system including "processing

[35] 155 knots: Ex P12.
[36] 250 feet: Ex P11.
[37] 433 feet/ 132 metres.
[38] VH-ZZA was heading north east while the *Linggar Petak 69* was heading south west: TP45.5.

delays", the satellite system or the US defence system which runs the GPS system. No evidence was adduced to raise doubt about the presumption that the aircraft was located at the position recorded on the Sighting Report, namely 11º26'46" South and 126º11'19" East, when it flew past the vessel.

[67] In light of that presumption, and the evidence that at that time the vessel was less than 132 metres away to the west of the aircraft, there was no room for doubt as to whether the vessel was within the AFZ. Thus there was no basis for departing from the prima facie evidence contained in the averments and Certificate.

[68] I referred above to the anomaly that would result if the vessel locations suggested by the electro optics readings taken on the two occasions from a distance of about two nautical miles and half a nautical mile respectively were correct. The two "screen shots" were tendered by counsel for the appellant and marked as Exhibits D14 and D15. They were tendered not as evidence of the accuracy of the information contained in them but to raise doubt about the accuracy of the systems used on the aircraft to accurately position the vessel. Exhibit D14 was a screen shot taken at 18.54.50 CST from a distance 2.2 nautical miles from the target vessel, and estimated the vessel to be located at 11º26'51" South and 126º11'04" East. Exhibit D15 was a screen shot

taken about 38 seconds later, at 18.55.28 CST, from a distance 0.6 nautical miles from the target vessel, and estimated the vessel to be located at 11º26'49" South and 126º11'06" East. If the vessel was located at 11º26'46" South and 126º11'19" East another 17 seconds later, at 18.55.45 it would have been travelling at a speed far in excess of its capability. Counsel submitted that there was a 500 metre unaccounted difference between the position of the vessel as measured 55 seconds before the time when the on-top fix was taken from a distance of 2.2 nautical miles and indicated on Exhibit D14 and the position indicated by the on-top fix. Clearly one or more of the estimates were wrong.

[69] His Honour considered this evidence in some detail and concluded that those screen shots should not be relied on as being particularly accurate as to the position of the vessel, inter alia because of the difficulty holding the camera sufficiently still when at such a distance from the target.[39] To the contrary he was satisfied about the accuracy of the equipment used for and reliability of the on-top fix, particularly in the light of the evidence of Mr Morgan and Mr Head. I see no basis for concluding that his Honour erred in reaching these conclusions.

[70] Counsel submitted that the prosecution should have called additional evidence to prove the reliability of the on-top fix system (which

[39] Reasons 11.

includes the GPS system) of the kind referred to by McKechnie J in *O'Brien v Ostrowski*.[40] Apart from the fact that s 146 UEA would not have applied in Western Australia, there was no suggestion during the hearing that it was necessary to call extensive evidence of that kind.

[71] The appellant also made two submissions about the averments that the appellant and his vessel were "*near* position 11º26'46" South and 126º11'19" East at the time of the offence" (emphasis added by counsel). Because averments must be strictly construed such averments are of "no assistance". Further, they are not authorised by s 166 FMA which refers to averring that the defendant or his boat were "at" not "near" a particular place. I reject that submission. In my opinion "*near* position 11º26'46" South and 126º11'19" East" is itself a "particular place". It is difficult to conceive of a more suitable way of describing the position of a vessel which is said to be located at a point closer to that particular geographic point than an adjacent geographical point.

[72] The second submission was that "the above submissions in relation to ground 5 and the submissions below in relation of ground 6 establish that the Magistrate could not reasonably conclude, 'on the whole of the material', the prosecution had established that the appellant and his boat were 'near position 11º26'46" South and 126º 11'19" (whatever that may mean) beyond a reasonable doubt: *Chief Executive Officer of*

[40] [1999] WASCA 184 at [28]-[38].

Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161 per Hayne J at 207-8." Apart from the fact that I have rejected the contentions raised in relation to ground 5, the submission fails to recognise the evidentiary effect of the averments and the Certificate.

