PARTIES:	TRAN v SCAMMELL
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE No:	91 of 1993
DELIVERED:	Delivered at Darwin 10 January 1994
HEARING DATES:	Heard at Darwin 16 & 17 November 1993
JUDGMENT OF:	Mildren J

CATCHWORDS:

CRIMINAL LAW - Appeal against conviction from Court of Summary Jurisdiction interpretation - meaning of "unprotected animals" - when Court shall have judicial notice of untendered regulations.

CRIMINAL LAW - Appeal against conviction - mens rea - unsafe and unsatisfactory evidence - principles applied to determine unsafe and unsatisfactory convictions - evaluation of credibility.

CRIMINAL LAW - Appeal against convictions - corroboration evidence of accomplices - necessary accomplice testimony warning.

STATUTES

Interpretation Act (NT) s38E
Criminal Code (NT) s3(4), s31, s31(1)(2), s12(1)(a) and (1)(b)
Territory Wildlife Regulations
Territory Parks and Conservation Act s9(1), s.29(3), s26, s27(1)(2)(4)
Justices Act (NT)

CASES

Davies v Director of Public Prosecutions (1954) AC 378 followed
Chidiac v The Queen (1990-91) 171 CLR 432 applied
K v Waldron (1988) 93 FLR 451 mentioned
Sanby v The Queen (unreported, Court of Criminal Appeal, 9/10/93 Mildren J) mentioned

Giles v Barnes (1967) SASR 174 followed
Hinton Demolitions Pty Ltd v Young (1973) 6 SASR 129 followed
Ex parte Madsen; re Hawes and Blissett (1960) SR (NSW) 126 considered *The Queen v Harm* (1975) 13 SASR 84 applied
James William Miller (1980) 1. A.Crim App R. 188 followed
Leslie Thomas Burr (1988) 37 A.Crim App R. 220 followed

REPRESENTATION:

Counsel
Appellant: J Withnall
Respondent: J Adams

Solicitors
Appellant: Withnall Cavenagh & Co
Respondent: DPP

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

No 91 of 93
9310855

IN THE MATTER of a Justices Appeal

BETWEEN:

THAN LOI TRAN

Appellant

AND:

FRITZ AXEL SCAMMELL

Respondent

CORAM: Mildren J

REASONS FOR JUDGMENT
(Delivered 10 January 1994)

The appellant was charged with three complaints of taking a number of protected animals, viz, turtles, without authority, contrary to s29 of the *Territory Parks and Conservation Act*. The prosecutor did not proceed with the first complaint, which related to taking between sixty-two and eighty-two turtles between 15 and 17 November 1991. The appellant pleaded not guilty to the second and third complaints upon which he was ultimately convicted. He was sentenced to two months' imprisonment on each complaint. Both terms of imprisonment were ordered to be concurrent; and the appellant was released forthwith on a two year good behaviour bond. In addition, the appellant was ordered, pursuant to s29 of the Act, to pay a total of $5,400 by way of monetary penalty.

The appellant appeals against both convictions and against his sentences upon a variety of grounds.

The facts as found by the learned magistrate are that the appellant, who was the master of the fishing vessel "*Tengirri*," left Darwin Harbour with three crewmen, Stephen Scarlett, Arthur

Probyn, and Adam Ferguson on 15 November 1991 in order to catch shark and mackerel. The vessel proceeded to the Fog Bay area.

From between about 15 November 1991 to 18 November 1991 the appellant deployed his shark net at a place approximately 2.4 nautical miles off Point Jenny, the nearest point of land. When the net was retrieved, between sixty-five and eight-two turtles were caught and died in the net. These findings of fact related to the first complaint. The facts relating to the first complaint, and the findings in relation thereto, were relevant to proof of the necessary mental element in relation to complaints two and three. The learned magistrate found that, knowing that the shark net had caught and killed sea turtles on the first occasion, the appellant, between about 17 to 20 November 1991, deployed his shark net on the second occasion at a point about 1.6 nautical miles from the nearest point of land. It is a reasonable inference from his Worship's findings, that the nearest point of land was again Point Jenny, given that he also found that the vessel had not moved significantly from the place where the net had been deployed on the first occasion. On this occasion, between 84 and 107 sea turtles were caught and died, and the appellant knew that a large number of turtles had been so caught and died.

