CHIOU YAOU FA and MORRIS
JUSTICES APPEAL

Supreme Court of the Northern Territory of Australia

Asche J.

29 & 30 July, 3 September, 15 October 1986 and 8 May 1987 at Darwin

Statutory Interpretation - statutory offences - tripartite categorisation - absolute liability - strict liability - mens rea.

Commonwealth Fisheries Act - strict liability - defence of honest and reasonable mistake available but not applicable in circumstances of this case.

Evidence - scientific instruments - satellite navigator instrument - method of proof required.

Evidence - navigation experts - totality of evidence.

International Law - provisional fisheries agreement between Australia and Indonesia - position of vessel inside Australian Fishing Zone - whether agreement applicable.

Constitutional Law - Australian Fishing Zone - Proclaimed waters - whether within Commonwealth power - Fisheries s. 51(X) - External Affairs s. 51(XXIX)

Commonwealth Fisheries Act - penalty - forfeiture of vessel - not excessive in the circumstances.

Cases applied:

Proudman v Dayman (1941) 67 C.L.R. 536
Porter v Kolodzeij (1962) V.R. 75
Bonser v La Macchia (1969) 122 C.L.R. 177
Chen Yin Ten v Little (1976) 11 A.L.R. 353
Mehesz v Redman (1981) 26 S.A.S.R. 244
Ostle v Lahoya (1983) 14 A.C.R. 315
He Kaw Teh v R (1985) 157 C.L.R. 523

Case considered

Sherras v De Rutzen (1895) 1 Q.B. 918

Cases referred to:

Pearks Gunston & Tee Ltd v Ward (1902) 1 K.B. 1
R v Ewart (1906) N.Z.L.R. 709
Crawley v Laidlaw (1930) V.L.R. 370
May v O'Sullivan (1955) 92 C.L.R. 654
Clark v Ryan (1960) 103 C.L.R. 486
Barker v Fauser (1962) S.A.S.R. 176
Lim Chin Aik v R (1963) 1 All E.R. 223
Cheatle v Considine (1965) S.A.S.R. 279
Patel v Comptroller of Customs (1965) 3 All E.R. 593
Philpott v Boon (1968) Tas. L.R. 97
Sweet v Parsley (1970) A.C. 132
R v Strawbridge (1970) N.Z.L.R. 909
Cheatley v The Queen (1972) 127 C.L.R. 291
Kidd v Reeves (1972) V.R. 563
NSW v The Commonwealth (1975) 135 C.L.R. 335
Reg. v Sault Ste. Marie (1978) 85 D.L.R. (3d)
Fang Chinn Fa v Puffett (1978) 22 A.L.R. 149
Hwang Ming Huei v Mellon (1980) 5 N.T.R. 9
Van Chen v Wutton (1980) 53 F.L.R. 44
Cameron v Holt (1980) 142 C.L.R. 342
Koowarta v Bjelke-Petersen (1982) 153 C.L.R. 168
Gammon (Hong Kong) Ltd v A-G for Hong Kong (1984) 2 All E.R. 508

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
JUSTICES APPEAL

No. 540 of 1985

BETWEEN:

CHIOU YAOU FA

Appellant

AND:

THOMAS MORRIS

Respondent

CORAM: ASCHE J.

REASONS FOR JUDGMENT

(Delivered the 8th day of May 1987)

On 24 March 1985 a foreign fishing vessel the "Ming Yang 21" was intercepted by HMAS Bunbury off the west coast of Western Australia. It is alleged that at the time that the vessel was intercepted she was in the position 12 degrees 12 minutes south, 124 degrees 20 minutes east. Assuming, for the moment, the correctness of that position the vessel was then in an area of proclaimed waters comprised in the Australian Fishing Zone pursuant to the Commonwealth Fisheries Act 1952. HMAS Bunbury was under the command of Lieutenant Commander David Oliver. He directed a boarding party under the command of Lieutenant Kops to board the Ming Yang 21. This was done at approximately 2130 hours. It was plain enough to the boarding party that the

ship had been engaged and was still engaged in fishing activities.

In the subsequent proceedings in the Court of Summary Jurisdiction Darwin, Lieutenant Kops said:-

> "We boarded at approximately 2130; upon boarding I made a quick appraisal of the activity on the upper deck, there were a number of shark, presumably freshly caught, in the entry port on the starboard side of the well deck. There were also some processed shark trunks on the port side, between 6 and 8, plus baskets containing shark fin and tail. There were approximately 12 members of the fishing vessel's crew working on the well deck at a branch line retriever and coiling machine, and they were retrieving a branch line that extended on the starboard side of the vessel;".

Later in his evidence this passage appears:-

> "Were you able to discern from the operations going on at the vessel at this time, the nature of the operation? We have pair trawling and gill netting. Were you able to determine the nature of the fishing operation? --- Yes, it was long line fishing operation.
>
> Was there line from the vessel into the water? --- There was.
>
> Was it identified in any particular way that you could see? --- It was marked with polystyrene Floats, some fitted with strobe lights. When Mr Morris questioned the commanding officer as to whether or not it was his line, the master claimed it was."

The evidence of Petty Officer Quartermaster Gunner George on this aspect was -

"Well when I boarded the vessel they were recovering lines with a branch line recovery equipment there, there was 5 or 6 sharks on the deck, they were in process of gutting them, cutting the heads off and tails off them, and so forth ready for processing.

Were you present during the entirety of the recovery of line?--- No, they'd already started recovering lines before the second half of the boarding party went over."

The third member of the boarding party Leading Seaman Lesay also said there were 10 or so sharks around the upper deck of the vessel and the crew were retrieving long lines.

The master of the vessel one Yaou Fa Chiou was questioned through interpreters. At first he was co-operative. Lieutenant Kops had noted that amongst the equipment on board there was an automatic pilot and gyro compass, a radar display and a satellite receiver and computer. The master was asked if the satellite navigation equipment was functioning properly. He said it was. He was asked to plot his position. He did so on Admiralty Chart 1047 which was in the vessel. The position thus plotted confirmed that the vessel was in the Australian Fishing Zone. According to the evidence of Lieutenant Kops the master then admitted that the ship was engaged in fishing operations and that the long line being retrieved was his. Lieutenant Kops observed the crew continuing to recover the

long line and he saw at least 2 sharks brought on board and then killed and processed. Later these were placed in the freezer which Lieutenant Kops observed had already contained a quantity of other shark and also boxed bait.

After the initial questioning the master suddenly became uncooperative or to use the expressive phrase of Petty Officer George "got the sulks". Thereafter he seems to have remained mostly in his cabin.

Acting under instructions HMAS Bunbury directed that the vessel with the boarding party on board proceed to Broome, but these instructions were changed and the vessel and HMAS Bunbury then set course for Darwin and arrived at Darwin on 26 March. There the vessel was boarded by a Mr Miellon who is a Senior Licensing Fisheries Officer with the Department of Primary Production of the Northern Territory and an authorised officer appointed under the Fisheries Act of the Commonwealth. He was accompanied by another officer of his Department and met on board a member of the original boarding party a Mr Morris who is a member of the Western Australian Fisheries. On conducting a search of the master's sleeping quarters Mr Morris found, inter alia, some plastic folders in which were some Indonesian sailing passes and two papers which he recognised as a type previously issued by his Department which fundamentally described areas of limitation authorised for vessels working in the Australian Fishing Zone which were usually provided to vessels licensed to fish in that Zone.

Mr Morris, after arriving on board Ming Yang 21 with the boarding party had also noticed signs of fishing activity taking place on the vessel and he gives detailed evidence of this at pages 44 to 47 of the transcript. He also took photographs which were produced in the subsequent court proceedings. He it was who requested the master to plot his position in accordance with the satellite navigator on board and observed the position plotted by the master on the chart. He gave evidence that the master said he was fishing for "sark" and had been fishing in that position for approximately 12 hours. Mr Morris questioned him further and he (the master) claimed that his engines were working well. Mr Morris then says:

> "However once I indicated to the captain that he was fishing in the Australian Fishing Zone, he became very very agitated indeed. He became very uncooperative, so we terminated all further questioning for approximately 15 minutes until he cooled down."

When the conversation was resumed Mr Morris said that the master remained uncooperative:-

> "Once he'd cooled down again, so to speak, he became very uncooperative in all further questioning. I asked him whether his engines were okay and he said no, they were very bad. He had navigation problems. He wanted - I think he stated, 'Please, I go my home, Taiwan' at the time. He just really didn't want to answer many questions at all from then on."

Mr Morris also gave evidence as to the amount of fish on board:

> "In relation to that catch, have you at any time inspected all freezer spaces on board the vessel? --- Yes, sir on the - the 26th, I believe, myself, Lieutenant Cox and other members of the party did a thorough inspection of the vessel, which involved the release of the forward hatch - sorry, the after hatch covers. We went down there. We located approximately 30 tonne, I'd say, of shark butts or shark carcasses in a frozen state. From there we adjourned further forward to the forward permanent freezer, where we located about 5 tonne, in my guesstimation, of mixed species of reef fish and also some shark. That, in addition to the 2 plate freezers, contained fish.
>
> I take it you've inspected fish on board vessels before? --- Yes, sir, yes, sir, I have.
>
> Would you be able to estimate the entirety of the tonnage on board the vessel as at 26 March? --- Yes, sir, I estimated approximately 35 to 40 tonne."

The Master was subsequently charged on three informations although ultimately one of these informations was not proceeded with or at least not dealt with at the subsequent hearing. At the Court of Summary Jurisdiction, Darwin on 15 July 1985 the two charges which were ultimately dealt with by the court on that day were:-

> (a) that he did in an area of proclaimed waters comprised in the Australian Fishing Zone use a foreign boat namely the Ming Yang No. 21 for processing fish that had been taken with the use of the said boat without there being in force a license under s. 9(2) of the Fisheries Act 1952 authorising the use of the said foreign boat in the said area. Contrary to sub-section 13B(5) of the Fisheries Act 1952.

(b) that he did in the Australian Fishing Zone have in his charge a foreign boat namely the Ming Yang No. 21 equipped with nets, traps and other equipment for taking, catching or capturing fish without there being in force a licence under sub-section 9(2) of the Fisheries Act 1952 authorising the use of the said boat for fishing in the said area. Contrary to sub-section 13AB(1A) of the Fisheries Act 1952.

The hearing before the learned Stipendiary Magistrate proceeded ex parte on 15 July 1985. It does not seem disputed in these present appeals that by that time the appellant had left Australia, but, before doing so, had, through Counsel, consented to the proceedings being heard summarily. (See s. 15, and pp. 2-3 of transcript of proceedings in the Court of Summary Jurisdiction).

