

Criminal Jurisdiction

PUBLIC PROSECUTOR -v- JONG HO BAEK

Mr Hilary Toa for the Public Prosecutor  
Mr John Malcolm for the Accused

J U D G M E N T

LENALIA J. The accused JONG HO BAEK a Captain of a Korean Longline foreign Fishing Vessel CHANCE 803 International with its call sign 6NHE and employed by a Korean based company and the owner of the said vessel NAMBUG Fisheries 1/ Co. Ltd is charged with 3 charges one for unlawfully fishing in Vanuatu's A3 Nautical Miles territorial waters without a valid foreign fishing Licence. The second charge is that the accused breached special conditions of foreign fishing Licence Number 36/95 to fish only in or on authorised fishing area of the Vanuatu 200 miles Exclusive Economic Zone. The third charge was that the accused failed to show away old fishing gear on board a foreign fishing vessel while he was on the Vanuatu's 12 Nautical miles territorial waters. There are offences against sections 4(1), 4(5) and 5(1) of the Fisheries Act Cap 158 respectively.

The facts of these cases are as follows. The Korean fishing vessel the CHANCE 803, call sign 6NHE is an holder of a current Foreign Fishing Licence No. 36/95 issued to its Captain, Captain JONG HO BAEG. This licence was issued with effect from 26th October 1995 to 25th October the succeeding year. This vessel has not previously held any Foreign fishing Licence in Vanuatu.

The vessel first berthed in the Port Vila harbour on the 24th October last and its Captain immediately applied for registration and a licence to Fisheries authorities in Vanuatu. The Forum fisheries Agency in Vanuatu issued a Vanuatu Foreign Fishing Licence on the 26th October last. This licence No. 36/95 specifies and authorizes the CHANCE 803 to fish in the 200 miles Exclusive Zone allowable by the Vanuatu Fishing laws.

On Tuesday 31st October, a local fisherman Mr Eric Festa located a buoy approximately some 5 miles from the seamount off the shore of Erromango. Mr Festa and his crew decided to trace the buoy and upon close examination of the said buoy the crew found out it was attached to a longline to which were attached freshly bated hooks. This was around 5 am. By 11 am the same date, the crew of the local fishing vessel "YMER" sighted a fishing vessel in the vicinity of the seamount. The sighting was then immediately reported to Police Maritime Wing.

Upon receipt of this, complaint, the RSV TUKORO was readied for sea, cast off and proceeded to sea to the estimated sighting area. At about 1919 hrs RSV TUKORO

gained radar contact bearing of 140 degrees and at the range of 11.9 nautical miles. The CHANCE 803 was located at Lat 18 17.30S Long 168 27 73E. The facts say that when the RSV TUKORO staff boarded the Foreign Fishing vessel, they could see the crew of the CHANCE 803 pulling the net, picking fish and throwing them into the vessel that upon examination of the positioning of the CHANCE 803 by Global Positioning System - the CHANCE was within the Vanuatu Territorial Waters prohibited by Fisheries Act Cap 158. In fact the charges relate to :

- (1) Unlawful fishing in Vanuatu 12 Nautical Miles Territorial Waters without a valid fishing licence, and
- 2) breaches of conditions of foreign fishing licence No. 36/95 to fish only in authorised fishing area of the Vanuatu 200 miles Exclusive Economic Zone, and
- (3) Failure to store all its fishing gears on board a Foreign Fishing vessel whilst in the Vanuatu's 12 Nautical miles territorial waters.

The penalties for the 3 offences charged

Section 4(1) - Vt 20,000,000

Section 4(5) - Vt 5,000,000

Section 5(1) - Vt 5,000,000

These are maximum fines and the Court is also given powers under Section 28 of the Act to Order forfeiture of the hoot and its fishing gears, and the fish that is caught in the catch the result of the charges.

In mitigation Mr J. Malcolm for the accused submitted that his client pleaded guilty to all 3 charges. That the offences were committed together. That is to say, when his client unlawfully fished in Vanuatu's 12 Nautical Miles territorial waters without a Foreign Fishing Licence, the breaches under sections 4(5) and 5(1) were also committed at the same time. He also submitted the offences were committed at the same act and not separate so as to render the nature of each charge serious. He also submitted his client is married with one child all residents in Korea. That this was the first time for his client to enter Vanuatu waters. He has been captain of many fishing vessels in other parts of the world.

Mr Malcolm submitted that the Court must take into consideration the totality principle. This principle requires the Court where it has imposed a serious of commutative sentences on an offender to review the overall sentence in order to ensure that the total punishment is not excessively harsh or grossly disproportionate to the level of gravity of individual offence. He further submitted that I must impose an appropriate sentence in respect of each case if it were the only penalty I would have to impose. However if the aggregate sentences appears to be either excessive or inadequate in the light of all the circumstance then I should consider imposing concurrent sentence in whole or part - R -v- Bradley [1979] 2NZLR 262,263 - see also 11 Halsbury's Laws of England (4 ed) par. 495 and R -v- BOCSKEI (1970) 54 Cr. App R 519, 521.<sup>1</sup>

Mr Malcolm has also submitted that these cases do not fall into a serious category and certainly cannot be compared with the case of LIN SHIOW HER Civil Case NO. 2/94 in which the Learned Chief Justice imposed a fine of Vatu 35,000,000 and Vatu 10,000,000 for Prosecution Costs. Mr Malcolm has submitted that, in the case of his client he was not given proper mapping, facilities by the Fisheries Authorities in Port Vila. I must say this is not a defence and the Court will not accept this as mitigation. I will accept the fact that, the circumstances of this case vary so much from that of LIN SHIOW HER.

Once the Captain realised that he was being caught he surrendered and obeyed willingly to return to Port Vila. I must also say that I have considered all mitigating factors said in favour of the accused.

I must say that I am not dealing with an inexperienced captain. His lawyer submitted to Court that he has had experience almost everywhere in the world as a captain. He ought to know the positioning of his vessel before casting his fishing lines. The fishing lines were giant fishing lines with nets that had to be reeled from 2255 hrs on Tuesday 31st October to 0538 am on Wednesday the 1st November 1995. I take the sizes of this fishing lines to be of great magnitude and which may also catch many fish in anyone catch.

In his allocutus the accused said he was sorry to get into this trouble. The reason being he was unsure of his position. I will not accept this as a defence. These class of offences are strict liability and the standard of technical knowledge required of him is the standard of an experienced captain. I take into consideration you have pleaded guilty to all the 3 charges. I find you guilty and convict you accordingly.

On Count 1 - You must pay a fine of Vatu 10,000,000 in default 12 months imprisonment. On Count 2 You shall pay a fine of Vatu 4,000,000 in default 6 months imprisonment concurrent on count 1. On Count 3 you shall pay another fine of Vatu 1,500,000 in default 6 months imprisonment concurrent on count 1.

Court further orders forfeiture of the catch involved in the commission of these offences. The value is some Vatu 2.5 million. I shall not make any orders for forfeiture of the ship and the fishing gears. The Complainant's passport be held by the Court until all fines are paid. SL

He must pay a Prosecution Cost of Vatu 50,000. All amounts be paid within 14 days. He has 14 days to Appeal.

DATED at Port Vila this 16th November 1995.

  
SALATIEL LENALIA  
Judge

