

PARTIES: SIMLESA, MARKO ANTE
REIDY, KODE ROBERT and
ARMYTAGE, LUCAS STEVEN

v

PERRY, RUSSELL LAWRENCE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING APPELLATE
JURISDICTION

FILE NOS: JA 105 of 2002 (20015481)
JA 37 of 2003 (20015481)
JA 115 of 2002 (20102600)
JA 38 of 2003 (20102600)
JA 116 of 2002 (20102599)
JA 39 of 2003 (20102599)

DELIVERED: 29 JULY 2003

HEARING DATES: 2 JULY 2003

JUDGMENT OF: ANGEL J

CATCHWORDS:

STATUTES – INTERPRETATION – “River” - Fisheries Act – Barramundi Fisheries Management Plan - Statutory interpretation - Commercial fishermen charged with offence of fishing with nets “landwards of a river mouth” for barramundi — Whether Perakary Creek is a “river” within the meaning of the term in the Plan – Whether the applicants nets were “landwards” of a “river mouth” within the meaning of the Plan - leave granted - Appeal allowed

Words & Phrases – “River”

Fisheries Act (NT), Part III, ss 4, 25(3), 27

Barramundi Fishery Management Plan (NT), clause 4, 6, 8(1)(a), reg 3

Errington v Jessop (1982) 59 FLR 99, distinguished

REPRESENTATION:

Counsel:

Applicants: P. Cantrill
Respondent: I. Rowbottam

Solicitors:

Appellant: Morgan Buckley
Respondent: Director of Public Prosecutions

Judgment category classification: B
Judgment ID Number: ang200308
Number of pages: 7

ang200308

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

Simlesa & Ors v Perry [2003] NTSC 85
Nos. JA 105 of 2002 (20015481), JA 37 of 2003 (20015481)
JA 115 of 2002 (20102600), JA 38 of 2003 (20102600)
JA 116 of 2002 (20102599), JA 39 of 2003 (20102599)

IN THE MATTER of the Justices Act

AND IN THE MATTER of appeals against
conviction, sentence and forfeiture orders of the
Court of Summary Jurisdiction in Darwin

BETWEEN:

MARKO ANTE SIMLESA

First Applicant

AND:

KODE ROBERT REIDY

Second Applicant

AND:

LUCAS STEVEN ARMYTAGE

Third Applicant

AND:

RUSSELL LAWRENCE PERRY

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 29 July 2003)

- [1] Each of the three applicants seeks leave to appeal out of time against two convictions for offences contrary to Clause 8 (1)(a) of the Barramundi

Fishery Management Plan for fishing “landwards of a river mouth”. No point was taken by the respondent regarding the applicants being out of time and the argument proceeded on the merits as if the appeals were on foot.

- [2] The Fisheries Act NT Part III provides for the formulation and promulgation of management plans and the Barramundi Fishery Management Plan, one such plan, came into operation on 1 February 1998, having been approved pursuant to s 25(3) of the Act. In virtue of s 27 of the Act the management plan has the force and effect of a Regulation in force under the Act.
- [3] There was no dispute that the applicants were commercially fishing in an area known as Perakary Creek on Bathurst Island on 13 August 2000. The applicant Simlesa was the holder of a Barramundi Licence issued under the Act during the period 1 July 2000 to 30 June 2001. The applicants Reidy and Armytage were “assistants” as defined by s 4 of the Act. Clause 6 of the Management Plan provides that an assistant as defined may be charged and convicted of an offence as if the assistant were a licensee.
- [4] Two principal points were argued by the applicants. First it was said the prosecution had failed to establish that Perakary Creek, at least in the area of the applicants’ nets, was a “river” as defined in Clause 4 of the Plan. As counsel for the applicants said, before there can be a “river mouth” there must be a “river”. Secondly it was said that the prosecution had also failed to establish that the applicants’ nets were “landwards” of a “river mouth”.
- [5] “River” is defined in Clause 4 of the Plan as follows:

“ ‘river’ includes a creek, stream, tidal arm, billabong, lake or other body of water, whether fresh or brackish, that, seasonally or consistently, flows directly or indirectly into the sea, and, for this purpose, a tributary, branch, anabranh, channel or division of a river, or a river flowing into a river, is to be taken to form part of and be one river;”.

“River Mouth” is defined in Clause 4 of the Plan to include “a body of water delineated –

- (b) ... by an imaginary line contiguous with the shape of the adjoining coast, bay or inlet, across a river”.

“Coast” is not defined in the Plan or the Act or the Regulations. Regulation 3 defines “coast line” as meaning –

- “(a) except in relation to a mouth of a river, an imaginary line drawn along the coast at the highest astronomical tide; or
- (b) in relation to the mouth of a river, an imaginary line, contiguous with the adjacent coast line drawn across the mouth of a river;”.