The learned Stipendiary Magistrate convicted the appellant on both charges. On the first charge under sub-section 13 B(5) he was convicted and fined $2,000 and the boat, fish and equipment were ordered to be forfeited to the Commonwealth.

On the second charge namely having in charge the boat equipped for catching fish he was convicted without a further monetary fine and the same order for forfeiture was made.

By Notices of Appeal dated 2 August 1985 the appellant appealed against both convictions and sentence.

These notices were subsequently amended. The first amendments were made on 25 June 1986 and contained inter alia certain grounds ((e), (f) and (g)) which could be construed as "arising out the constitution or involving its interpretation." Pursuant to s. 78 B of the Judiciary Act notices were given to the Attornies-General of the Commonwealth and States. None wished to intervene or make any application for removal. During the hearing before me further application was made to amend by deleting certain grounds and adding a further ground that the Magistrate erred in

> "giving effect to the proclamation of the Northern Boundaries of the Australian Fishing Zone as a valid exercise of power conferred on the Government of Australia by the Australian Constitution."

Although I was prepared to give leave to amend by adding this ground it was a matter plainly within s. 78B of the Judiciary Act and the appeal could not proceed until again the Commonwealth and the States had been notified accordingly. The appeal had therefore to be adjourned, the appellant being ordered to pay the costs thrown away. The appropriate notifications were given and again no application to intervene or remove the case was made by the Commonwealth or the States. The Notices of Appeal as finally amended therefore in each case read, so far as relevant, as follows:-

"AND TAKE NOTICE that the grounds of such appeal are:-

1. That the conviction was against the evidence and the weight of the evidence.

2. That the learned Stipendiary Magistrate erred in:

   (a) proceeding to hear an information in the absence of the defendant after the defendant had been released from his bail contrary to the provisions of the Justices Act;

   (b) failing to take into account adequately or at all the evidence concerning the intent of the Appellant at the time of the arrest of the ship;

   (c) that he found that the Appellant's vessel at the relevant time was within proclaimed waters of the Australian Fishing Zone;

   (d) that he admitted evidence of an entirely hearsay nature both in relation to the position of the boundaries of the said

zone and of the geographical position of the appellant's vessel at the relevant time;

(e) giving effect to the proclamation of the Northern boundaries of the Australian Fishing Zone as a valid exercise of power conferred on the Government of Australia by the Australian Constitution;

(f) failing to take into account adequately or at all the effect of enforcement of the Northern boundary of the Australian Fishing Zone of a Memorandum of Understanding between the Governments of Australia and Indonesia concerning the implementation of a provisional fisheries surveillance and enforcement agreement executed on 29 October 1981;

(g) accepting evidence of a geographical position of the Appellant's said fishing vessel at the relevant time on the evidence of a reading from an electronic device namely a Satellite Navigator without any or any proper or sufficient proof of the accuracy of the device or any electronic or navigation system of which it constituted a part.

(h) that there was no or no sufficient evidence that the Appellant was within the said zone at any or any material time.

(i) Alternatively to (a) to (h) both inclusive:

(i) imposing a sentence of forfeiture of the vessel its fishing gear and its catch that was manifestly excessive in all the circumstances;

(ii) treating the offence as other than a minor breach of the Fisheries Act in all circumstances;

(iii) in imposing penalty failing to give any or any proper cognisance to the effect of the penalty on the obligations of the international joint venture fishing company K.K.F.C. Pty Limited to pay all penalties imposed in respect of breaches of the Fisheries Act by fishing vessels from Taiwan.

(iv) failing to take any or any proper account or judicial notice of the facts that the event the subject of conviction involved no detriment to the Northern Australian Fishing Industry or the Northern Australian Fishery."

Although it may be more logically consistent to deal with the constitutional ground first since an adverse finding against the Crown on this issue would determine the matter I think it better to follow the grounds as they were put to me by Mr McCormack for the appellant.

In fact save in the more particularised sense contained in certain other grounds Mr McCormack did not argue the first ground that the conviction was against the evidence or the weight of evidence.

Ground 2(a) was ultimately withdrawn and not further argued by Mr McCormack since it was postulated on the misapprehension that the appellant had been released from his bail, whereas all that had occurred was that bail had been varied to allow the appellant to depart overseas.

I turn therefore to the substantive grounds argued by Mr McCormack. I should add that in the earlier part of the hearing Mr McCormack was referring to the numbered grounds in the Notice of Appeal dated 30th July 1986. For convenience I will refer to the numbered paragraphs as they finally appeared.

GROUNDS 2 (g) and (h)

Ground 2 (g) alleges that the Magistrate was in error in "accepting evidence of a geographical position of the Appellant's said fishing vessel at the relevant time on the evidence of a reading from an electronic device namely a satellite navigator without any or any proper or sufficient proof of the accuracy of the device or any electronic or navigation system of which it constituted a part.

Ground 2(h) alleges that "there was no or no sufficient evidence that the appellant was within the said zone at any or any material time."

These two grounds are taken together by Mr McCormack as being interdependent. They depend upon the nature of the evidence given on behalf of the prosecution which related to the use of an instrument known as a satellite navigator to fix the positions of the vessels at the time of the apprehension of the Ming Yang 21. It is one

of Mr McCormack's points that no proper description of a satellite navigator system was given to the court below. It is sufficient I think, for the purposes of this appeal, to appreciate the general principle that transmissions passing between orbital satellites and ground tracking stations can be received and translated by this instrument in such a way as to fix the position on the earth's surface where that instrument is at the time it receives the signals.

Mr McCormack submits:-

1. that the instrument known as a satellite navigator, if it is a scientific instrument, is not one of that class of "notorious" scientific instruments as to which there is a common law presumption of accuracy and regularity.

2. that if it is not a notorious instrument its accuracy must be established by expert evidence.

3. expert evidence of a properly admissible nature was not forthcoming in this case.

4. there is therefore no sufficient evidence of the position of the Ming Yang 21 at the time of her interception.

As to the first proposition I am inclined to agree with Mr McCormack that a satellite navigator does not yet fall within

> "a class of instruments of a scientific or technical character, which by general experience (are) known to be trustworthy, and are so notorious that the court requires no evidence to the effect that they do fall into such class before allowing the presumption in question to operate with regard

to readings made thereon." Per Herring C.J. - Porter v Kolodzeij (1962) V.R. 75 at 78.

In Crawley v Laidlaw (1930) V.L.R. 370 at 374 Lowe J. treats this presumption as based upon the concept of judicial notice

> "I do not doubt that in appropriate cases the Court will use its 'general information and ... knowledge of the common affairs of life which men of ordinary intelligence possess." - Phipson on Evidence (6th Ed.), p. 19 - and that of the nature of most if not all, of the instruments mentioned in the paragraph cited from Taylor the Court would require no evidence in order to raise the presumption relied on."

The "instruments mentioned" in Taylors work on Evidence 10th Ed. to which His Honour was referring include watches, clocks, thermometers, pedometers, aneroids, anemometers and "other scientific instruments". The expression "other scientific instruments" however is not in the context of blanket admission of the class but on the contrary clearly carries the meaning "other scientific instruments which have achieved judicial recognition". The very insistence that such instruments should be "notorious" obviously disqualifies new or comparatively recent inventions no matter how precise or accurate they may be. This despite the probability that generally the newer the device the more accurate it is likely to be. The water power of the clepsydra was replaced by the mechanical power of clockwork which in turn was replaced by electronic

devices; with a marked improvement in efficiency and accuracy at every stage.

But the law is cautious - perhaps sometimes over-cautious - rather than inconsistent. Once an instrument gains sufficient recognition the law will permit the shorthand of judicial notice. Until then it must be the more strictly proved. An instrument may in time graduate from the latter to the former class without any inconsistency. In Crawley v Laidlaw (1930) V.L.R. 370 Lowe J. refused to take judicial notice of the nature of loadometers. Thirty-five years later Travers J. in Cheatle v Considine (1965) S.A.S.R. 279 (admittedly with some more positive proof than was before Lowe J.) was content to accept that readings from such instruments could create a prima facie case against the defendant of having driven a motor vehicle with a weight on the axle exceeding the permitted weight. But, as Travers J. was careful to point out, that in no way suggested that Lowe J. was wrong in 1930.

While it might be suggested that the common law takes an unconscionable time to recognise many scientific instruments in common and accepted use, parliament can, and often does, accelerate that process by building in various presumptions into legislation based upon the accuracy of such instruments. (See e.g. ss. 27, 28 Weights & Measures Act (Weighbridges): ss. 8(L), (J) Traffic Act (Breath

Analysis Instrument). No doubt a satellite navigator instrument may one day fall into the class of notorious instruments but on the principles set out above I must rule that that day has not yet dawned.

Mr McCormack makes the point that the Commonwealth parliament has not so far provided by legislation for the recognition of the instrument itself without further proof, or for readings taken from the instrument to be prima facie evidence of position. It may well be, in view of the importance attached to these instruments and their readings that in this case and no doubt others to follow that the legislature should give its attention to these matters.

Meanwhile however the position is as set out by Herring C.J. in Porter v Kolodzeij (supra) at p. 78:-

> "Where, however, the instrument in question does not fall within the notorious class, then ... evidence must be given to establish that it is a scientific or technical instrument of such a kind, as may be expected to be trustworthy, before the presumption (i.e. of its working accuracy) can be relied upon."

How far should such evidence go? A complicated scientific instrument may require a battery of experts in various fields if the rule against hearsay is to be strictly applied.

In Mehesz v Redman (1981) 26 S.A.S.R. 244 the appellant had been charged and convicted of driving a motor vehicle on a road while there was present in his blood a concentration of alcohol of .08 grams in a hundred millilitres of blood. The concentration alleged was .24.

On appeal it was submitted that the evidence against the appellant depended upon the use of instruments whose accuracy had not been established and was in part based on hearsay.

The actual instrument in question was known as an "autolab" which received blood samples processed through a Gas Chromatograph, and by analysing the electronic signals thus produced, printed out a reading showing the quantity of alcohol in the sample. Evidence was given of its degree of accuracy and the methods used to confirm that accuracy.

