PP
v.
NARONGNE SOOKPAVIT & ORS

High Court Malaya, Johor Bahru
Mahadev Shankar J
[Criminal Appeal No: 59 Of 1984]
22 September 1985

JUDGMENT

Mahadev Shankar J:

[1] On the surface, the only issues which this appeal appeared to involve was whether reg 3(b) of the Fisheries (Maritime) Regulations 1967 (the Regulations) created an offence of strict liability and whether in the absence of a conviction, the Court trying such an offence, could still make an order for the forfeiture of the subject matter of the offence. But beneath is another which may have far-reaching consequences. That issue is the extent to which Malaysia may exert general legislative authority within its territorial waters even if by so doing persons claiming to be exercising the so-called right of innocent passage may be adversely affected.

[2] Narongne Sookpavit and the 22 other accused in this case are all Thai nationals. They are fishermen. On January 27, 1984 at about 4.30 pm they were on a vessel bearing Registration No SC2219 (the boat) which was then at a bearing of 300° from Tanjung Ayam, Johore about 3 miles from the shore. On board were 4 trawl nets, 4 otter boards, and 2 ropes (collectively referred to hereafter as "the fishing appliances") and a very sizeable quantity of iced fish. What the nationality of the boat was and whether she carried any ship papers are matters which are at large.

[3] John Wee Fok Hun is the Commanding Officer of the Malaysian Naval Patrol vessel PZ10. On the date and time in question he was in the vicinity with 4 officers and 30 men. In the belief that an offence was being committed contrary to the Fisheries Act 1963 (Laws of Malaysia - Act 210 - Revised 1979) (hereafter referred to as "the Act") he apprehended the boat and all 23 accused on board. They were brought to Tanjung Pengelih the same evening and kept in custody. The fish was auctioned off for $2,000. The accused were produced before the Magistrate on January 29, 1984 and charged for being found in possession of the fishing appliances in contravention of reg 3(b) of the Fisheries (Maritime) Regulations 1967 and punishable under s 11(1) of the Fisheries Act 1963 (Revised 1979).

[4] All the accused pleaded not guilty. They were then remanded in custody until March 17, 1984 when the case came up for mention. Bail was applied for by defence counsel for the first accused only and he was allowed out. The others remained in custody till the conclusion of the trial. This is a matter for

adverse comment. Because they were foreigners, releasing them on their own recognizances may have brought about other problems So in the lock-up they remained till they were liberated by the learned Magistrate 7½ months later. In such circumstances it was the duty of all those who were immediately concerned with the welfare of these persons either to ensure an immediate trial or to bring the matter up to the High Court so that the necessary arrangements could be made as the justice of the case required. But that did not happen and I can only hope this instance will be the last of its kind.

[5] The case came on for hearing on June 16, 1984 but could not proceed because there was no Thai interpreter. A number of adjournments then followed for one reason or another but eventually the Prosecution evidence was received on August 11 and 21 and finally on September 9, 1984 when the prosecution rested. The defence then made a submission of no case. It was claimed that possession had not been proved. It was also submitted the accused were where they had been found, because to get to Singapore they had no alternative but to take the route which they did. This defence was classified by defence counsel as a defence of necessity. To quote his words, "The vessel was not merely exercising the right of innocent passage but was negotiating a route that had been used since time immemorial." The accuracy of the radar on PZ10 was also attacked.

[6] But the Magistrate found that a *prima facie* case had been made out and called for the defence. Only the first and the second accused gave evidence. They claimed that they had originally set out from Sammudsakhon in Thailand and after fishing in international waters they were heading for Singapore. When they got near the place where they were apprehended they claimed that they had received an SOS call from another boat SC1909 which was taking water (This was not put to Mr John Wee). They also claimed that because of bad weather they had to hug the coastline to be safe. When they received the SOS call they claimed that they were in the Middle Channel. They then approached the boat giving the SOS call which was stationary. Finally they claimed that they did not know that it was an offence to have a trawl net in Malaysian territorial waters without a licence. All the other 21 accused merely confirmed the evidence given by the first two.

[7] In his final submission defence counsel repeated his previous submissions but now added a further line of defence. He contended that since they went to the place where they were found in response to a distress call, the accused could not be held guilty of any criminal act.