Ground 6

[73] The appellant contended that "even if the evidence of the on-top fix was rightly admitted, it did not prove the position of *Linggar Petak 69* at 18.55 CST on 18 April 2014 within the AFZ beyond reasonable doubt given:

(a) the inaccuracies in the on-top fix system both generally and in this instance as referred to above;

(b) the fact that the appellant is a professional fisherman who had the relevant charts[41] and appeared to be skilled navigator [42] and with a GPS which was shown to be accurate. He had the AFMA map with the boundary shown on it.[43] None of the records in his GPS show that the appellant was south of the boundary on any occasion[44]. There is no evidence of flight or consciousness of guilt. On the

[41] See Ex 7, photos 1394-6, lost by the prosecution: TP86.6.
[42] See Ex P3, Q166 et seq.
[43] Ex P23, P24.
[44] Ex P27.

contrary, on all occasions he insisted that he was in Indonesian waters.[45]"

[74] The matters referred to in paragraph (b) above do not gainsay the averments and Certificate and the other evidence led by the prosecution concerning the location of the vessel within the AFZ at the relevant time. Although none of the information downloaded from the appellant's GPS showed the vessel south of the AFZ boundary, none of that information related to the period 16 to 20 April. However, it does show a pattern of deliberately fishing close to the AFZ boundary on various occasions between 7 April and 21 April 2014.[46]

[75] Nor did the appellant give or call evidence as to the whereabouts of him and the vessel at the relevant time from which any inference might be drawn that the vessel was not within the AFZ. I have already agreed that his Honour did not err in relying upon the evidence based upon the on-top fix.

[76] Even allowing for the variables in the GPS system and the different methods of plotting the AFZ boundary, the vessel was still well within the AFZ at the relevant time.

Defence of honest and reasonable mistake – grounds 7 & 8

[45] Ex P2, QA91-94; Ex P3 QA183.
[46] Ex P27

[77] Section 9(2) of the Code provides in effect that, a person is not criminally responsible for an offence if:

(a) the person was under a mistaken but reasonable belief about a fact or facts;

(b) if the fact or facts existed the person's conduct would not have constituted an offence.

[78] Section 13.3(2) of the Code imposes an onus on a defendant to satisfy the evidential burden of raising the defence as an issue. The "evidential burden" is defined in s 13.3(6) to mean "the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist".

[79] The appellant submitted that if his Honour was right to find that it was established beyond a reasonable doubt that the appellant and the Linggar Petak 69 were within the AFZ at about 18.55 CST on 18 April 2014, his Honour wrongly concluded that:

(a) the appellant had not discharged the evidential burden on him to raise honest and reasonable mistake;

(b) the Crown had excluded mistake beyond a reasonable doubt.

[80] The evidential burden upon an accused to raise honest and reasonable mistake has been discussed in numerous cases including *CTM v R*[47] where the majority repeated what had previously been said in *He Kaw v The Queen*[48] that:

> … the evidentiary onus of raising the grounds of exculpation is on the accused, but, once that occurs, the ultimate legal onus of displacing the ground lies on the prosecution. The concept of evidentiary onus itself needs to be understood in the light of the subject matter to which it applies; here, honest and reasonable belief, a concept that has *a subjective element of a kind that ordinarily is peculiarly within the knowledge of the accused*, and an objective element that must be capable of being measured against the evidence by a tribunal of fact.
>
> (emphasis added by me)

[81] In relation to the subjective element, unless the accused has already asserted such a belief for example when interviewed by an investigating officer, an accused would usually give evidence at the hearing. This occurred for example in *Mei Ying Su v Australian Fisheries Management Authority (No 2)*[49] (*Su v AFMA*) and in the decision subject of the appeal in *Hindrum v Lane*[50].

[82] The belief must be an affirmative belief. Inadvertence, the mere absence of knowledge, or not turning one's mind to the issue, is not

[47] (2008) 236 CLR 440 at [8]
[48] (1985) 157 CLR 523 at 534-535.
[49] [2008] FCA 1485; (2008) 251 ALR 135.
[50] [2014] TASFC 5.

sufficient.[51] Per Handley JA, Mahoney JA agreeing, in *Von Lieven v Stewart*[52]:

> The only excuse is the existence of an actual or positive belief, based on reasonable grounds, in the existence of some fact or facts which, if true, would make the act in question innocent.

[83] In order to satisfy the evidential burden an accused would need to show that there is "sufficient evidence to raise the issue" of honest and reasonable mistake, and no more.[53]

[84] In relation to the evidential burden upon the appellant, counsel repeated the points quoted in [73](b) above.