King C.J. (with whom Cox J. concurred) dealt with the objection as to hearsay in this way:-

> "Mr Wells further contended that the result of the test was inadmissible because it was tainted by hearsay. Perhaps in a sense there is an element of hearsay in the use of scientific instruments. The courts do not ordinarily insist on evidence from those who manufacture scientific instruments or from experts as to the manufacture of those instruments that the instrument in question is properly constructed, arranged or programmed so as to produce an accurate result. It is sufficient that the expert who uses it is able to say that it is an instrument which is accepted and used by competent persons as a reliable aid to the carrying out of the scientific procedures in question and

that he so regards it. The point is dealt with in Wigmore, 3rd edition, vol. 2, par. 665a as follows:-

> "665a. (2) Scientific instruments, formulas, etc. The use of scientific instruments, apparatus, formulas, and calculating-tables, involves to some extent a dependence on the statements of other persons, even to anonymous observers. Yet it is not feasible for the professional man to test every instrument himself; furthermore he finds that practically the standard methods are sufficient to be trusted. Thus, the use of a vacuum-ray machine may give correct knowledge, though the user may neither have seen the object with his own eyes nor have made the calculations and adjustments on which the machine's trustworthiness depends. The adequacy of knowledge thus gained is recognized for a variety of standard instruments."

To the extent that the evidence given by an expert as to the results of scientific tests made with the aid of an instrument can be regarded as hearsay, its admission in evidence must be treated as an exception to the hearsay rule. Its admissibility is not affected, in my opinion, by the fact that the instrument used is a computer or has computerized components."

His Honour then turned to the objection that the autolab was not shown to be an instrument whose trustworthiness could be relied on. He referred to the passage in Wigmore previously quoted, and after referring to the "notorious" class of instruments where accuracy could be presumed without evidence, said:-

> "In the case of other instruments evidence is required of the trustworthiness of that type of instrument in general and of the correctness of the particular instrument. The evidence of the trustworthiness of that type of instrument in general may be supplied by the expert who uses it and who can testify as to its acceptance as a

> reliable instrument in his field of science. The accuracy of the particular instrument will ordinarily be proved by those who use and test it."

In the above case King C.J. also adopted the remarks of Burbury C.J. in Philpott v Boon (1968) Tas. L.R. 97 at 99-100

> "If a scientific instrument is used the court must have evidence from a witness expert in its use to explain its general function to the court and to vouch for its accuracy. This is not to say that detailed evidence as to the working of such an instrument need be given. It is sufficient if it is established that it is a scientifically accepted instrument for its avowed purpose and that the particular instrument used was working accurately."

Mr McCormack submits that the evidence before the learned Stipendiary Magistrate did not satisfy the requirements stated by King C.J. and Burbury C.J. in the above passages. Lieutenant-Commander Oliver and Lieutenant Victor gave evidence of their training and experience in navigation. But neither, he says, "explained the general function" of a satellite navigator or "testified to its acceptance as a reliable unit".

Certainly they testified as to its accuracy. Lieutenant Victor said:

> "Satellite navigation, the accuracy of the system was confirmed the day before, on approach to Ashmore Reef, when I conducted a celestial observation that morning and my position was within .75 of a mile of the satellite derived position."

So he gave direct evidence on this aspect.

Lieutenant-Commander Oliver said,

> "The satellite navigator will depend on your movement at the time, and the number of passes that it goes through, but its accuracy will be guaranteed to well under two miles. And if you're near stationary it can be as exact as a few hundred yards."

This sounds rather more like hearsay although it may be a summation of the witnesses own direct observations.

I am of the view that Mr McCormack is correct that it was not sufficiently proved to the court exactly what a satellite navigator was, how it functioned and whether it is accepted as a reliable instrument in its field. Had the ship's position depended entirely on the satellite navigator readings it may well be that on the evidence before the Court of Summary Jurisdiction there was not a sufficient basis to make a finding of that position.

But in my view the argument of Mr McCormack that it must follow that there was no sufficient evidence of the position of the appellant completely falls down when one looks at the totality of the evidence on this point placed before the court. The totality of evidence did not entirely depend upon the use of the satellite navigator system. It depended on a number of uncontradicted matters which together build up a very strong case - indeed in my view a case beyond reasonable doubt - that the position of the

appellant's vessel at the appropriate time was where the expert witnesses called for the respondent said she was.

Both Lieutenant-Commander Oliver and Lieutenant Victor must be accepted as skilled navigators. Lieutenant-Commander Oliver has had 20 years experience in the Navy and has done courses in navigation and has had substantial practical experience and has even been responsible for the navigation training of junior officers. He has kept up his navigation experience and says that prior to his current posting he spent a "four week concentrated navigation revision". (See p. 8).

Lieutenant Victor has been in the Navy for 6½ years. He completed the required navigation course for the HMAS Bunbury class of ship in August and September 1984 and prior to that he says he had two previous navigation jobs for the Navy. He has been the navigator of HMAS Bunbury since December 1984.

In Clark v Ryan (1960) 103 C.L.R. 486 at 491 Dixon C.J. said:-

> "The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by J.W. Smith in the notes to Carter v Boehm, 1 Smith L.C., 7th ed. (1876) p. 577. 'On the one hand' that author wrote, 'it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it

> without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it'. Then, after the citation of authority the author proceeds: 'While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a sujbect-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it'."

In my view navigation can properly be said to "partake of the nature of a science" within the meaning of the passage quoted by Dixon C.J. and these two officers may properly be taken as experts in that science with a substantial grounding in both theory and practice.

One is tempted to say that that by itself concludes the matter. If two persons periti in this science of navigation say that the appellant's vessel was in a particular position; and if no attack is made on their expertise and no evidence is advanced to the contrary, then that vessel was, at the relevant time, where they say she was.

> "When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts." Stephen - Digest of the Law of Evidence - Article 49.

See also King C.J. in Mehesz v Redman (supra) in the passage already quoted and I repeat his conclusion that

> "To the extent that the evidence given by an expert as to the results of scientific tests made with the aid of an instrument can be regarded as hearsay, its admission in evidence must be treated as an exception to the hearsay rule."

If however it is still insisted that the scientific efficacy of the satellite navigator must be proved before the experts who rely upon it can give their evidence, then the answer in this case is that this instrument was only one of the aids to navigation used on board HMAS Bunbury.

Lieutenant-Commander Oliver says the ship had a gyro, a back-up magnetic compass for steering and a satellite navigator and radar which is "primarily a navigation radar". The ship used a log to record distance run. The ship's position was checked from a vessel the "Regional Endeavour" whose position was exactly known. At p. 9 appears this passage (Lieutenant Commander Oliver):-

> "If I can just interrupt - what degree of accuracy do these navigational aids give you? --- The satellite navigator will depend on your movement at the time, and the number of passes that it goes through, but its accuracy will be guaranteed to well under two miles. And if you're near stationary it can be as exact as a few hundred yards. The radar itself is accurate to under 50 yards, in as far as range goes, and the gyro compass bearing would be accurate to half a degree."

Then at p. 12:-

"You've also mentioned the drill ship "Regional Endeavour" about which you received notification, it was a navigational marking at that time - a fix - at a fixed position? --- Yes we were also throughout that period we were taking fixes of the Regional Endeavour by radar bearings."

Then at p. 13:-

"When navigating back to Darwin by use of radar and satellite navigator, but again any difficulties with error in relation to your equipment?--- No, we were quite happy with the navigation, we made good landfall, where we expected to be. There was no problem, we went to the entrance to Darwin Harbour, where we were met by a Customs vessel.

....

And obviously you've since taken Bunbury from Darwin to Fremantle, have there been any further patrols by you in that vessel?---Yes, since then we've done another six week patrol which we came up to Darwin, and we finished that some two weeks ago.

During that time has there been any problem with your navigation equipment, as we've described? --- No, my navigation equipment I'm very happy with, it's worked well, and there has been no problems there at all. The satellite navigator has been checked against stars on numerous occasions, and has tied in very well.

When you say against stars, that is by use of those? --- Well by use of a sextant and to reduce - to take stars and when to check them with the navigator, the satellite nav position against that. In fact we did it about - within 24 hours of the Ming Yang incident before that, and we took a set of stars, which plotted particularly well, and I believe their accuracy would've been well under two miles and that tied in right on the satellite navigator."

Lieutenant Victor said at p. 16:-

"And during your passage to your search area, did you in fact take ranges and bearings from the

Regional Endeavour? --- Yes, when the drill ship became radar visible to us, we were using that as a position fixing aid.

Prior to that were the islands of the Ashmore Cartier group, such as they are - painting up on your radar? --- Initially that was our method of position fixing was by radar ranges, and bearings, from the Ashmore Island group. Subsequent to that, we were relying upon satellite navigation positions, and then ranges and bearings from Regional Endeavour."

And again at pp. 16-17:

"You being, as it were, responsible for the navigation equipment on board Bunbury since its commission, would you comment to the court on the accuracy of various pieces of it, such as the satellite navigator, the radar, and your compass? --- Yes, well first of all with the compass system, I've been with the boat since it was first commissioned, and worked the trials with the boat. The compass system has had no record of any inaccuracies since being initially fitted in the ship. After trials it's worked efficiently and we haven't had any major problems with it whatsoever. Satellite navigation, the accuracy of the system was confirmed the day before, on approach to Ashmore Reef, when I conducted a celestial observation that morning, and my position was within .75 of a mile of the satellite derived position. Radar, the requirement is to confirm the accuracy of the radar ranging units once every three months. All errors that have been gained in that have been within 50 yards of correct."

And again at pp. 17-18:

"And you were receiving satellite navigation fixings during the course? --- Yes, we received several updates, one whilst on passage from Ashmore Reef to the area, which put me one mile from my expected position, and I believe that that error was due to the tidal effects which occur in this area. Several further updates were received throughout the night.

If you forgive me one moment, Your Worship. You gained Regional Endeavour on your radar at some stage during your radar at some stage during your - - -? --- That's correct. We were not relying upon the position of Regional Endeavour to fix and confirm our position, it was just in addition to the satellite derived positions.

Now, about 2020 hours - about 20 past 8 on 24 March, did you gain a contact on your radar? --- That is correct. I was not actually the person who saw the contact, but I was called.

And you then, having been called, you then personally made observations did you? --- The observation was made and plotted.

Do you recall the - by what means you plotted the position? --- The position was plotted as a range and a bearing from our dead reckoned position, since our last satellite fix, based on the best information that we had available on our position, so it was a radar range, and a bearing from the ship's position at that time."

And again at p. 20:

"Was a radar range and bearing taken of the Regional Endeavour during - at any time during that period? --- Yes, there was several ranges and bearings taken actually. One particular one, having received a satellite fix at 2130 or time of 2130 the actual satellite fix isn't available to the navigator until some time after. A range and bearing from Regional Endeavour was taken at 2150, which is perhaps five minutes after the satellite navigator's fix would've been available. That range and bearing was 354 degrees. 14/4 nautical miles.

How did that compare when extrapolated to latitude and longitude as it were, of the satellite navigator fix? --- It corresponded quite well."