[8] With this submission the learned Magistrate agreed. He acquitted all the accused. He also ordered the boat, the fishing appliances, and the proceeds of the auction sale to be returned to the rightful owner. All the accused were ordered to be immediately deported to their homeland. This verdict was given on September 10, 1984. On September 13, 1984 the Prosecution filed a Notice of Appeal but only against the order releasing the fishing appliances and the boat (The Prosecution had not in fact produced the $2,000 as an exhibit in the Court below, only the receipt at the auction which was tendered as P. 12 and the learned Magistrate's order in this respect seems misconceived).

[9] The Prosecution also applied for and obtained on January 31, 1985 a stay order whereby the exhibits which were the subject matter of the appeal could be further detained and the appeal eventually came on for hearing before me on July 18, 1985.

[10] The crux of this appeal revolves around s 14(1)(b) of the Act. It reads in material particular:

> "An order for the forfeiture ... of anything liable to forfeiture under this Act shall be made by the court ... if it is proved to the satisfaction of the court that -
>
> (b) that thing was the subject matter of ... the commission of, the offence, notwithstanding that no person may have been convicted of such offence."

[11] Section 14 of the Act has already received the attention of the Federal Court in *Public Prosecutor v. Ismail bin Yusoff* [1979] 1 MLRA 370; [1979] 2 MLJ 119. It was there held that when it is proved to the Court's satisfaction that an offence under s 13(1) of the Act has been committed by the use of a net prohibited by the Regulations and a boat has been used in the commission of the offence, the Court is bound to make an order for the forfeiture of the boat.

[12] Regulation 3(b) reads:

> "No person shall --
>
> b) ... have in his possession on board a vessel any fishing appliances or any part thereof."

[13] The material words of s 11 (1) of the Act are:

> "Any person who ... fails to comply with, the provisions of this Act or any regulations ... thereunder shall be guilty of an offence ..."

[14] In *Sak & Anor v. Public Prosecutor* [1976] 1 MLRH 174; [1978] 1 MLJ 181 Abdul Razak J. held that reg 3(a) of the Regulations created an offence of strict liability. Following this decision I hold that reg 3(b) does likewise.

[15] *Public Prosecutor v. Sai & Ors* [1979] 1 MLRH 326; [1980] 2 MLJ 153 quoted by the learned Deputy Public Prosecutor did not deal with the question of *mens rea* at all but only with the imperative necessity of making an order of forfeiture once it was found that the offence had been committed. But there again the accused persons had been convicted. Here there is an absence of conviction, which thus necessitates a full analysis of the evidence to determine if an offence had been committed.

[16] In the light of the international implications of this case, it is useful to

remember that art 74 of the Malaysian Constitution empowers Parliament to make laws with respect to any of the matters enumerated in the Federal list and item 9 of that list in the 9th Schedule specifically refers to shipping, navigation and fisheries. Section 2 of the Act defines 'maritime waters' as:

> "that part of the seas adjacent to Malaysia, both within and outside territorial waters, whether or not citizens have by international law the exclusive right of fishing; and reference to maritime fishing and to maritime fisheries shall be construed accordingly".

[17] By reg 1 the Regulations apply only in respect of fishing and fisheries in maritime and estuarine waters.

[18] The delimitation of the territorial waters of Malaysia was the subject of the Emergency (Essential Powers) Ordinance No 7 of 1969 (PU(A) 307A dated August 2, 1979). Section 3 of this Ordinance as amended by the Emergency (Essential Powers) Ordinance No 11 of 1969 enacted that:

> "... the breadth of the territorial waters of Malaysia shall be 12 nautical miles and such breadth shall except in the Straits of Malacca, the Sutu Sea, and the Celebes Sea be measured in accordance with arts 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone (1958), which articles are set out in the Schedule hereto."

[19] Article 6 of the Schedule provides that "the outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the base line equal to the breadth of the territorial sea." And art 12 reads:

> "Where the coast of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the base lines from which the breadth of the territorial sea of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.
>
> (2) The line of delimitation between the territorial seas of the two States lying opposite to each other or adjacent to each other shall be marked on large scale charts officially recognised by the coastal States."

[20] The evidence clearly established that the accused persons were in possession of the fishing appliances without a licence within Malaysian territorial waters. But can the same be said of the claim to the right of innocent passage?