As to the third complaint, the learned magistrate found that between 20 to 22 November 1991, the appellant, in the same general area, and within three nautical miles of the coast, set the shark net again, and that on this occasion there were ninety-six or ninety-seven turtles caught and killed.

The learned magistrate also found that the appellant foresaw the taking of sea turtles as a possible consequence of his actions in setting the shark net on the second and third occasions; that the sea turtles taken on each occasion were of the species olive-ridley, loggerhead, flat-back and hawksbill, were all indigenous to Australia, and were all protected animals within the meaning of

the Act; that the appellant did not have a permit to take any of those animals, that no notice under s29(3) of the Act declaring it lawful to kill those animals had been published by the Minister in the Gazette in respect of the relevant period, and that the taking of the animals was not authorised by the regulations to the Act.

Accordingly, the learned magistrate convicted the appellant on each of the second and third complaints.

The first ground of appeal argued was ground 3(f) of the amended notice of appeal, which attacked the finding that the turtles caught on each occasion were protected animals. The prosecutor called evidence from Michael Guinea, from the science faculty at the Northern Territory University, an expert in sea turtles and marine biology. Mr Guinea gave evidence that on 2 December 1991 he attended Dundee Beach, to the south of Native Point which is the northern most point of Fog Bay. He observed and photographed a number of dead turtles between a creek called Rocky Bank Creek (to the north of Native Point) and a public boat ramp at Dundee Beach several kilometres to the south. The following day, he travelled by helicopter south from Quail Island to Channel Point. Dead turtles were seen at various places north of the Little Finniss River, along Five Mile Beach, and to the north of Stingray Head. The turtles were identified by either landing or hovering. A number were photographed. A total of 100 turtles were found of which eighty-five were olive-ridleys, five loggerheads, 8 flat-backs, one hawksbill and one unidentified (as it was still floating in the sea). The hawksbill was located south of Point Jenny, the only turtle seen south of the Little Finniss River. The location of the carcasses was recorded on a map - Exhibit P6. Assuming that the turtles so found were all protected animals, it was submitted that there was no evidence from which an inference could be drawn that these turtles were the same turtles that had been caught in the appellant's shark nets, and as there was no other evidence to show what type of turtles had been caught (as

the turtles had been thrown overboard and none of the crew were able to identify them), the Crown could not prove that the turtles caught were protected animals.

Mr Withnall, counsel for the appellant, submitted (1) that there were a number of possible causes for the deaths of the turtles apart from a fishing incident which had not been excluded (2) that was no evidence about wind or tide movements or current patterns such as to lead to a conclusion that any dead turtles thrown overboard from the vessel would have been likely to have been washed ashore on the beaches in question (3) the evidence of Mr Guinea was that some of the turtles had been dead for no more than three or four days from 3 December 1991 (i.e. killed on 30 November at the latest, and therefore considerably after 22 November, the latest date the subject of the complaints). Therefore, some other cause could not be excluded.

Mr Adams for the respondent submitted that the inference was able to be drawn from (1) the improbability of possible causes other than a fishing incident: (a) tidal surges and tidal waves - none were recorded in the area at the time; (b) lightening strikes - extremely unlikely, according to Mr Guinea; (c) "red tides" (a product of biological poisoning) - Mr Guinea said there was no evidence of this at the time; (d) poisoning from the rivers, but the wet season had not started; (e) something toxic in the food chain, but there was no evidence to support this; (f) coxsidiosis, but this would cause a slow poisoning over a period of months. Mr Guinea discounted these causes as "not fitting the situation" or "extremely unlikely." This left human causes such as swallowing of debris (plastics) or boat strikes, but Mr Guinea investigated these possibilities and could find no evidence of this. He concluded that "a fishing incident was a possible cause."

The learned magistrate said:

> "Given the absence of any other feasible cause put forward, or any other evidence to suggest reasonable alternative causes, I would be satisfied on the balance of probabilities, based on Mr Guinea's opinion, that a fishing incident caused the death of the sea turtles that he examined on 2 and 3 December 1991.
>
> In order to progress beyond a finding on the balance of probabilities and linking the dead sea turtles examined by Mr Guinea to the Defendant requires the assessment of conflicting evidence which I will turn to subsequently."