And finally, at p. 24:

"Perhaps, in conclusion, Lieutenant, do you say that all fixing, plotting and extraction of

satellite navigation equipment was done by you was accurate and correct? --- All fixes taken would have been accurate and correct; the only constraints that I would place on that is the accuracy of the equipment, which has all been checked and is within acceptable standards."

In the face of this evidence, and accepting that reliance was certainly placed on the satellite navigator, (which along with all other navigational aids had been checked and was within acceptable standards) and accepting the expertise in navigation of the two officers the conclusion on the totality of the evidence is that the positions given of the appellant's vessel when intercepted were correct.

Ultimately, this becomes a question of fact to be determined on the weight of evidence. See Chen Yin Ten v Little (1976) 11 A.L.R. 353. In that case the appellant had been convicted in the Court of Petty Sessions Exmouth of an offence under s. 13AB of the Fisheries Act of having in his possession or in his charge a foreign boat equipped with nets or other equipment for taking catching or capturing fish. One of the grounds of appeal was that the finding of the Court of Petty Sessions that the appellant's vessel was intercepted some 1.8 miles within the declared zone was against the evidence. The evidence for the prosecution on this point was given by two naval officers who had used radar positioning. It was contradicted by the appellant himself. The Full Court of the Supreme Court of Western

Australia saw no reason to disagree with the finding of the Magistrate on the evidence.

Jackson C.J., with whom Jones J. agreed said on this point at p. 359:

> "The final ground of appeal against the conviction is that the magistrate's conclusion that the fishing boat was intercepted some 1.8 miles within the declared fishing zone was against the weight of the evidence. This again was a question of fact. There was evidence on both sides, the two officers of the Adroit speaking of their plotting several positions of their vessel by radar up to and including the time when they arrived alongside the fishing boat, and the appellant denying that his boat was within the zone. There was some criticism of the fact that the final position was ascertained by only one 'fix'; but it was shown that this was consistent with the earlier positions ascertained by several 'fixes' and with the speed and direction of the ship's course. The magistrate accepted the evidence of the two officers, in preference to that of the appellant, as reliably showing the fishing boat's position, and there is no reason for this court to disagree with him."

See also the remarks of Burt J. at pp. 360-61.

It is not necessary in these circumstances to rely upon the satellite navigator being in the "notorious" class.

It is not even necessary in my view in these circumstances to demonstrate that it was a "scientifically accepted instrument for its avowed purpose ", to use the words of Burbury C.J. although the evidence is such that that might well be implied. It is true that neither witness

actually said words to that effect but the implication is plain enough that their training and experience as navigators included training and experience with this instrument and one might assume from their familiarity with it and reference to it that it had become a scientifically accepted instrument in the Australian Navy and indeed on other ships throughout the world since the Ming Yang 21 itself was equipped with one.

But assuming that the evidence has not gone quite so far, there are still grounds for the acceptance of the readings of the instrument; although I repeat that the totality of evidence both in experience of the navigators and the use of other instruments makes it strictly unnecessary to indulge in such an exercise.

Cross on Evidence 3rd Edn para 2.14 speaks of "the common law rule that the readings of scientific or technical instruments are prima facie evidence of the facts which they purport to register; the rule is sometimes described as the presumption of accuracy of scientific instruments."

In Barker v Fauser (1962) S.A.S.R. 176 at 178 Travers J. speaking of "what is often called a presumption of accuracy" which applied to the particular instrument in question (a weighbridge) said:-

> "The word 'presumption' is sometimes used in this behalf but I think it is so used in a sense which

> is not strictly accurate. It is rather a matter of the application of the ordinary principles of circumstantial evidence. In my opinion such instruments can merely provide prima-facie evidence in the sense indicated by May v O'Sullivan (1955) 92 C.L.R. 654. They do not transfer any onus of proof to one who disputes them, though they may, and often do, create a case to answer."

I assume His Honour to be looking more to the "notorious" class of instruments in that particular case, but in my view his analysis can apply to all scientific instruments. The concept of judicial notice in these cases is no more than judicial shorthand based ultimately on circumstantial evidence. In the present case the accuracy of the satellite navigator on the occasion when the Ming Yang was intercepted can be reasonably and properly and indeed strongly inferred from the previous accuracy of the instrument checked as it had been "against stars on numerous occasions" and particularly about 24 hours before the interception (p. 13)(p. 17).

In Mehesz v Redman (supra) White J. at p. 251-2 abstracted the following principles from the case-law.

> "1. If the instrument falls within the class of instrument known as notorious scientific instruments, the court will take judicial notice of its capacity for accuracy, so that the operator merely proves that he handled it properly and read it properly on the particular occasion.
>
> 2. If the instrument is not a notorious scientific instrument, its accuracy can be established by evidence; (a) that the instrument is within a class of instrument generally accepted by experts as accurate for its particular purpose; (b) that the instrument, if handled properly, does

> produce accurate results; (a) and (b) must be established by expert testimony, that is, by experts with sufficient knowledge of that kind of instrument; and upon proof of (a) and (b), a latent presumption of accuracy arises which allows the court to infer accuracy on the particular occasion if it is proved) - (c) that the particular instrument was handled properly and read accurately by the operator on the particular occasion; (c) can be established by a trained and competent person familiar with the operation of the instrument, not necessarily the type of expert who proves (a) and (b)).
>
> 3. Where the actual accuracy of the measurement can be inferred from all of the proved circumstances, it is not necessary to rely upon the presumption arising from (a) and (b), proof of which is superfluous."

It is plain to me that the present case comes within paragraph 3 of those rules since the accuracy of the satellite navigator instrument can be inferred from all of the proved circumstances; including the fact that a similar instrument on board the Ming Yang was used by the Master of the Ming Yang at the invitation of Lieutenant Kops of the boarding party to plot his position and, with a very small variation not significant as to position plotted on board HMAS Bunbury, showed substantially the same result. (See pp. 29-30). I have no hesitation therefore in accepting that the prosecution establishes a prima facie case that at the time of interception the Ming Yang was in the prohibited zone. It does not, of course, follow that because the appellant did not give evidence or cross-examine witnesses or make submissions that the appellant must be convicted. The onus remains on the prosecution to establish the case beyond reasonable doubt. May v O'Sullivan (1955) 92 C.L.R.

654. However I am satisfied that on the whole of the evidence that point which is further down the track than acceptance of a prima facie case has been reached and it has been established beyond reasonable doubt that at the time of her interception by HMAS Bunbury the Ming Yang was in the prohibited zone. In my view the evidence is overwhelming and it would be an affront to common sense and rational judgment to find otherwise.

In the course of this appeal Mr McCormack did not seek to lead any fresh evidence. He confined himself to making the submissions I have already outlined and drawing my attention to a fuller description of a satellite navigator than appears in the transcript and giving examples of how the instrument can be in error. These matters were lucidly explained by Mr McCormack who I know is himself a navigator of no mean ability; and I hope they have somewhat enlarged my own sparse knowledge of the subject. But explanations of this nature from the Bar table, no matter how interesting or informative, can hardly take the place of evidence. I am prepared to accept that there can be circumstances when the instrument may be in error just as one can accept that speedometers and barometers may be in error. But the uncontradicted evidence in this case is that the instrument on board HMAS Bunbury had been regularly checked and was accurate. I am unable to see how the matters put to me by Mr McCormack, even if accepted into evidence - which they were not - could in any significant way weaken the evidence of the prosecution.

Ground 2(b). Failing to take account adequately or at all the evidence concerning the intent of the appellant at the time of the arrest of the ship.

Mr McCormack submits that the various offences created under the Fisheries Act import, though they do not expressly say so, the concept of mens rea and that the prosecution failed to discharge the onus of proving beyond reasonable doubt that the appellant had the necessary intent:-

(a) to have in his charge and without a licence a foreign boat equipped for taking capturing or catching fish, in the Australian Fishing Zone, s. 13 AB(1); or

(b) to use a foreign boat for taking fish in the Australian Fishing Zone without a licence. s. 13 B(1)(a).

Mr McCormack relies upon cases such as Cameron v Holt (1980) 142 C.L.R. 342. In that case the respondent was charged with an offence under s. 138(1)(d) of the Social Services Act (1947) (C'th) in that he had presented to an officer of the Social Services Department a document which was false in a particular. The sub-section under which he was prosecuted did not itself give any indication (e.g. by use of such expressions as "knowingly" or "with intent to defraud" etc.), that the concept of mens

rea was imported. But the High Court had no difficulty in finding that expressions in other subsections made it clear that knowledge of the falsity of the statement was an ingredient of the offence and their Honours were the more ready to find that because of the nature of the penalty imposed.

At p. 346 Barwick C.J. said:-

> "Furthermore there is a presumption - in my opinion a strong presumption - that in creating a criminal offence the legislature intends a guilty intent appropriate to the nature of the offence to be an ingredient of the offence. This presumption can only be displaced if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence."

See also Mason J. (as he then was) at p. 348.

In coming to their conclusion, their Honours were applying the principle stated by Wright J. in Sherras v De Rutzen (1895) 1 Q.B. 918 at 921:-

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."

Even in those days, and before the quantum leap in legislation in the latter half of the twentieth century,

Wright J. was conceding that it was "not very easy to reconcile the cases on the subject." (See p. 921: and see Lim Chin Aik v R (1963) 1 All E.R. 223 at 227 (per Lord Evershed).

In Sherras v De Rutzen (supra) Wright J. had attempted to classify the three main exceptions to the general principle as,

(a) Acts not criminal in the real sense but prohibited in the public interest under a penalty.

(b) Some, "and perhaps all" public nuisances.

(c) Proceedings criminal in form but really only a summary mode of enforcing a civil right.

That Wright J. recognised he was not laying down any exact rules is obvious from his own phrase in treating these classifications as the "principal classes of exceptions".

The various attempts to clarify what constitutes the first class of exceptions have been as wide and imprecise as the initial formulation. Channel J. in Pearks Gunston & Tee Ltd v Ward (1902) 1 K.B. 1 at 11 spoke of cases where "the legislature has thought it so important to prevent the act being committed that it absolutely forbids it to be done." Lord Hodson in Patel v Comptroller of Customs (1965) 3 All E.R. 593 at 595 referred to

"quasi-criminal offences." Lord Scarman in Gammon (Hong Kong) Ltd v A-G for Hong Kong (1984) 2 All E.R. 503 at 508 spoke of "an issue of social concern" as being the only situation in which the presumption that mens rea is required in a criminal offence could be displaced.