[21] I do not consider the suggestion by the first two accused that they were going to the aid of another vessel in distress as deserving of credibility. This suggestion was never put to Mr John Wee. If an SOS had in fact been sent out it would have been heard by all the other ships in the vicinity. Furthermore, Mr John Wee's evidence on the route taken by the boat was not challenged. He said that when he first sighted the boat it was 2 to 2½ miles from the Johore coast. He was further away to sea than that. When he closed in the boat headed towards the open sea and he intercepted it and went alongside. This is in sharp contrast to the defence evidence that they were assisting a boat SC 2219 which was then stationary about the time that they were apprehended.

[22] At best for the accused my finding must be that this boat was going in a south-westerly direction when it was apprehended. The precise point has been plotted by Mr John Wee as longitude 104° 14 minutes 38 seconds East and latitude 1° 18 minutes and 36 seconds North. The prosecution produced the official chart 243 Folio 2 of the Singapore Straits with this point marked thereon with a pencil cross. It is a few hundred yards to the north of the Middle Channel which is the name given to that part of the main sea lane from the Malacca Straits and Singapore Island into the South China Sea. To its north is Singapore Island and the south eastern extremities of Johore State. To the south of this sea lane are several islands belonging to the Republic of Indonesia. Opposite Tanjung Ayam are Indonesian islands Pulau Batam and Pulau Bintang. A convenient point on the base line from which the breadth of the territorial seas of Malaysia and Indonesia is to be measured here is to take Tanjung Ayam and Tanjung Tondang on the island of Pulau Bintang. The distance between these two points is approximately 12 nautical miles. On the official chart the traffic lane is marked in a purple broken straight line on either side. The lane itself is between 3 to 4 nautical miles wide at this point. It is divided into two to allow for a Traffic Separation Scheme so that boats coming into Singapore from the South China Sea are required to use the side nearer the Johore coast. Those going northeast use the other half of the lane on the Pulau Bintang side. But what is significant is that almost the entire traffic lane here is to the north of the median point between Tanjung Ayam and Tanjung Tondang and therefore well within Malaysian territorial waters.

[23] The genesis of this Traffic Separation Scheme is suggested by some passages which have been extracted from *The International Law of the Sea* (1982) by BP O'Connell Volume I:

> "Ostensibly the anarchy which authorities had been predicating ever since the Hague Codification now came into existence in the 1960s. But does this mean that there is no criterion for determining the extent of the territorial seas?
>
> The answer to the question lies, less in recording the diverse claims of State to territorial sea limits that range between shore and 200 miles, than in the purposes for which the concept of freedom of the seas exist. This concept is basically dual, namely, freedom of movement and freedom of exploitation of natural resources. If the former can be

preserved in its integrity, diminution of the latter can be tolerated ..."

"Indonesia in 1957 joined the Philippines in adopting the archipelago theory, whereby it sought to enclose all of the waters of the archipelago as internal waters within a system of straight baselines drawn around the points of the outer-most islands .... [S]uch a claim ... dates only from a communique of 14 December 1957 stating that ... in view of the territorial integrity and of the need to preserve all the wealth of the Indonesian State, it was deemed necessary to consider all the islands and seas between them as a unit. "Peaceful passage" of foreign vessels through the waters enclosed by the islands would be guaranteed so long as it was not contrary or harmful to the sovereignty of the Republic. The limits of territorial waters of a width of twelve miles would be measured from straight baselines connecting the outer-most parts of the islands."

(p 249)

"However ... the concept of ... innocent passage ... is of more recent origin than the texts would indicate."

(p 260)

"The Third Law of the Sea Conference has reflected a trend towards intensifying coastal State control over shipping in the territorial sea, so that innocent passage is likely to become less a right than a privilege."

(p 270)

"The idea of dividing up the straits (of Malacca) arose out of the agreement between Indonesia and Malaysia, reached in 1969, whereby a common continental shelf boundary was designated. In July 1970, Indonesia, Japan, Malaysia and Singapore agreed to conduct a joint hydrographical survey in the Straits, the first phase of which was carried out between October and December 1970 when it was established that the configuration of the sea-bed was constantly changing, and that the charts were inaccurate. A consultation of the governments of Indonesia, Malaysia and Singapore was held in Kuala Lumpur on the October 14, 1971, and a statement was made on the November 16, 1971 that the three Governments agreed that the problems of the safety of the navigation and the question of internationalization of the straits were two separate issues; and that Indonesia and Malaysia agreed that the Straits of Malacca and Singapore were 'not international straits, while fully recognising their use by international shipping in accordance with the principle of innocent passage.' Singapore took note of this position."