Mr Withnall attacked this finding, so far as it went, as he submitted, there was nothing to elevate Mr Guinea's opinion of 'possible cause' to 'probable cause.'

The ultimate finding of the learned magistrate was as follows:

> "Given the evidence of Ferguson, Scarlett and Probyn, that the dead sea turtles were thrown overboard and were seen floating away, and the evidence of Guinea (at page 46 referred to at pge 17 hereof), I am satisfied beyond all reasonable doubt that the dead sea turtles examined by Guinea on the 2nd and 3rd day of December 1991 were sea turtles caught and killed in the defendant's nets in either the first, second or third netting. Accordingly, I am satisfied beyond all reasonable doubt that the sea turtles taken (within the meaning of section 9(1) of the Act) on the first, second and third occasion, were of the species olive-ridley, loggerhead, flat-back and hawkesbill, and, accordingly, were protected animals within the meaning of the Act."

There is no reference to Mr Guinea's evidence at p17 of his Worship's findings, but his Worship (at 19) referred to the following passage from Mr Guinea's evidence (at p46 of the transcript) with apparent acceptance:

> "As to the likely position of the sea turtles when they were overtaken by tragedy, Mr Guinea said at page 46 of the transcript:
>
> > 'From my knowledge of Fogg Bay (sic) I would expect them to be within 10 kilometres of the shoreline of the 5 Mile Beach. My reason for saying that is that any further than 10 kilometres would put them outside Fogg Bay and they would be subject to tidal stream, as shown on the charts, and therefore carcasses would be expected to travel further to Bare Sand Island, Dum In Mirrie Island and also further south to Peron Islands.'"

Earlier in his reasons, his Worship had made findings as to the location of the vessel at each time the shark net had been deployed, consistent with the evidence of Ferguson (who he found had taken accurate radar readings of the position of the vessel on the first and second occasion) and the evidence of other witnesses which was to similar effect. These locations were within Fog Bay and within ten kilometres of an extension of a line drawn parallel to Five Mile Beach, and less than three nautical miles from Point Jenny. Although the area where the nets were laid was not precisely within ten kilometres of Five Mile Beach, because it was a few kilometres further to the south, I think that his Worship was entitled to take the view that Mr Guinea's evidence supported the conclusion that the turtles were taken from inside the bay and in the general vicinity of Five Mile Beach.

In my opinion, the evidence supported his Worship's findings except in one respect which I will come to shortly. There was, in addition, considerable evidence of injuries to a number of the turtles found by Mr Guinea consistent with having been caught in a net: flippers missing, bones in flippers broken, claws on flippers missing, heads missing, scoots missing, extensively injured flesh, and broken carapaces.

As to the possibility that some other fishermen may have been the cause of the deaths, neither the appellant (who gave evidence) or any of the appellant's crew (all of whom gave evidence) suggested seeing any other vessels in the area at the relevant time. The appellant's vessel was fitted with radar so that the presence of other vessels - even at night - could have been observed.

As to the argument that at least some of the turtles were probably killed on about 30 November 1991 - a week after the period covered by the third complaint - whilst it must be conceded that based on Mr Guinea's evidence as to the probable time of death of some of the turtles the appellant could not have caused the deaths of

those particular animals at the times referred to in complaints two or three, it does not follow that someone else was possibly responsible for the rest of the turtles which had been washed up prior to that (probably, on the evidence of Mr Guinea, on or about 23 November). The learned magistrate does not say how he resolved this problem; he either did not accept Mr Guinea's evidence on this point, or it was overlooked. In my view, whichever be the true explanation, does not matter. The evidence which the magistrate accepted was overwhelming that the appellant was responsible for most - if not all - the deaths. The fact is that all of the turtles identified were protected species. The total number of turtles killed was between 245 and 286; so, obviously, as only 100 dead turtles were found, there were many more unaccounted for. The inference to be drawn from the fact that there were no dead turtles of an unprotected species found on the beach, is that all of the turtles which the appellant killed were of the protected variety; and this inference is just as capable of being drawn even if some of the dead turtles were not proven to have been killed by the appellant's activities during the times alleged in the complaints. If therefore the learned magistrate was in error in finding that all of the turtles examined by Mr Guinea were caused by the appellant's netting activities, I consider that there has been no substantial miscarriage of justice and would dismiss this ground of appeal pursuant to s177(2) of the *Justices Act*.