[6] The learned Magistrate found that the applicants’ net No. 4 was strung from mangrove trunks rooted in ground inundated regularly by sea water which was higher by some metres than the bed of a steep tidal channel comprising Perakary Creek. This net was located, he found, “about 800 metres from the

open sea”. The learned Magistrate also said “as far as I can tell, the physical features were pretty much the same at net No. 5 (1,500 metres from the open sea): mangroves growing on a flattish area, and that area ending suddenly delineated by the steep bank of Perakary Creek”. The learned Magistrate said that the presence of mangroves indicated that those flattish areas were regularly inundated by the tidal movements of the sea on every high tide and that he had no reason to believe that the situation was any different at the two points where nets Nos. 4 and 5 were located.

[7] The learned Magistrate concluded his reasons as follows:

“I can see no reason at all why this pattern of inundations should in any way affect the characterisation of Perakary Creek as a river, and, in particular, why it should affect in any way, the establishment, according to the BFMP’s definition of ‘river mouth’. In my judgment the ‘coast’ is self-evidently the seaward edge of the mangroves, and the beach along that edge. In the course of the police’s visit to Perakary Creek on 29 August Senior Constable Cook stood on the western edge of the mouth of the Creek, and indicated with an outstretched arm where he thought ‘an imaginary line contiguous with the shape of the adjoining coast, bay or inlet’ lay across the mouth. That line has been drawn on Ex A. In my judgment, senior Constable Cook was standing on, or near enough to, the coast, so the western end of his line an appropriate starting point to delineate the ‘river mouth’. However, in my view the ‘shape of the adjoining coast’ would dictate a line heading almost due east from that starting point, not SE, or, ESE, as Cook’s line does, somewhat generously to the defendants. Be that as it may, the river mouth is there or thereabouts. The nets were landwards of the river mouth, by approximately 800 metres, and 1500 metres respectively. ‘Fishing’ according to the definition in s 4 of the Act includes the ‘... taking ... of fish ...’, and in my view a separate ‘act’ within the meaning of s 2 of the Criminal Code, was entailed in clearing each net. For these reasons I found proved the two charges against each defendant.”

[8] Before this Court the applicants argued that Clause 4 of the Plan might be paraphrased as meaning “any body of fresh or brackish water flowing directly or indirectly into the sea”. It was submitted that there was no evidence that the area where the nets were located consisted of a body of fresh or brackish water and that whether or not sea water flowed back and forth with the tide was irrelevant for the purposes of the definition of a river even if it ran through a clearly defined channel and thus there was no evidence that the area comprised a river within the meaning of Clause 4. It was also submitted that the prosecution had failed to establish the location of the river mouth and that in particular no evidence was led as to the location of the highest astronomical tide at the relevant area, and that in the absence of such evidence the prosecution had not proven its case. It was submitted that on the evidence and findings of the learned Magistrate the area where the nets were set was within a channel within a mangrove swamp and that although there were sand dunes or “chemiers” as they were called comprising dry land within the mangrove swamp area, the true line of the coast for the purposes of the prosecution had not been established. It was submitted that the evidence established that the true line of the coast was closer to certain eucalypt forest or dry savanna areas inland from the mangroves where the applicants’ nets were set and that it could not be said beyond reasonable doubt that the applicants had been fishing landwards of a river mouth.

[9] The learned Magistrate held Perakary Creek was properly to be described as a “creek” or “tidal arm” and thus a “river” as defined. In doing so he did not consider whether, as such, it comprised a “body of water, whether fresh or brackish, that, seasonally or consistently flows ... into the sea ...”.

However I consider he was bound to do so. “River” is defined as “including” rather than “meaning” certain things. An armlet of the sea comprising seawater channelling inland the level of which rises and falls with the tide is not a river as ordinarily understood. Perakary Creek, at least the deep channel thereof aside from the contiguous mangrove flats, is a creek, as known and ordinarily understood, that is, a sea inlet or small stream. It is not a large natural stream of water, ie. a river as ordinarily understood. Thus to constitute a river for the purposes of the prosecution it must be brought within the extended definition. That definition perforce should be strictly construed.

[10] Neither a “creek”, a “tidal arm”, a “billabong”, or a “lake” is ordinarily regarded as a “river”, and this notwithstanding Chambers Pocket Dictionary saying that one meaning of “creek” is “small river”. The words “other body of water” etc in the Clause 4 definition qualify the preceding words “creek, stream, tidal arm, billabong, lake ...”. Thus, although Perakary Creek was both a creek and a tidal arm as ordinarily understood, unless at the location of the applicants’ nets it was shown also to be a “body of water, whether fresh or brackish, that, seasonally or consistently flows ... into the sea ...,” it is not a river for the purposes of the prosecution case. There was no

evidence led to establish that water in Perakary Creek is fresh or brackish, or, on the contrary, simply seawater.

[11] On the evidence the applicants' nets were set in an armlet of the sea running inland in a narrow channel where seawater flows in and out according to the tide rather than in the tidal estuary of a river. The evidence does not demonstrate that fresh water or brackish water makes its way to the sea along the channel. In short the prosecution has not established that the area known as Perakary Creek was a "river" within the meaning of that term in the plan, cf *Errington v Jessop* (1982) 59 FLR 99, a decision of Forster CJ. The charges should have been dismissed.

[12] Leave to appeal is granted. The appeal is allowed, the convictions, penalties and orders of forfeiture are set aside.