[85] Counsel for the appellant also referred to an occasion some eight months earlier, on 29 September 2013, when the appellant and his vessel were allegedly detected approximately 1 nautical mile inside the AFZ. Although his GPS plotter was checked at that time and "compared accurately with" the AFMA GPS and although AFMA officers were satisfied that he "displayed good navigational skills", he was not apprehended on that occasion because there was "a discrepancy" between the Indonesian chart 367 which the appellant had

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[51] *Hindrum v Lane* at [14] citing *Mei Ying Su v Australian Fisheries Management Authority (No 2)* [2008] FCA 1485; (2008) 251 ALR 135, and at [48] – [49] and [52] – [54] referring to *Von Lieven v Stewart* (1990) 21 NSWLR 52 at 66-67 and *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721 at 725-726.
[52] (1990) 21 NSWLR 52, at pp 66-67
[53] *Hindrum v Lane* at [16] – [19] and [70].

been using and the relevant Australian chart.[54] Counsel submitted that there is no evidence to suggest that that discrepancy was explained to and understood by the appellant at the time. Indonesian chart 367 was the chart which the appellant was using on Linggar Petak 69 in April 2014.[55] That chart was seized but subsequently lost by AFMA. No attempt was made by AFMA to confirm whether or not it accurately depicted the position of the AFZ.

[86] Counsel also pointed out that no attempt has been made to analyse the accuracy (to within 900m or at all) of the position of the AFZ as marked on the vessel's plotter (Ex P25).

[87] Counsel submitted that this amounts to evidence that raises "a reasonable possibility" that:

(a) at the relevant point, the boundary of the AFZ was incorrectly marked on his chart and/or his plotter at a position more than 900m south of where it in fact was; and

(b) it was his honest but mistaken belief in the accuracy of his chart and/or his plotter that led him to be mistaken as to his own position in relation to the boundary and thereby to accidentally

[54] Ex P6.
[55] Ex P7, photo 1396.

transgress 900m into the AFZ. That is a mistake of fact: *Australian Fisheries Management Authority v Su*.[56]

[88] Counsel submitted that this possibility was not excluded beyond a reasonable doubt by the prosecution, a conclusion which is more comfortably reached because the prosecution had the plotter available to it but chose not to analyse this aspect of it and because it lost the appellant's copy of Indonesian chart 367 and did not locate another copy.[57]

[89] His Honour also referred to another occasion, on 22 December 2013, when the appellant and his vessel were said to be observed 400 yards inside the AFZ. However by the time the vessel was reached and boarded by officers of ACV Corio Bay it was no longer inside the AFZ. The Commanding Officer of ACV Corio Bay recorded that the master, namely the appellant, was issued with an AFMA chart and that he "knew where he was and understood directions given to him".[58]

[90] On 21 April 2014 the appellant was interviewed by Customs and Border Protection Officer Timothy Jones. He (correctly) stated that the

[56] (2009) 176 FCR 95 at [26].
[57] Citing *Police v Sherlock* (2009) 103 SASR 147.
[58] Ex P5.

vessel was then in Indonesian waters and he used the vessel's GPS to show Jones where they were then situated.[59]

[91] The appellant participated in a recorded interview on 1 May 2014. He agreed that when his vessel had been boarded in December 2013 he had been given an AFMA chart which showed the "jurisdiction lines", where Indonesians can fish and where Australians can fish.[60]

[92] He also went into considerable detail concerning the precise (and correct) position of his vessel at the time when the customs vessel arrived on the morning of 21 April.[61] He acknowledged that the vessel and lines were very close to the AFZ line, insisted that the vessel was in Indonesian waters, and referred to the very strong current that he said could have caused his fishing equipment to drift south of the line during the customs investigation. He also stated that he often fishes very close to the line.[62] He acknowledged that he can read a navigational chart, make measurements and fix the position of his vessel on his chart, and use a compass and GPS.[63]

[93] The appellant did not say anything about where he thought the vessel was on 18 April, and in particular whether and why he believed that it was in Indonesian waters. He did not suggest that his GPS plotter may

[59] Ex P2 Q 92 & 94.
[60] Ex P3 Q 174-179.
[61] Ex P3 Q 183-197.
[62] Ex P3 Q198.
[63] Ex P3 Q 199-205.