The next ground of appeal argued (ground 3(a)) was that there was no evidence that the animals were protected animals within the meaning of the Act.

Section 29 of the Act provided (at the relevant time) as follows:

> "29. TAKING OF PROTECTED ANIMAL
>
> (1) Subject to this Act, a person shall not take or injure a protected animal unless the act is done under the authority of and in accordance with the terms, conditions and limitations of the Regulations a permit issued under this Act or a notice under subsection (3).

Penalty: $2,000, or imprisonment for 6 months, or both; and, in addition, $100 for each animal in respect of which the offence was committed.

(2) A permit issued for the purposes of this section does not authorize the taking of an animal in a park, reserve, sanctuary, wilderness zone or protected area unless the permit names the species of animal that may be taken and describes the area in which it may be taken.

(3) The Minister may, by notice in the Gazette, declare that it is lawful to kill a protected animal and may specify –

(a) the period during which (including the times at which) a protected animal may be killed;

(b) the areas where a protected animal may be killed;

(c) the type of equipment which may be used for the purposes of killing a protected animal;

(d) the maximum number of protected animals which a person may kill during a specified period;

(e) the maximum number of dead protected animals or parts of dead protected animals which a person may have in his possession or under his control; and

(f) such other conditions or matters, as the Minister thinks fit.

(4) A declaration, by notice under subsection (3), does not authorize the killing of an animal in a park, reserve, sanctuary, wilderness zone or protected area."

The learned magistrate found that there was no permit issued and no notice in the Gazette. There is no challenge to either of these findings. By s9(1) of the Act, "protected animal" is defined to mean "an animal declared by this Act or the regulations to be a protected animal, while it is a protected animal" and "animal" is defined to mean "any member of the animal kingdom (other than man)."

Section 26(1) of the Act provided as follows:

"26. PROTECTED ANIMALS

(1) All animals that -

(a) are mammals, birds, reptiles or amphibians and are -

(i) indigenous to Australia or to the Australian coastal sea or the sea-bed and subsoil beneath that soil; or

(ii) of a kind introduced into Australia, directly or indirectly, by Aboriginals before the year 1788; or

(b) are migratory mammals, birds or reptiles and periodically or occasionally visit Australia or the Australian coastal sea, are protected animals except while they are in those parts, if any, of the Territory in which they are, and during those parts, if any, of the year during which they are, unprotected animals, pests or prohibited entrants.

(1A) A protected animal remains a protected animal whether or not the property in that animal is vested in the Territory.

(2) Any vertebrate wildlife that is not a pest or a prohibited entrant is a protected animal while it is in a park, reserve, sanctuary, wilderness zone or protected area.

(3) The Regulations may declare, whether with or without qualification, than (sic) an animal is a protected animal."

The learned magistrate found that the turtles of the four species mentioned were all reptiles and all indigenous to Australia. There is no challenge to those findings. However the learned magistrate made no specific finding that the animals were not, at the relevant time, "unprotected animals, pests or prohibited entrants," although he must have implicitly so found, as he concluded that the animals were protected animals. Mr Withnall contended that the onus was on the respondent to prove these matters and that it failed to do so.

In my opinion the conclusion by the learned magistrate was

correct. "Unprotected animal" is defined by s9(1) to mean "an animal declared by the Regulations to be an unprotected animal, while it is an unprotected animal." Reg3 of the *Territory Wildlife Regulations* declared certain animals listed in Schedule 2 to be unprotected in certain circumstances. Turtles are not included in Schedule 2. Mr Withnall submitted that the learned magistrate could not have had regard to the regulations (and therefore nor could I) as they had not been tendered by the prosecutor, and therefore judicial notice could not have been taken of them: see *Ex parte Madsen; re Hawes and Blissett* (1960) SR (NSW) 126. However, in my opinion, the position is different when the Act itself defines the meaning of a word by reference to what is declared in the regulations. In that situation, the court which decides the questions of fact can and should take judicial notice of the regulations without the necessity for them to be tendered: see *The Queen v Harm* (1975) 13 SASR 84 at 98 per Bray CJ.