The problem has been compounded in England because there is no auream mediocratatem between the requirement in a statutory offence of mens rea on the one hand and strict or absolute liability on the other. (See - Sweet v Parsley (1970) A.C. 132.) The expressions "strict" and "absolute" are used interchangeably. (See Patel's case - p. 195 : Gammon's case - p. 508.) This choice between extremes gives rise to the problems posed by Professor Howard in his article "Strict Responsibility in the High Court of Australia" (1960) 76 L.Q.R. 547 at 550:-

> "A court faced with the task of deciding into which class a new minor statutory offence falls, may find itself in a difficulty. If it decides that the offence requires full mens rea it may put an impossible burden upon (the prosecutor) and thereby nullify the legislation. But if it decides that the prosecutor need prove no mental element at all, it runs the risk of penalising innocent and guilty alike, to the detriment of justice and respect for the law."

In Australia, Canada and New Zealand a "half-way house" is recognised where in an appropriate case a statute may be construed as removing from the prosecution the obligation to establish mens rea in the broad overall sense

but none the less to permit the accused to raise matters which may give rise to a reasonable doubt that he acted under an honest and reasonable mistake. If such matters are raised (and only if), then the onus remains on the prosecution to prove lack of honest and reasonable mistake, beyond reasonable doubt.

This position takes its genesis from the remarks of Dixon J. in Proudman v Dayman (1941) 67 C.L.R. 536 at 540-1:

> "There may be no longer any presumption that mens rea, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also.
>
> Doubtless over a wide description of legislation the presumption in favour of its application is but a weak one ... But it still remains a presumption, and in relation to s. 30 there appears to be no sufficient reason for treating it as rebutted.
>
> The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt."

This approach was regarded with approval, (and perhaps envy) by the House of Lords in Sweet v Parsley

(1970) A.C. 132, at least insofar as their Lordships would have felt that a just result would be the more likely to be attained if, once the necessary facts were proved in a statute which could be construed as applying strict liability, it was open to the defendant to raise on the balance of probabilities that he was innocent of any criminal intention. But their Lordships seemed to have felt that Woolmington's case (1935) A.C. 462 was an obstacle to what would otherwise have been a "sensible half-way house" (per Lord Pearce at 157 and see Lord Reid pp. 149-150, and Lord Diplock at pp. 163-64).

Lord Reid referred to the difficulties of the legislator in determining whether the public interest really required that "an innocent person should be prevented from proving his innocence in order that fewer guilty men escape" (p. 149). On the other hand he was conscious of the "many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals" (p. 150).

In He Kaw Teh v R. (1985) 157 C.L.R. 523 the High Court (Gibbs C.J., Mason, Brennan and Dawson JJ: Wilson J. diss.) decided that the presumption that mens rea is required before a person can be held guilty of a grave criminal offence was not displaced in relation to s. 233B(1)(b) of the Customs Act which made it an offence for any person to import or attempt to import or export or

attempt to export any of a specified class of prohibited imports or exports. In doing so the High Court overruled decisions of the State Full Courts of Queensland and Victoria which had held that mens rea was not an ingredient of this offence. Their Honours emphasised the principle that the prosecution bore the onus of proof throughout.

Obviously one factor which weighed heavily with their Honours in the appeal before them was that the maximum penalty where the goods consisted (as they did in this case) of a commercial quantity of heroin, was life imprisonment. (See Gibbs C.J. at 530: Brennan J. at 583: Dawson J. at 597). Other matters taken into account were, the words of the statute, the subject matter with which it dealt and whether strict liability would promote the observance of the statute. Gibbs C.J. at pp. 529-30 found that while these indications did not all point in the same direction they at least suggested the conclusion that parliament did not intend the offence in s. 233B(1) to be an absolute one. See also Dawson J. at 594-596.

The importance of the decision, however, is that by various routes, the High Court recognised that there can be three alternative approaches in construing a statutory offence.

1. that mens rea applies in full.
2. that the offence is one of strict liability so that the prosecution does not have to rebut

mens rea in proving the actus reus; but if the evidence raises a likelihood of honest and reasonable mistake the prosecution must rebut that beyond reasonable doubt.

3. that the offence creates absolute liability.

To differentiate the terms "strict" and "absolute" liability in this way and thereby to recognise a distinction which has not always been recognised in the past is to follow the categorization adopted by the Supreme Court of Canada in Reg. v Sault Ste. Marie (1978) 2 S.C.R. 1325-6: 85 D.L.R. (3d) 181-2, (see later), and by Dawson J. in He Kaw Teh's case. At p. 590 Dawson J. says:-

> "In relation to the offence of importing narcotic goods into Australia, the question which arises is whether the prosecution has to prove any mental state accompanying the importation. In other words, the question is whether mens rea is an ingredient of the offence to be proved by the prosecution. If it is not, the further question arises whether the offence is one of strict liability which, whilst not requiring the prosecution to prove mens rea in order to make out a case, allows the accused to raise honest and reasonable mistake by way of exculpation. To that extent a mental element is imported into an offence of strict liability short of requiring proof of mens rea by the prosecution. The mistake must involve a belief in a state of affairs which, if true, would make the act of the accused innocent. If the statute in neither of these ways requires any mental state to accompany the importation, then the offence is an absolute one and is complete once the prohibited act of importation is proved. Offences of strict or absolute liability are creatures of statute. The terms 'strict liability' and 'absolute liability' are not always used precisely and sometimes interchangeably, but used as I have used them, they are a convenient way of drawing the distinction to which I have referred."

His Honour then examines the various interpretations which may place the offence created by the statute into the appropriate class. He refers to the "strong presumption" that the legislature intends a guilty intent appropriate to the nature of the offence; and the "weak presumption" in favour of strict liability rather than absolute liability. He then points to a difference between offences at common law and statutory offences containing no mental element to be proved as an ingredient of the offence. In the former case the prosection must rebut honest mistake whether reasonable or unreasonable. In the latter it need only rebut such circumstances which, if present, might suggest that the accused might have an honest and reasonable mistake. An honest but unreasonable mistake goes beyond the area of exculpation which must be disproved.

Gibbs C.J. (with whom Mason J. agreed) recognised that "there has developed a principle that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not required as an element of an offence" (p. 532). Gibbs C.J. likewise recognised the 3 categories into which statutory offences may be divided. He refers to the categorisation adopted in the Canadian case of Reg. v Sault Ste. Marie (1978) 2 S.C.R. 1299 85 D.L.R. In that case Dickson J. speaking for the 9 judges who comprised the Supreme Court on that occasion said (S.C.R. 1325-6: D.L.R. 181-2)

"I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr Justice Estey so referred to them in Hickeys's case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

Insofar as the Canadian Supreme Court would suggest that the onus of proving honest and reasonable mistake to a charge arising out of a statutory provision of strict liability lies upon the accused, Gibbs C.J. would obviously disagree. (See p. 537). But otherwise His Honour appears to accept the tripartite categorisation.

Brennan J. also appears to recognise the three possible categories. He commenced with, and emphasises strongly, the general rule that, "It is now firmly

established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication." (p. 566). "The requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct." (p. 568). He then analyses the concept of mens rea itself. In the course of his analysis he draws the distinction between "knowledge" and "absence of exculpatory belief". I take this to be a recognition of the "half-way house", for His Honour then says at p. 576:-

> "If there are alternative states of mind - knowledge or absence of exculpatory belief - that may apply to circumstances which are external elements of a statutory offence, how is the applicable state of mind to be ascertained? Principally by reference to the language of the statute and its subject matter. From those sources, the mischief at which the statute is aimed is derived, and the purpose of the statute is perceived. The purpose of the statute is the surest guide of the legislature's intentions as to the mental state to be implied. The ascertainment of the legislature's intention in the case of a statutory offence is not likely to be any easier than the ascertainment of the relevant mental element in some common law crimes."

Although Wilson J. dissented on the conclusion that mens rea was a necessary ingredient to the offence created by s. 233B(1) of the Customs Act his judgment follows those of Gibbs C.J. and Dawson J. insofar as it recognised a middle course between the full requirement of mens rea in a

statutory offence and an offence of absolute liability on the other. At pp. 557-8 he says:

> "In my opinion, the omission of the words 'without reasonable excuse' from par. (b) has the effect of removing mens rea as an element of the offence which is to be positively established by the prosecution in making out a prima facie case. But this is not to constitute the offence as one of absolute liability. It is to give with one qualification the same effect to the omission as Day J., in Sherras v De Rutzen, gave to the omission of the word 'knowingly' from the description of one offence in the Act there under consideration whilst the words appeared in another offence in the same section. His Lordship said:
>
> > '... the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word 'knowingly' in the one sub-section and its omission in the other.'
>
> The disqualification is that the word 'prove' in this passage should not in this context be understood to mean any more than to 'adduce evidence of'. In other words, the effect of the omission of the words 'without reasonable excuse' from par. (b) is to transfer the evidential burden, the burden of adducing evidence, from the prosecution to the defence. It then remains on the prosecution to rebut that evidence to the satisfaction of the jury beyond a reasonable doubt."

In New Zealand also the tripartite categorisation has been recognised in R v Strawbridge (1970) N.Z.L.R. 909. In that case the Court of Appeal approved with one qualification, the remarks of Edwards J. in R v Ewart (1906) N.Z.L.R. 709 at 731. Those remarks were:

> "There are, therefore, two classes of cases under the statute law - 1, those in which, following the common-law rule, a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence; 2, those in which, either from the language or the scope and object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence. There is also a third class in which, although from the omission from the statute of the words 'knowingly' or 'wilfully' it is not necessary to aver in the indictment that the offence charged was 'knowingly' or 'wilfully' committed, or to prove a guilty mind, and the commission of the act in itself prima facie imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tries him that in fact he had not a guilty mind."

The qualification which the Court of Appeal placed on those remarks was that the onus of proof did not pass to the accused in the third class referred to by His Honour. Furthermore the New Zealand Court of Appeal considered that Woolmington's case constituted no obstacle to this half-way house despite the concerns expressed by Lord Pearce in Sweet v Parsley (1970) A.C. 132 at 157-8.

If it has become recognised that a statutory offence can, so far as the ingredients of proof are concerned, fall into three categories, that does not increase the difficulty of statutory interpretation in this area by one third. Rather, it makes it somewhat easier; for most of the difficulties so far have been caused by the

understandable reluctance of courts to place the defendant in a position where he might be convicted without at least being given a chance to raise circumstances of honest and reasonable mistake. The attraction of the half-way house is that it can give effect to the intention of the legislature (where that intention appears) to achieve protection of social or national interests by legislation making the actus reus itself the offence and thereby relieving the prosecution of the sometimes difficult task of proving intent; but still preventing obvious injustice if a reasonable doubt can be raised as to honest and reasonable mistake.