(pp 318, 319)

"At the Third Law of the Sea Conference, Malaysia joined with other 'straits-States' in proposing that the regime for straits should be similar to that of the territorial sea, except that there should be no suggestion of passage.

In February 1977, the three Malacca Straits States signed an agreement on navigation of the Straits concerning essentially the prevention of accidents."

(p 320)

[24] I have directed my attention also to the resolution a 375(X) adopted on November 14, 1977 by the Inter-Governmental Maritime Consultative Organisation which concerns navigation through the Straits of Malacca and Singapore. The assembly being informed of the decisions and measures taken by the governments of Indonesia, Malaysia and Singapore concerning the safety of navigation and the protection of the marine environment in the Straits of Malacca and Singapore given in the annexes to that resolution, invited all governments concerned to advise ships to comply with the resolution from the appropriate date.

[25] It is Annex 3 of this resolution dealing with the Horsburgh light house area with which we are concerned. The description of the Traffic Separation Scheme in that annex is the legal authority for the traffic lanes and traffic separation scheme which has been marked on the official chart. Rules are provided in Annex 5 for vessels navigating through the Straits of Malacca and Singapore and Part III Rule I specifically stipulates that deep draught vessels shall use the designated deep water route between positions indicated whilst other vessels should as far as practicable, avoid the deep water route. Rule 7 provides that all vessels navigating in the Traffic Separation Scheme shall maintain at all times a safe speed consistent with safe navigation, shall proceed with caution, and shall be in a maximum state of manouvering readiness. There is also a warning in Part IV to mariners that local traffic which could be unaware of the internationally agreed regulations and practices of seafarers, may be encountered in or near the traffic separation scheme and they should take any precautions which may be required by the ordinary practice of seamen or by the special circumstances of the case.

[26] It seems to be evident from these recommendations and the official chart itself that the sealane in question was specifically designed for safe navigation by deep draught vessels and very large crude carriers (VLCC). Indeed the official chart produced also carries a caution that "mariners are warned that vessels including VLCCs entering or leaving Singapore port are likely to cross the traffic lanes in this area and within Singapore Straits may be under constraint of restricted manoeuvring room".

[27] From all that has gone on before, it would also appear self-evident that in the interests of survival smaller coastal vessels such as the boat with which we are concerned with in this case would do well to keep to the outer periphery of the sealane so as to keep out of the way of the larger ocean going vessels.

[28] The next question to be considered is what constitutes "innocent passage".

[29] Ian Brownlie in his *Principles of Public International Law* 3rd edn (1979) at p 204 says:

> "As a question of policy innocent passage is a sensible form of accommodation between the necessities of sea communication and the interests of the coastal state. In the face of tendencies to claim a broader territorial sea in the practice of states, any proposals to restrict the right will no doubt be met with considerable opposition. Definition of innocent passage is a matter of some difficulty, not only in respect of precision in stating the conditions of innocence, but also with regard to the question of a presumption in favour either of the visitor or of the coastal state in case of doubt. The starting point must be art 14 of the Convention of the Territorial sea:
>
> 1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
>
> 2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
>
> 3. Passage includes stopping and anchoring; but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.
>
> 4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.
>
> 5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.
>
> In substance this article corresponds to the customary law, but it is more specific in certain aspects."

[30] What needs to be emphasised for the purposes of this case is art 14/5 above. The avowed intention of the Act and the Regulations is to prevent any vessels from fishing within maritime waters which includes the sea adjacent to Malaysia, both within and outside territorial waters, unless there is previous compliance with the Act and the Regulations.

[31] How this law is to be applied to transgressions committed outside

territorial waters is a nice question which I do not have to decide. But within territorial waters art 14/5 clearly suggests that the passage of foreign fishing vessels will not be considered innocent if they do not comply with the Act and the Regulations.

[32] According to Brownlie (p 205):

> "At the Third United Nations Conference on the Law of the Sea (197309) the right of innocent passage was a matter of particular interest.
>
> The maritime states, faced with expanding claims to territorial seas affecting many seaways, were concerned to provide firmer outlines for the right. Consequently in the Informal Composite Negotiating Text of 1977 there is a more detailed definition of 'innocent passage.'"