As to pests, s9(1) of the Act defines "pests" to mean "an animal declared by this Act or the Regulations to be a pest whilst it is a pest." The Act itself does not declare any animals to be pests except animals which are in those places in which they are prohibited entrants: see s27(4). Otherwise s27(1) provided only that the regulations may declare any animals to be a pest. Regulation 5 declared animals of a species listed in Schedule 3 to be pests; but none of those animals included any type of turtle. As to "prohibited entrant" this is defined by s9(1) as follows:

> "'prohibited entrant' shall be construed in accordance with section 27(2)."

Section 27(2) provided:

> "(2) For the purposes of this Act –
>
> (a) no species of wildlife is a prohibited entrant unless, not being indigenous to the Territory, it is declared a prohibited entrant by the Regulations; and
>
> (b) all other vertebrates are prohibited entrants unless declared not to be either by the Regulations or by a notice under subsection (3)."

As the learned magistrate had found that the turtles were indigenous to the Territory, it follows that they could not have been validly declared to be prohibited entrants by the regulations. In fact the regulations did not so provide.

Accordingly this ground of appeal is not made out.

The next ground of appeal (grounds 3(d) and 3(g)) related to the learned magistrate's findings as to relevant mental element of the offences. Section 117A provided that certain offences against the Act were regulatory offences. The offence created by s29 is not referred to in s177A, and is therefore a simple offence: s3(4) of the *Criminal Code* read with s38E of the *Interpretation Act*. Consequently, the provisions of Part II of the *Criminal Code*, and in particular s31, applied to this offence. Mr Withnall submitted that whilst the learned magistrate found that the appellant foresaw that the taking of the turtles was a possible consequence of his conduct (see s31(1)) he made no finding, in terms of s31(2) of the Code, that "in all the circumstances, including the chance of it occurring and its nature, a reasonable person similarly circumstanced and having such foresight would (not) have proceeded with that conduct." Mr Withnall submitted that the prosecution had to prove as an element of the offence, both limbs of s31; and as no finding was made in terms of s31(2), the convictions could not stand.

Mr Adams conceded that the prosecutor had to prove both limbs of s31, and that there was no explicit finding in relation to s31(2). However, he submitted (a) that by the way the case was run in the court below, the appellant conceded that if the first limb was made out, the second limb would follow as a matter of course; (b) that it is implicit in the learned magistrate's findings that the second limb had been made out.

As to the first of Mr Adams' submissions, he was unable to point to any express concession made by Mr Withnall in the transcript of the proceedings in the court below. At p269 of the transcript, Mr Withnall had adverted to s31(1) when he informed the magistrate that, in relation to the first charge, the prosecutor had properly stood it aside because the prosecution acknowledged the difficulty on the first occasion of showing that the appellant "foresaw what occurred, foresaw its possible consequence." At p284 of the transcript Mr Withnall submitted that, after the first netting, the appellant had shifted a significant distance, and therefore there was no "mens rea." At pps288-9 of the transcript, his Worship asked Mr Withnall what the elements of the second charge were that he had to be satisfied were proved beyond reasonable doubt. Mr Withnall said, in relation to the mental element, that:

> "You've then got to be satisfied beyond reasonable doubt that this had happened on an immediately prior occasion so that Tran could be said that he should've reasonably expected that sort of occurrence.
>
> You have to be satisfied beyond reasonable doubt that he had not shifted between any prior occasion and this occasion, any significant difference - any significant distance, so that he could be said to be trying in a different location, vis-a-vis turtles."

It is apparent that Mr Withnall, by using the words "reasonably expected that sort of occurrence" was alluding to s31(2) of the Code. The prosecutor cast his submissions in similar terms. For example, at p288, Mr Adams said:

> "So what Mr Tran - what your Worship will have to decide, is whether when Mr Tran went 500 metres he thought 'well, that's far enough away from all the turtles. I won't catch any turtles here' or whether he reasonably foresaw that if he only moves a few hundred metres that he could well catch turtles that swim in the water."