In my view therefore there will be a growing tendency to take the middle course in statutory offences, though always starting with the presumption that mens rea is not displaced without some good reason being shown. If, however, mens rea can be shown to have been displaced in does not follow that the court should leap to the opposite extreme of absolute liability. Rather the presumption, if mens rea is displaced, should be of strict liability unless the words of the statute are so clear and unambiguous as to admit of no other construction.

I am, of course, well aware that in the case of He Kaw Teh v The Queen, which must necessarily now be the leading case on this subject, the majority of the High Court held that mens rea applied to both offences to the full

extent. But, as I have mentioned, one factor in that decision was the severity of the penalty and their Honours in examining the intention of the legislature were conscious, as Brennan J. put it at p. 583, of "the enormity of convicting a person of one of these offences if he were innocently ignorant of the contents of a container he had imported or the nature of a substance that he had imported if the contents of the substance turned out to be narcotic goods."

In the light of these observations I turn to the two charges against the appellant in this case, and examine into which category each may fall. For, by reason of certain defences open in one case but not the other, it is possible that they may fall into different categories.

The first task is to look at the purpose of the Act. It can be seen at once that the Act is one of great importance economically and politically to the preservation of Australian fishing interests in those waters over which the Australian government desires to exert its control. It is clearly designed to regulate and control fishing and fishing boats in such waters. It does this basically by ministerial prohibition of various fishing activities (s. 8) and by the issue of licences (s. 9). Various offences are defined which essentially consist of doing certain things in such waters without the requisite licence. Ss. 13, 13A, 13AB, 13B, 13BA and 13BB are directly concerned with the

fishing activities of foreign boats in proclaimed waters comprised in the Australian Fishing Zone, and there is no doubt that the Act intends control over foreign boats for these purposes. Officers of the Commonwealth or the States including members of the Defence Force are authorised to board, search, arrest or generally take over control of a foreign boat and its crew for the purposes of policing the Act (s. 10) and interference in the carrying out of these duties is itself an offence (s. 14).

> "With the Zone so greatly extended, policing and, where necessary, appropriate arrest and prosecution involves the utilization of very considerable resources time and national expenditure" (per Muirhead J. Hwang Ming Huei v Mellon (1980) 5 N.T.R. 9 at 15.)

All these matters seem to me to make the Act one of national importance and strongly to suggest that for the proper and efficient carrying out of its purposes it is not considered necessary in any prosecution for an offence under the Act, and provided that the prohibited act is proved, to establish knowledge in the accused that the act was a prohibited act.

Furthermore, although there seems to be no case directly in point, there is dicta of high authority for this conclusion.

In Cheatley v The Queen (1972) 127 C.L.R. 291 the appeal to the High Court was against the penalty imposed for

an offence of using a foreign boat for fishing in Australian waters. The penalty imposed was a fine on the master of the boat and forfeiture of the boat. It was submitted that since the boat was not the property of the master and the master had not been convicted of an offence, the boat could not be forfeited. The High Court rejected the submission.

In his judgment Barwick C.J. observed that the court was not concerned with the validity of the conviction of the master (p. 295). He then said pp. 295-6:

> "The section is universal in its scope as to the persons upon whom its prohibitions are placed. It opens with the words 'a person', without qualification. Its specification of what may not be done clearly includes acts which need not necessarily and indeed usually will not be done by the owner of a foreign fishing boat. Such a boat is by definition a boat owned by a person not resident, or a company not incorporated, in Australia or in a territory of Australia. The evident purpose of the section is to protect Australian fishing grounds from exploitation by the use of foreign boats without the permission of an Australian official.
>
> For the offence the section creates to have been committed, the foreign boat must have been intruded into and used for fishing in the proclaimed waters on a declared fishing zone. If that intrusion and use is deliberate the likelihood of it being done without the complicity of the owner of the boat must be small. If it is accidental the circumstance will be weighed in the exercise of any available discretion."

The last sentence seems clearly enough to suggest that His Honour felt that accidental intrusion was no defence.

See also Hwang Ming Huei v Mellon (1980) 5 N.T.R. 9 where Muirhead J. was dealing with appeals against severity of sentence for offences of fishing in proclaimed or restricted waters. In the context of his reasoning in which he observes (p. 14) "there was nothing accidental or casual about the offences with which I am dealing", it seems plain that His Honour regarded the question of accident as a matter to be considered in mitigation of penalty but not as a defence to the charge itself.

It is true that in Fang Chinn Fa v Puffett (1978) 22 A.L.R. 149 (another case of appeal against sentence) Gallop J. at one point (P. 153) referred to the "defence of accident"; but since he then reduced penalties because of another type of accidental intrusion into Australian waters, and referred to "the accidental aspect of the offences" I take him to be using the phrase as an element of mitigation rather than a real defence.

In Ostle v Lahoya (1983) 14 A.C.R. 315 the appellant was charged with two offences under the Western Australian Fisheries Act. Those offences consisted of in Western Australian waters using a foreign boat for taking fish and in Western Australian waters using a foreign boat for carrying fish taken with the use of the boat. The Full Court of Western Australian did not specifically advert to the concept of mens rea but it is clear in their judgments that their Honours considered the offence established when

the ingredients contained in the statute were made out. In dealing with the 2 offences Rowland J. said at pp. 320-1:-

> "Subsection (2)(b) is also in exceedingly wide terms and it seems to be of no moment that the fish therein referred to may have been taken outside Western Australian waters. The offence is using a foreign boat for carrying that category of fish in Western Australian waters.
>
> Subsection (3)(a) gives a hint of the width of the words used in subs (2)(a) becuase it provides that it is a defence to a prosecution if there is a licence authorising 'the use of the boat for that purpose'.
>
> In my view, from the use of the words themselves, supported as they are by the other provisions in the section, the purpose for which the boat is being used is relevant and if the purpose is for taking fish then any use of a foreign boat that accommodates that purpose offends against the section.
>
> The second appeal relates to the respondent being acquitted of an offence against s. 29A(1)(b). This offence occurred at a different time to that of the first offence. No defence under subs (3) was available to the respondent. Once it is established, as it was in this case, that a foreign boat is within Western Australian waters carrying fish that have been caught or captured with the use of that boat, then the offence is established."

I am therefore satisfied that the general purpose of the Act requires an interpretation which does not import mens rea in the sense I have mentioned into the two offences with which the appellant was charged. Although it might seem that that conclusion should be the more easily drawn from the terms of s. 13AB, because specific defences are mentioned in s. 13AB(3), an examination of those defences indicates that they are provided only as incidental

to the general licensing provisions of the Act and to allow foreign fishing boats rights of passage in Australian waters provided that permission is obtained from the authorities and the fishing equipment is properly secured. Such a limited exception would not in itself exclude other defences.

Accordingly I am satisfied that both offences are offences at least of strict liability. In accordance with the principles previously stated I am, however, unable to see that they should be regarded as offences of absolute liability. The fact that monetary penalties only are provided as neutral to this examination. So is the dictum of Barwick C.J. apparently negativing accidental circumstances; for I take His Honour to use the term in the sense which the O.E.D. gives of "happening by chance", "undesignedly", "unexpectedly". In this sense a ship straying accidentally into the Australian Fishing Zone and there fishing without a licence would, on the principles of both strict and absolute liability be guilty since it is sufficient for the prosecution to prove he did the prohibited act. If the defendant, however, was acting under an honest and reasonable mistake he would not be acting undesignedly and what he was doing would not be by chance. He would intend to do what he was doing acting on his honest and reasonable belief that what he was doing was lawful or permitted.

The purpose of relieving the difficulties of prosecution is adequately achieved by strict liability and it would not become necessary for the prosecution to rebut honest and reasonable mistake unless circumstances were raised making that appropriate. It would normally, I expect, be difficult to raise such circumstances. For instance, as I have already suggested, to stray accidentally into the Australian Fishing Zone would not create such circumstances. Honest and reasonable mistake created by failure or malfunctioning of navigation instruments may occur. But in these days of cross-checking and alternative instruments one would hardly expect the Court to be particularly impressed by a mere assertion of that nature. Similarly an honest and reasonable mistake that the accused had the appropriate licence could no doubt occur in very special circumstances. (c.f. Kidd v Reeves (1972) V.R. 563). The adoption here of the concept of strict liability would still recognise the policy of the Act, still facilitate what would otherwise be a difficult task for the prosecution but still allow the occasion for an innocent person to escape conviction for an offence in circumstances where no questions of morality or policy could justify a conviction. Furthermore it recognises that before the full rigour of absolute liability is imposed an Act must indicate so expressly or by very strong implication and I am not persuaded that the Fisheries Act demands that interpretation.

THE FORMAL PROOFS & GROUNDS 2(c) & (d)

In the present case, pursuant to s. 16, certificates were tendered to the effect that:-

(a) during the period in which the Ming Yang 21 was arrested it was not an Australian boat.

(b) that the area of waters in which the Ming Yang was found was during the relevant period part of the Australian fishing zone.

(c) that such area was part of proclaimed waters.

(d) that the appellant was not the holder of a licence to be in charge of a boat for fishing in the area of proclaimed waters.

(e) that no person was the holder of a licence authorising Ming Yang 21 for the purpose of taking fish in the area of proclaimed waters.

Pursuant to s. 16(4) these certificates were prima facie evidence of the matters specified in them; and no challenge was made to them in the proceedings before the learned stipendiary magistrate, or in the present proceedings.

It follows that ground 2(c) which submits that the Magistrate was in error in finding that the appellant's vessel was not at the relevant time within proclaimed waters of the Australian Fishing Zone cannot be sustained.

Insofar as ground (d) submits that the Magistrate admitted evidence of an entirely hearsay nature in relation to the position of the boundaries of the Zone that ground is

not appropriate because of the formal proofs. The balance of that ground is dealt with in the remarks relating to grounds 2(g) and (h).

THE CASE PROVED

These certificates, coupled with the proofs given by the witnesses called for the prosecution established -

1. that on or about 24 March 1985 the appellant did in an area of proclaimed waters comprised in the Australian fishing zone have in his charge and without a licence a foreign boat equipped for fishing.

2. that on or about 24 March 1985 the appellant in an area of proclaimed waters comprised in the Australian fishing zone did without a licence use a foreign boat for processing fish.

Having established those matters without contest it would seem inevitable that the prosecution should succeed unless the Magistrate would entertain some reasonable doubt about the proof of those matters. Nothing appears to suggest that; and I am certainly not persuaded that anything the appellant said to the prosecution witnesses raised any real suggestion of honest and reasonable mistake. All that appears is that the appellant first told Mr Morris that his radar and satellite navigator were in working order, admitted that his ship had come to its present position on 24 March at 3am when he had set lines and said he had caught

a thousand kilograms of fish. He admitted marking the position on a chart but when he was asked if he knew his ship was fishing in Australian waters he said he did not and then became perturbed and said his engines were very bad. (Transcript p. 53-4). He noted on a chart a position of one of the areas he had fished which was within the Australian fishing zone (p. 54-6). At some stage after he had been asked if he had been fishing in Australian waters he said something to the effect that he had navigation problems (p. 50). Mr Morris says that "once I indicated to the captain that he was fishing in the Australian fishing zone he became very very agitated indeed. He became very unco-operative.