have been inaccurate. Nor did he mention the Indonesian chart 367 and suggest that he was still relying on it despite its inaccuracies. Indeed, affixed to the wall of the cabin very close to the navigational equipment, was the bottom half of an AFMA map which is provided to Indonesian fishermen, indicating where the various maritime boundaries are.[64] Immediately above a number of schedules of coordinates appear the following words, in Indonesian: "Australia has strong fisheries laws and if you are caught illegally fishing in Australian waters inside you may lose your boat, your catch and your fishing gear. You may be fined or sent to jail."[65]

[94] Contrary to counsel's submissions noted in [87] above I do not consider that the evidence raised a reasonable possibility that the appellant was under the mistaken and reasonable belief that he and his vessel were in Indonesian waters at the relevant time, namely at about 1855 CST on 18 April 2014. Had the appellant relied upon the Indonesian chart 367 or considered that the AFZ boundary was incorrectly marked on the chart or his plotter, one might have expected him to say so, either when interviewed by AFMA officers, or by giving evidence at the hearing. He did neither.

[64] Ex P7 photo number 1475 and Ex P23.
[65] Ex P23 & Ex P24.

[95] This might be contrasted with the situation in *Su v AFMA*,[66] for example, where the defendant called evidence from the master and the chief engineer of vessel. This was to the effect that they believed their vessel was situated approximately 11.61 nautical miles north of the AFZ, not within the AFZ as was the admitted fact. This mistaken belief was based on their assumption that a red line shown on their GPS unit represented the location of the AFZ border, which in turn was based upon the mistaken statement of the Taiwanese GPS unit supplier that the red line shown on the GPS unit represented the AFZ border. The trial judge accepted this evidence and also the master's evidence that he did not judge the geographic position of his vessel by reference to latitude and longitude or by reference to the AFZ itself, notwithstanding that he had available to him a working GPS showing the coordinates of the vessel's position and at least one chart of the area with the border marked on it. The trial judge accepted the master and the chief engineer as truthful witnesses and that their mistaken belief as to the position of the vessel was reasonable.

[96] I agree with the respondent that his Honour gave careful consideration to whether the appellant could rely upon a defence of mistake of fact.[67] His Honour was correct in finding that the appellant had not discharged

[66] [2008] FCA 1485; (2008) 251 ALR 135, upheld on appeal in *Australian Fisheries Management Authority v Su* [2009] FCAFC 56; (2009) 176 FCR 95.
[67] Reasons 2-6.

his evidential onus of raising the defence. Even if there was some such evidence, his Honour was quite justified in concluding that the prosecution had established beyond reasonable doubt that the appellant was not under a mistaken but reasonable belief that his vessel was not within the AFZ. Further, even if the appellant was under some mistaken belief, such a belief would not have been reasonable, particularly in light of the fact that he often fished close to the AFZ boundary and in light of the clear warning on the chart affixed to the wall of the cabin.

[97] As his Honour found:

(a) the appellant was a professional fisherman of some experience who had been master of the vessel for some considerable time;[68]

(b) he had been previously found within the AFZ by Australian authorities;[69]

(c) he had available to him a GPS navigational plotter, navigational charts and three chart plotters;[70]

(d) nothing said by the appellant when spoken to when intercepted by Australian authorities on 21 April 2014 gave any explanation as to why he might have transgressed into the AFZ;[71]

[68] Reasons 2.
[69] Reasons 2-3.
[70] Reasons 3.

(e) the appellant was being deliberately vague in answering questions in his interview as to whether he had been monitoring his GPS;[72]

(f) the appellant was aware that he was fishing very close to the AFZ;[73]

(g) after the appellant's vessel was boarded by customs officers on 21 April 2014, when asked by Customs Officer Timothy Jones to indicate the position of the vessel on a chart the appellant indicated a position north of the AFZ which corresponded with the vessel's GPS;[74]

(h) there was no evidence to suggest that the appellant's GPS was inaccurate. Mr Jones checked the vessel's GPS with a hand held GPS he was carrying which indicated a variation of about 20 metres.[75]

[98] There was no error on the part of his Honour.

Conclusions and orders

[99] As none of the grounds of appeal have been made out the appeal must be dismissed.

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[71] Reasons 3.
[72] Reasons 5.
[73] Reasons 5.
[74] Reasons 5.
[75] Reasons 5.