It may be that these submissions could have been more lucidly expressed; but it seems to me that there was no implied concession that if the appellant had foreseen the possibility of catching turtles on the second or third occasions, a reasonable person

similarly circumstanced would not have proceeded with that conduct. Both submissions by counsel raised the question whether, having regard to the shift in the locations of the vessel at the time of the second and third nettings, a reasonable person would have proceeded to use the shark net in those circumstances.

However, it does appear from the submissions that the issue between the parties was whether the vessel had moved sufficiently from each of the first and second locations for it to be said that a reasonable person in the position of the appellant would not have proceeded to do as he did. I consider that it is implicit in his Worship's findings that he decided this against the appellant. At p19 of his Worship's reasons he said:

> "I am satisfied beyond all reasonable doubt from the evidence of Ferguson and Scarlett that the boat did not move significantly between the times the shark net was set on the first and second occasions and again on the second and third occasions."

The question of whether the vessel had moved "significantly" was clearly crucial, not only to the question of whether the appellant had actual foresight of the possibility that he might catch turtles using the shark net, but also to the question of the reasonableness of his conduct in continuing to net for shark in the area. What the parties were in effect submitting to the magistrate was that if the vessel had shifted "significantly", the appellant's conduct was not objectively unreasonable; but conversely, if there had been no 'significant' shifting of position, the opposite conclusion was inevitable and not in dispute.

The appellant was represented by competent counsel at the hearing in the court below who defined the issues which the magistrate was called upon to decide. In these circumstances the appellant cannot now be heard to complain if the magistrate decided the case in the manner he was invited to by the appellant's counsel (see *Hinton Demolitions Pty Ltd v Young* (1973) 6 SASR 129 at 132; *The Queen v*

Harm (1975) 13 SASR 84 at 108-9 per Sangster J; *Giles v Barnes* (1967) SASR 174 at 183), particularly as, in my view, no injustice was thereby caused to the appellant by the approach taken: see *James William Miller* (1980) 1 Crim App R 188 at 219-223; *Leslie Thomas Burr* (1988) 37 A Crim R 220 at 224.

Mr Withnall's next argument was that the learned magistrate's finding that the vessel did not move "significantly" was not supported by the evidence. He referred to a passage in the evidence of Mr Guinea (at transcript pp44-5) where Mr Guinea said:

> "Is it unusual then to find those four separate species of turtles, that's olive-ridleys, loggerhead, flatback - I've got HB here, I forget what HB is?---It would mean Hawksbill.
>
> Hawksbill - is it unusual to find four different species like that in the one grouping?---No, I'd think it is not unusual. They're usually habitat selective and so they would be looking at particular habitats within the regions. The - if I may use, for example, the turtle population in the northern part of the bay very close to the reef there are sub-adult green and Hawksbill turtles, and yet a few hundred metres away from the reef, over a muddy sub-straight, I've seen flatback turtles but I've never seen a flatback turtle on the reef and yet there is only a couple of hundred metres separating them."

Mr Withnall submitted that, in the light of this evidence, a shift of position of one and a half kilometres between the first and second settings of the shark net was not insignificant, but I do not think that the passage quoted above from the evidence of Mr Guinea supports Mr Withnall's argument. Mr Guinea did not say that turtles would not be expected to be found over a wider area than a few hundred metres; only that one variety of turtle may have its habitat as close as a couple of hundred metres to that of another variety. Mr Withnall also submitted that no evidence was called as to what a reasonable fisherman might do to shift away from a particular place where turtles had been caught, given that turtles are bottom feeders and cannot easily be seen from the surface. This was a matter of judgment for the learned magistrate based on common sense and experience. I do not consider that it has been

shown that his decision was in error. I therefore conclude that grounds 3(d) and 3(g) were not made out.