Now, while the prosecution bears the onus of proof throughout, it does not have to meet non-existent cases. Until circumstances could be shown to raise the possibility of honest and reasonable mistake the prosecution did not have to rebut that. Kidd v Reeves (1972) V.R. 563. In the present case it does not seem to me that honest and reasonable mistake was ever seriously raised. But if I am wrong about this, and the appellant's rather vague remarks that his engines were bad and he had navigation problems and did not know he was in Australian waters - remarks which were contradictory of his earlier statements and actions, - if those remarks sufficiently raised honest and reasonable mistake then, in my view, the prosecution proved beyond reasonable doubt that the appellant did not have an honest and reasonable mistake as to his whereabouts. It seems

plain that he knew where he was and in view of his earlier answers his later ones seem no more than a rather feeble attempt to exculpate himself after he realised he was in trouble. Furthermore at no stage did he elaborate on these remarks or explain how his engines or navigation was at fault. I would have no doubt that he was not labouring under any honest and reasonable mistake.

The complaint raised by this ground of appeal is that the Magistrate "failed to take into account adequately or at all the evidence concerning the intent of the appellant at the time of the arrest of the ship."

On the contrary it seems to me that the learned Stipendiary Magistrate went further than he needed to go (but thereby very much in the appellant's favour) and dealt with the question of mens rea and was in no doubt that "this was a deliberate fishing venture inside the fishing zone." He added:-

> "Furthermore the vessel concerned was equipped with navigational aids of sufficient precision, had they been observed, would lead inevitably to the conclusion that they, or the master, knew at the time that he was inside the zone.
>
> On the evidence before me, it's also evidence that following the enquiries that took place, the master became uncooperative. Not only did he become uncooperative in the sense of not wishing to participate in questioning, but it appears he switched off the radar at some point, and the satellite navigational aid.
>
> He also embarked upon a process of deception, or attempted deception as to the boat's fitness - the

engines. I have little doubt that the navigational aids were in proper working order, as was the boat.

It perhaps suggests - or confirms rather, that the master knew that he was in trouble, and he knew that he was inside the zone."

If it were necessary for me to do so I should say that I entirely agree with the observations of the learned Stipendiary Magistrate. However I have treated the ground of appeal as raising the whole question of the availability or otherwise of mens rea as an ingredient of these offences and that was the way in which Mr McCormack argued it. For the reasons given this ground of appeal must fail.

RELIEF AGAINST FORFEITURE

(Ground 2(i))

Mr McCormack submits that even if I hold the appellant was rightly convicted the penalty insofar as it related to the forfeiture of the boat was excessive.

I am unable to see how this could be. There were no mitigating circumstances such as applied in Fang Chinn Fa v Puffett (1978) 22 A.L.R. 149 or Van Chen v Wutton (1980) 53 F.L.R. 44. Mr McCormack urges upon me the limited time the boat had been in the zone and the limited catch that had been made. Since all the evidence indicates that the appellant would have continued his

activities if he had not been apprehended he can hardly make a virtue out of that.

One should keep in mind the remarks of Barwick C.J. in Cheatley v The Queen (1972) 127 C.L.R. 291 at 296:-

> "The protection of the fishing grounds of the nation from foreign exploitation is somewhat akin to the protection of the country from smuggling. Drastic action in protection of the country's interests in each instance may be regarded as warranted, indeed, if not to be expected. Each is an area where pecuniary penalties are unlikely to provide adequate protection."

In Hwang Ming Huei v Mellon (1980) 5 N.T.R. 9 Muirhead J. refused to interfere with penalties which involved fines and forfeiture of two ships in circumstances where there was "nothing accidental or casual about the offences" and no evidence had been called on behalf of the defendants "to justify a finding of misjudgment, accidental infringement or the like" (p. 14). He referred to the policy of the law that the owner should suffer forfeiture though not directly involved in the breach.

The fishing industry can and often does yield large profits and there is always a temptation to those involved in it to go where the fish are plentiful even if that means trespassing upon the fishing grounds of other nations. A nation desiring to protect itself from such depredations must make it very plain that the game is not worth the

candle, i.e., that the risk of heavy penalties if caught outweighs the profit that might be made. Fines, even heavy fines against individuals will not usually suffice since the individual may either not have the wherewithal to pay or it may be difficult or impossible to follow such assets as he had into another country. In any event a heavy fine may work an injustice on an individual who will often be acting under orders. The real offender is usually the foreign owner who will almost certainly have no funds in this country to pay any fine imposed. Hence, save where there are special mitigating circumstances, forfeiture is the only effective way to see that the policy of the Act is carried out. Indeed, if it became known that Australian courts treated offences against the Act only by fines, this would be to a substantial degree counter-productive, since many more foreign ships would venture into Australian waters to the great detriment of the Australian fishing industry.

I see no reason to interfere with the penalty.

THE PROVISIONAL FISHERIES AGREEMENT

The submission of Mr McCormack as ultimately drafted is that

> (f) the learned Stipendiary Magistrate erred in failing to take account adequately or at all the effect on enforcement of the northern Boundary of the Australian Fishing Zone of a

Memorandum of Understanding between the Governments of Australia and Indonesia concerning the implementation of a provisional fisheries surveillance and enforcement agreement executed on 29 October 1981.

This ground can be dealt with speedily because, in my view, it fails in limine. Mr McCormack's argument depends upon some differences between the Australian Fishing Zone as it presently exists and the Provisional Fisheries Surveillance and Enforcement Arrangement made between Australia and Indonesia on 29 October 1981 and announced as coming into effect on 1st February 1982. (See Department of Foreign Affairs - News Release - 30/10/81.) That arrangement resolved some but not all of the differences between the two countries as to maritime boundaries. The position is put by Mr Peter Bassett an officer of the Department of Foreign Affairs in an article "Australia's maritime boundaries" appearing in the Australian Foreign Affairs Record of March 1984. He sets out the earlier agreements and explains the difference of approach of the 2 countries as follows:-

> "The provisions of the 1982 Convention on the Law of the Sea relating to the continental shelf (especially Article 76) and to boundary delimitation are not perfectly clear. Indonesia's view is that every country is entitled to a continental shelf of at least 200 nautical miles (nm) if no other country's interests are affected (regardless of whether or not the shelf actually extends that far), so that where the adjacent or opposite coastlines are less than 400 miles apart, as in the case of Timor and Australia, a median line would be appropriate. Australia does not accept that view, maintaining, on the contrary, that there are two separate propositions embodied

in Article 76 of the Law of the Sea Convention. The first is that the coastal state is entitled to exercise jurisdiction over its continental shelf throughout its natural prolongation. The second is that where the continental shelf does not extend out to 200 nm, the coastal state is entitled to exercise jurisdiction over the seabed, regardless of its nature, out to 200nm."

He then summarises the provisional fishing agreement of 29 October 1981.

> "A Provisional Fisheries Arrangement was negotiated with Indonesia also in 1981 to overcome the practical problems of overlapping fisheries jurisdictions. The fisheries delimitation roughly follows the median line, except in the west where it comes close to Ashmore and Cartier Islands. This arrangement was expressed to be without prejudice to the position of either Government in on-going seabed delimitation negotiations. Jurisdiction over sedentary species is governed by the 1971 and 1972 seabed boundary agreements."

The basis of this agreement for the purposes of the present case is the understanding as set out in paragraphs 1 and 2 of Memorandum of Understanding between Indonesia and Australia:-

> "(1) It is accepted by both Governments that a provisional fisheries surveillance and enforcement arrangement should be established in the maritime areas lying between Indonesia and Australia, outside the territorial sea of either country, where the economic or fishing zone of each country, established in accordance with international law, would overlap.
>
> (2) It is understood that in areas of that overlap, and pending the permanent settlement of maritime boundaries between the two countries, neither Government will exercise

jurisdiction for fisheries surveillance and enforcement purposes beyond a provisional fisheries line in respect of swimming fish species against fishing vessels licensed to fish for such species by the authorities of the other country."

(Department of Foreign Affairs - News Release - 30/10/81).

The differences in boundaries between the Australian Fishing Zone as defined in s. 4(1) of the Fisheries Act and included as proclaimed waters, pursuant to s. 7, by Proclamation of 20 September 1979 (Government Gazette 26/9/79) and the Provisional Fisheries Surveillance and Enforcement line are usefully set out in the map appended to the article by Mr Bassett previously referred to.

Mr McCormack argues that if a foreign vessel were apprehended by an Australian ship outside the Provisional Fisheries Surveillance and Enforcement line but inside the Australian Fishing Zone then:-

(a) recognition should be given to the agreement, albeit only a provisional agreement, between the two countries that Australia would not exercise jurisdiction against fishing vessels licensed by Indonesia, and

(b) if a foreign vessel were apprehended in that area it would be necessary in any prosecution under the Fisheries Act for the prosecution to prove that the vessel did not possess a valid and current licence from the Indonesian government."

But Mr McCormack admits that if I am satisfied with the position of Ming Yang 21 when apprehended by HMAS Bunbury (as appears on the Chart and overlay plotted by Lieutenant Victor) she would be 10 nautical miles inside the surveillance and enforcement line and 41 nautical miles inside the Australian Fishing Zone. His argument therefore depends upon there being some doubt as to that position, particularly bearing in mind what he would suggest in the circumstance is a relatively short margin for error.

For the reasons previously given I have no doubt as to the position given by the officers of HMAS Bunbury and it becomes unnecessary to deal with this submission further.

THE CONSTITUTIONAL POWER

Ground (e) - the learned Stipendiary Magistrate erred in giving effect to the proclamation of the northern boundaries of the Australian Fishing Zone as a valid exercise of power conferred on the Government of Australia by the Australian Constitution.

The submission puts in issue the constitutional power of the Commonwealth to assume jurisdiction over the area of proclaimed waters comprised in the Australian Fishing Zone.