[33] Article 19 of the draft reads:

> "Meaning of innocent passage
>
> 1. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state. Such passage shall take place in conformity with the present Convention and with other rules of the international law.
>
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state, if in the territorial sea it engages in any of the following activities:?
>
> (a) to (h) - (not relevant to this case)
>
> (i) any fishing activities;"

[34] The customary law to which art 14 of the Convention of the Territorial Sea is said to correspond may be the customary law of England or it may be customary international law. In the Court below, and before me, Defence Counsel seemed to suggest that it was self-evident that such customary law was part and parcel of Malaysian law.

[35] I am far from satisfied that this is the case. H.L. Dickstein in his article "The Internal Application of International Law in Malaysia: A Model of the Relationship between International and Municipal Law" has dealt with some of the problems which arise when a Malaysian Court has to decide whether to import English customary law or customary international law as it is applied in England. (See *Journal of Malaysian Comparative Law* Vols 1-2 (1974-1975) p 204-215.)

[36] The Malaysian cases to which Mr Dickstein has referred have not assisted me in coming to any definite conclusion on whether it could confidently be said that there is a right of innocent passage through territorial waters which is

recognised by Malaysian Law. Section 13 and s 14 of the Evidence Act 1950 require evidence to be given of a custom before the Court can reach a positive conclusion as to its existence. Foreign law is likewise a matter for proof by expert evidence under s 45 of the Evidence Act (See also *Sarkar* on Evidence 11th p 501). No such evidence was led in the Court below. Nor was there any material in the Court below or before me to impel one to the conclusion that art 14 of the Convention on the Territorial Sea or the draft of the negotiating text of 1977 had been imported into Malaysian Law.

[37] As to this, art 76(1) of the Malaysian Constitution provides the Federal Parliament with the competence to enact legislation for the purpose of implementing treaties, agreements or conventions between the Federation and any other country or any decision of any international organisation of which the Federation is a member. So before a Convention can come into force in Malaysia, Parliament must enact a law to that effect. The Carriage by Air Act is one such example and the importation of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) by the Emergency (Essential Powers) Ordinance No 7 of 1969 is another. No Malaysian statute has been cited to me to show that art 14 had become part of Malaysian Law. In fact the Ordinance just cited stops at art 13 and the irresistible inference must be that art 14 was not intended to be imported into this country.

[38] Consequently I am compelled to hold as follows:

(1) that the evidence given in the Court below proved the commission of an offence under s 11(1) of the Act in that by being in possession of fishing appliances without a licence within territorial waters the accused had failed to comply with reg 3(b) and were consequently guilty of an offence under s 11;

(2) that the boat and the fishing appliances were the subject matter of the offence and notwithstanding that no person was convicted of such an offence in the Court below, an order of forfeiture should have been made;

(3) that the material before the Court in this case was inadequate to come to any positive conclusion as to whether innocent passage through Malaysian territorial water is a right and if so what were its precise limits;

(4) that even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysian domestic legislation.

[39] I am all too conscious that my last finding could give rise to some problems in international relations but the matter is not without judicial precedent.

[40] Mr H L Dickstein in his article referred to the judgment of the Supreme Court of the United States in *Whitney v. Robertson* (1888) 124 US 190, 194 where in dealing with international dissatisfaction arising out of the implementation of municipal law obligation the Court said:

> "If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its claim to the Executive Head of the Government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress."

[41] Again at p 214 after dealing with the problems which arose between Britain and Norway following from the conviction of a Norwegian citizen for a fishing offence in British territorial waters, he referred to Mr Justice Jackson's pronouncement in *Lauritzen v. Larsen* (1953) 345 US 571, 582 which is worthwhile repeating here:

> "It would not be candid to claim that our Courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact we hold to be sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

[42] The moral of this story therefore would appear to be that urgent inter-governmental action is required to clarify the extent of the privilege or the right of innocent passage through these waters.

[43] But as to the matters with which this Court is immediately concerned the order must be that the boat and the fishing appliances in question are forfeited and shall be disposed of as the Police shall direct. The order of the learned Magistrate is set aside to that extent. In the light of the finding of this Court the proceeds of the sale in the sum of $2,000 shall be disposed of by the Director-General of Fisheries in accordance with the jurisdiction vested in him by s 13(2) and s 14(2) of the Act.