The next ground of appeal relied upon by Mr Withnall was ground 1(a). The nub of Mr Withnall's argument was, that on the evidence the magistrate should not have found that the setting of the shark net on 17 November 1991 was the second occasion that the net had been deployed; Mr Withnall's contention was that this must have been the first such occasion, and therefore the conviction on the second complaint could not stand because, if this was the first such occasion, there was no basis for any finding adverse to the appellant in terms of s31 of the Criminal Code. The basis for Mr Withnall's attack was that the evidence in support of this being the second such occasion was unsafe and unsatisfactory because the magistrate rejected the evidence of both Scarlett and Ferguson that the vessel left Darwin harbour on 14 November, and found instead, on the basis of the evidence of a marine officer with the Darwin Port Authority, Mr O'Brien, that the vessel left on 15 November. This finding, said Mr Withnall, discredited these accounts entirely. I do not accept this submission. Whilst it follows from his Worship's finding that both Scarlett and Ferguson made the same error of being a day out as to the date of the vessel's departure (and this error would be likely to be continued throughout the time the vessel was away) that did not necessarily impugn the rest of these witnesses' accounts. The question of whether or not there were three occasions when the shark net was deployed was essentially a question of the credibility of the witnesses. The appellant maintained that the net was deployed twice; Scarlett and Ferguson maintained otherwise. In addition there was evidence from a wildlife officer, Mr Heard, who spoke to the appellant upon the vessel's return to Darwin Harbour, and who said that the appellant had told him that the net had been deployed on three separate occasions. I accept that in an appropriate case I may disturb a magistrate's findings on the unsafe and unsatisfactory ground: *JK v Waldron* (1988) 93 FLR 451

per Kearney J. The relevant principles to be applied have been discussed in many cases; most recently in my own judgment in *Sanby v The Queen* (unreported, Court of Criminal Appeal, 19/10/93 at 21-22). I am not satisfied, having made my own independent assessment of the sufficiency and quality of the evidence, that the learned magistrate ought to have had a reasonable doubt that there were three and not two occasions when the net was deployed. This ground therefore fails.

The next ground of appeal (ground 2) attacked his Worship's finding that the third time the net was deployed between 18 and 23 November 1991. This finding was also attacked as being unsafe and unsatisfactory. Mr Withnall submitted that this finding rested entirely upon the evidence of Ferguson. Scarlett's evidence was that the net was last retrieved on the night of 30 November; Probyn said it was retrieved on 5 December. Mr Guinea said that he found some dead turtles which he estimated had died about three or four days before 3 December. The learned magistrate said that he preferred the evidence of Ferguson and Scarlett to that of the appellant or the other witnesses as to the use of the shark net and the number of turtles caught, and that he preferred Ferguson to Scarlett on the question of the dates the net was set. This was again an evaluation of the evidence which his Worship was called upon to make on the basis of the credibility of the witnesses. This was a matter for his Worship, and as Mason CJ pointed out in *Chidiac v The Queen* (1990-91) 171 CLR 432 at 444, an appellate court will only infrequently set aside a conviction as being unsafe and unsatisfactory because the evidence of a Crown witness lacks reliability or credibility; although "occasions do arise when a jury proceeds to a conviction when the Crown case rests upon oral testimony which is so unreliable or wanting in credibility that no jury, acting reasonably, could be satisfied of the accused's guilt to the required degree. Then the appellate court must discharge its responsibility to set aside the conviction as one which is unsafe." (ibid).

Mr Withnall's submission was that the magistrate appears to have preferred Ferguson's evidence that the third netting occurred "around about the 20th" because he had made a notation of the time, when in fact Ferguson did not have reference to his notes when he gave evidence as to the date. However a reading of the transcript suggests to me that Ferguson probably did refer to his notes when he gave evidence in chief that the date of the third netting was on 20 November 1991 (transcript p68) and that the passage relied upon by Mr Withnall in cross-examination (transcript p79) when Ferguson said "I don't have a date here, I've - no date, no times" occurred when Ferguson was referring to the appellant's log.

Another submission made by Mr Withnall affecting the reliability of Ferguson's dates rested upon inferences to be drawn from the depth of the water at zero tide on 22 November at this particular location, and the draft of the vessel. Mr Withnall's submission was that if Ferguson's evidence was to be believed, there was at best about .2m of water below the vessel's keel at zero tide, or at worst the vessel was aground, and that it was unlikely in the extreme that the appellant would have risked his vessel. The learned magistrate said in his reasons (p19) that he had had regard to these matters. I am not persuaded that this argument has sufficient force for me to conclude that the magistrate's assessment of Ferguson's credibility ought to be disturbed. According to the chart (Exhibit P3) there were no reefs in the area and there was nothing else in the evidence to suggest that there was any hazard to the vessel even if it had been grounded at zero tide. This ground of appeal is also not made out.