The Australian Fishing Zone is defined in the Act as:-

"(a) the waters adjacent to Australia and having as their inner limits the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is distant 200 nautical miles from the point of one of those baselines that is nearest to the first-mentioned point; and

(b) the water adjacent to each external Territory and having as their inner limits the baselines by reference to which the territorial limits of that Territory are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is distant 200 nautical miles from the point on one of those baselines that is nearest to the first-mentioned point,

but does not include -

(c) waters that are not proclaimed waters;

(d) waters that are excepted waters; or

(e) waters that are described in an agreement in force between Australia and another country as waters that are not to be taken, for the purposes of this Act, to be within the Australian fishing zone;"

"Proclaimed waters" means :-

"waters declared by a Proclamation in force under section 7 to be proclaimed waters, and includes, for the purposes referred to in section 12K, waters deemed by that section to be proclaimed waters;"

"Proclaimed waters" are now declared by the Proclamation of 26 September 1979 (revoking earlier Proclamations) as:-

"SCHEDULE 1

All waters within 200 nautical miles outwards of the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law, other than waters that are within the territorial limits of Australia or another country.

SCHEDULE 2

All waters within 200 nautical miles outwards of the baselines by reference to which the territorial limits of an external Territory are defined for the purposes of international law, other than waters that are within the territorial limits of a country other than Australia and waters included in the waters specified in Schedule 1."

Mr McCormack puts his argument very simply. He accepts that the starting point of his argument must be the case of Bonser v La Macchia (1969) 122 C.L.R. 177. In that case the Governor-General, acting under the Fisheries Act as it then stood proclaimed certain "Australian waters" as "proclaimed waters" for the purposes of the Act. Those waters were an area the seaward limits of which were approximately 200 miles from the east, west and south coasts of Australia. The eastern limit continued north around the eastern part of New Guinea between New Britain and the Solomon Islands to a point north of the boundary between Papua-New Guinea and West Irian. The western limit continued through the Timor Sea to a point north of the Gove peninsula. The High Court held that the waters described in the proclamation were part of "Australian waters beyond territorial limits" within s. 51(x) of the Constitution (the fisheries power) and the proclamation was valid.

The Act in its present form no longer requires that waters need to be characterised as "Australian waters" and the "Australian fishing zone" therefore becomes the zone within the 200 mile limits defined providing that they are proclaimed waters and not excepted waters or waters not to be taken to be within the Zone if excepted by an agreement between Australia and another country.

Mr McCormack submits that at the time Bonser v La Macchia was decided the proclaimed area, so far as the northern part of Australia was concerned, was established by the proclamations of 30 November 1954 and 7 February 1956; and that established the Australian Fishing Zone at a line approximately mid-way between Australia and its outlying islands and the Indonesian Archipelago. That, he says, was well within the Commonwealth power as indeed so found by Bonser v La Macchia. But the proclamation of 20 September 1979 so widened the northern area, particularly in relation to external Territory (Schedule 2), that it takes in parts of the Indonesian Archipelago. This he submits cannot be within the fisheries power of the Commonwealth, which speaks of "Fisheries in Australian Waters beyond territorial limits." He concedes that the proclamation does except waters that are within the territorial limits of another country and he concedes that, subsequently, various "excepted waters" were proclaimed in relation to various external territories (Australian Antarctic Territory, Coral Sea Islands Territory, Norfolk, Macquarie, Heard, McDonald,

Christmas, Ashmore and Cartier Islands) by Proclamations of 31 October 1979. Nevertheless he submits that the width of the Proclamation of 20 September 1979 cannot be read down and the fisheries power cannot support the result. He relies on various remarks of their Honours in Bonser v La Macchia which, he submits, indicate that extension of boundaries beyond those agreed to be within power in that case might not be looked on favourably if further extensions were promulgated. McTiernan J. said at p. 199.

> "I think it is right to take the view that there are no waters so little connected with Australia or so distant in this area as to lead the Court to hold that the area defined by proclamation is based on an excessive estimate of the extent of "Australian waters."

Kitto J. at p. 206:-

> "In this context it seems to me the adjective 'Australian' resembles the adjective 'Australasian' as used in the description of those waters in which fisheries were a matter 'of common Australasian interest' in that it connotes a propinquity or other physical relation sufficient to make the enactment of laws concerning fisheries in those waters a matter of natural relevance to the government of the Australian Commonwealth."

Later at p. 208 Kitto J. says:

> "When the lines described in the Governor-General's proclamation of 30th November 1954, are traced upon a map of the world, and it is seen how close and distinctive is the physical relation of the enclosed waters to the Australian continent and Tasmania, to the islands off the coast which are politically Australian, to the Territory of Papua and New Guinea, and to the Territory of Ashmore and

> Cartier Islands, and how carefully the area is delineated to exclude all waters which, in a context referring to the self-government of countries in regard to fisheries, may fairly be thought to be Indonesian rather than Australian, the conclusion seems to me to admit of no doubt that in such a context every part of the area is naturally to be subsumed under the heading either of 'Australian' waters or of waters 'adjacent' (in a corresponding sense) to a Territory."

See also Menzies J. at p. 210; Windeyer J. at 233 and Owen J. at 235-6.

These reservations of their Honours are the matters upon which Mr McCormack principally relies; but it seems to me that within that case there is ample support for at least a 200 mile zone as being within the fisheries power no matter what might be said of extensions somewhat further. Thus Barwick C.J. says at p. 195:-

> "There is in my opinion, no reason why waters should not for Australian constitutional purposes be considered Australian waters though for its own domestic and for that matter international purposes part of those waters may be regarded by another nation as its own waters."

Kitto J. said at p. 207:-

> "A case may of course be imagined in which a court should hold that waters which the Executive or even the Parliament itself, has treated as 'Australian' or as 'adjacent' to a Territory (in the sense that has been mentioned) are, as a matter of objective fact, not within these descriptions. The waters of the Persian Gulf, for instance, would necessarily be held incapable of falling within either of the expressions, even if the Parliament or the Executive should be found to have indicated a

contrary view. But we have not here to consider such a case."

Menzies J. said at pp.210-211:-

"My conclusions, both as to the inner limit of the waters in which fisheries are subject to the legislative power of Parliament and to the extent of such waters, are strongly reinforced by the circumstance that at the time of the establishment of the Commonwealth there were in existence two Acts of the Federal Council of Australasia, the validity of which was recognized by the Constitution Act, s. 7. These Acts defined areas extending 500 miles from the coast of Australia as 'Australian waters' for the purposes of the Federal Council of Australasia Act, 1885, an Imperial Act which authorized legislation in respect to 'Fisheries in Australasian waters beyond territorial limits.' See The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of 1888, and the Western Australian Pearl Shell and Bech-de-mer Fisheries (Extra-Territorial) Act of 1889. By these Acts 'Australasian waters adjacent to Queensland' were defined as 'All Australasian waters within the limits described in the Schedule of this Act, exclusive of waters within the territorial jurisdiction of the Colony of Queensland' and 'Australasian waters adjacent to Western Australia' were defined as 'All Australian waters within the limits described in the Schedule of this Act, exclusive of waters within the territorial jurisdiction of the Colony of Western Australia'. The schedule to these Acts, as I have already intimated, covered waters at least 400 miles from the coast. These Acts must be regarded as of great importance in the construction of s. 51(z.) of the Constitution. They recognize that 'Australasian waters' are waters adjacent to some part of Australasia and that waters at least 400 miles from the coast are within that description."

Windeyer J. at p. 216:-

"The power to legislate for fisheries in Australian waters does not make those waters, 'a part of the Commonwealth' within the meaning of s. 5 (in the

> covering clauses) of the Constitution Act. The question is what, for the purpose only of the power over fisheries are the limits of Australian waters."

It seems to me that the conclusion to be drawn from this case is that, while obviously there may be circumstances in which the area asserted by the Commonwealth as within the Fisheries power will clearly not be so (c.f. the "Persian Gulf" example given by Kitto J.), an area of no more than 200 miles outwards from Australia and external territories and subject to the territorial limits of another country would be well within the power.

Indeed, as Mr Gardner points out, the concept of a 200 nautical mile fishing zone is well established in customary international law. According to Brownlie - Principles of Public International Law - 3rd End - p. 219

> "By 1978 some seventy-four states had fishing zones of 200 miles, whilst ten states had claims greater than twelve but less than two hundred miles. The adherents to two hundred mile zones included the United States, Japan and the members of the E.E.C. (including the United Kingdom). Clearly the fishery conservation zone, not greater than 200 miles from the usual baselines, is in the process of crystallizing as a principle of customary international law."

In Ryan's International Law in Australia - 1984 - p. 377 under the heading - "Australian Fishing Zone", appears this passage:-

"While no provision has been made in international treaty for a 200 mile fisheries zone this zone may be regarded as having been established under customary international law in the light of claims of a vast number of maritime nations including the United States, Russia, Japan, the United Kingdom, European Economic Community and the countries of the third world."

If there is any doubt as to the fisheries power in these circumstances the power could still in my view be derived from the external affairs powers which is not to be read down by reference to the fisheries power. See the observations of Mason J. (as he then was) in N.S.W. v The Commonwealth (1975) 135 C.L.R. 335 (the Seas and Submerged Lands Case) at 471:

"Next it was urged that to give a wide meaning to the power would make other heads of power in s. 51 redundant, notably s. 51 (x) and (xxx). The frailty of this argument is that, even on a limited view of s. 51 (xxix), it appears to embrace Australia's relationships with the islands of the Pacific, and consequently to cover the field included in s. 51 (xxx). Furthermore, the reference to 'relations' in s. 51 (xxx) strongly suggests that 'external affairs' in s. 51 (xxix) is a more comprehensive expression which is not confined to relationships with other countries.

Similarly, I am not persuaded by the plaintiff's submission relating to s. 51 (x). There can be little doubt that control and regulation of fisheries beyond territorial limits was regarded as having such importance as to require its specific mention in s. 51. Fishing and fisheries were a matter of great concern to the Australian colonies before federation. The fisheries power had been included in the short list of powers conferred on the Federal Council of Australasia by the Federal Council of Australasia Act 1885, s. 15(c). Its omission from s. 51 of the Constitution was not to be contemplated; in its historical context, the omission may have had an untoward significance in the interpretation of the Constitution.

> For these reasons it is my opinion that the power conferred by s. 51 (xxix.) extends to matters or things geographically situated outside Australia. This view appears to accord with what was said by Evatt and McTiernan JJ. in Burgess' Case. And it applies with special force to the territorial sea and its solum because, as I have already observed, their control and regulation is an aspect of the external sovereignty of Australia and Australia's external relationships with other nations."

See also Jacobs J. at p. 497. See also Koowarta v Bjelke-Petersen (1982) 153 C.L.R. 168 at 223 (per Mason J.). In my view this ground of appeal cannot be sustained.

CONCLUSION

For the reasons given above I am of the opinion that both charges were made out by the informant and that the penalty imposed by the learned Stipendiary Magistrate was the appropriate penalty.

The appeals will be dismissed. I will reserve liberty to apply on the question of costs.