The next argument raised by Mr Withnall (grounds 3(b) and (c)) was that the magistrate erred in law in holding that the evidence of Scarlett "was substantially corroborative" of the evidence of Ferguson "on the important aspects," and of Probyn. It was

submitted that Scarlett, Ferguson and Probyn were all accomplices of the appellant, and as a matter of law could not corroborate each other. Further, it was submitted that the learned magistrate erred in failing to warn himself of the dangers of convicting the appellant on the uncorroborated evidence of these witnesses.

Mr Withnall submitted that, notwithstanding that the crew were carrying out the orders of the appellant this was no excuse, as they aided and abetted the appellant's actions in the putting out of the nets on the second and third occasions, and had the necessary foresight because they remonstrated with the appellant over this issue at the time.

The first issue raised by Mr Withnall is whether Scarlett, Ferguson and Probyn were in fact accomplices of the appellant. There is no suggestion that any of these witnesses had been charged with or found guilty of an offence against s29 of the *Territory Parks and Wildlife Conservation Act*. The question therefore was one which the learned magistrate had to decide for himself on the evidence before him: *Davies v Director of Public Prosecutions* (1954) AC 378 at 402. The learned magistrate made no express finding either way. There are two possible explanations for this. Either he considered that they were not accomplices, and therefore the rule that the testimony of one accomplice cannot corroborate that of another did not apply; or, he misdirected himself on the applicability of the rule.

Mr Adams for the respondent expressly conceded on the hearing of this appeal that each of these witnesses were accomplices because they were accessories within the meaning of s12(1)(a) or (b) of the Criminal Code. That concession having been made, I do not pursue matter further, and proceed upon the basis that each were accomplices. In these circumstances, the learned magistrate ought to have instructed himself that, although he might convict upon the evidence of these witnesses it is dangerous to do so unless it

is corroborated in some material particular by some other evidence independent of these witnesses tending to show that the offences had occurred and the appellant was the person responsible.

On the morning that his Worship was due to deliver judgment in this matter, Mr Withnall and Mr Adams appeared before his Worship, and Mr Withnall made the submission that these witnesses were accomplices and could not corroborate each other, and of the danger of convicting on their uncorroborated evidence. His Worship said: "Yes, all right. I'll note that" and then advised counsel that his reasons for judgment were still being typed, and he hoped to deliver judgment at 10 o'clock. The court then adjourned, and later that morning his Worship delivered judgment. Mr Adams submitted that it was hardly likely that his Worship did not have regard to these matters, even if there is no mention of them in his reasons. I do not accept this submission. In his written reasons his Worship says that Scarlett's evidence is corroborative of Ferguson and of Probyn. As a matter of law, it could not be, if they were all accomplices: see *Davies v Director of Public Prosecutions, supra*.

Alternatively, Mr Adams submitted that there was in fact other evidence which corroborated these witnesses' accounts and that therefore no warning was required. I accept that the evidence of the witness Heard as to the communication he had with the appellant when the vessel returned to Darwin, coupled with Mr Guinea's evidence as to the turtles found on the beach amounted to corroboration. In these circumstances it may be that no warning was in fact necessary; but that does not overcome the difficulty that the learned magistrate, who relied heavily upon the evidence of Ferguson (and rejected the appellant's evidence) wrongly considered that Ferguson's evidence was corroborated by Scarlett. I do not consider that the respondent has shown that it was inevitable that the appellant would have been convicted if this error had not occurred: see *Leslie John Burr* (1988) 37 A Crim R

220 at 224. I do not therefore consider that I should dismiss the appeal by relying on the 'proviso' contained in s177(2)(f) of the Justices Act which permits this Court to dismiss an appeal notwithstanding that a point raised in the appeal has been decided in the appellant's favour, if the court considers that no substantial miscarriage of justice has actually occurred.

Accordingly, the appeal is allowed, the convictions, sentences and orders for the payment of monetary penalties are quashed, and I remit the complaints to the Court of Summary Jurisdiction for re-hearing.

I will hear the parties as to costs.