

MAGISTRATES COURT AT REDCLIFFE

CHERELLE BROUGHTON

v.

THAI HOC NGUYEN

PROSECUTION'S OUTLINE OF SUBMISSIONS ON SENTENCE

Antecedents

1. The defendant was born on 15 June 1968 in Vietnam. He is currently 42 years of age and was 41 years of age at the time of the commission of these offences. He is a pensioner.
2. The defendant does not have any prior convictions for fisheries offences.

Facts

Offences – 7 November 2009

3. During the evening of 7 November 2009 a complaint was made to the Pinkenba QBFP. The informant provided a description of a vessel, operating in Nundah Creek, that was similar to a vessel that had been observed by QBFP Officers at the Clontarf Boat Ramp at various times during the previous 2 week period. The complaint was investigated by two QBFP Officers that evening.
4. The Officers observed the vehicle that was the subject of the complaint and that they had previously observed at the Clontarf Boat Ramp. The Officers then proceeded to Nundah Creek and launched their patrol vessel. The Officers observed that the Defendant's vessel was not displaying any navigation lights and was manoeuvring along Nundah Creek.
5. The Officers approached the vessel and introduced themselves to the defendant who was the sole person on board the vessel. The Officers conducted a search of the vessel and located and seized:
 - 1 white plastic box containing a quantity of Mud Crabs;
 - 1 brown hessian sack containing a quantity of Mud Crabs;
 - A quantity of Mud Crabs running loose in the floorboards of the vessel;
 - 1 monofilament net; and
 - 9 balls of blue twine.

6. The Officers further observed that there was an unconnected battery at the front of the vessel under a sheet of metal. When connected the navigation lights of the vessel came on.
7. The defendant initially claimed to have been fishing with 5 Crab Pots but then stated that he had only been using 4 Crab Pots, that it was his first time crabbing, that he did not own the vessel and that he did not hold a Recreational Marine Driver's License.
8. An Officer then accompanied the defendant whilst he retrieved his crab pots and returned from Nundah Creek at Shorncliffe to the boat ramp at Clontarf. The second Officer followed behind in their patrol vessel.
9. Later that evening, the Officers returned to Nundah Creek and recovered 13 unnamed Crab Pots.
10. Upon returning to the Marine Operations Base the Officers commenced sorting through, measuring and photographing the details of the seized items.
11. In total the defendant was found to be in possession of:
 - 17 female Mud Crabs;
 - 25 undersize male Mud Crabs;
 - 8 legal male Mud Crabs; and
 - A commercial fishing net.
12. On the morning of 23 November 2009 the defendant participated in a translator assisted ROI. He made full admissions to the offences, stating:
 - He caught all of the mud crabs
 - He tied all of the mud crabs;
 - He baited all of the crab pots;
 - Nobody helped him to catch the mud crabs
 - He placed the mud crabs in the hessian sack, esky and plastic box
 - He was aware that there were mud crabs under the floor of the vessel
 - He did not have any markings on the crab pots or floats;
 - He was not licensed to operate the vessel;
 - He did not measure any of the crabs but put back those that he thought were too small;
 - He was not aware that he was in a green zone; and
 - He had made no attempts to find out about the rules relating to fishing and crabbing in Queensland

Offences – 1 December 2009

13. Less than 1 month later the defendant has again come to the attention of QBFP.
14. On the morning of 1 December 2009, Field Officers were patrolling the waters of the Hays Inlet in a patrol vessel. The Officers observed a vessel being

manoeuvred along the waterway behind some mangroves. The Officers recognised the vessel from the previous interception, however this time the vessel had been painted camouflage green. When the Officers pulled up alongside the vessel they were able to identify the defendant who was the only person on board at the time.

15. The Officers observed 2 collapsible crab pots, one rectangular and one round that were baited with chicken but did not contain any crabs. Underneath the crab pots were 4 green supermarket bags that were tied with their handles, each containing tied mud crabs. The Officers asked the defendant how many crabs there were and he replied 60 or 70. The Officers have further observed 9 loose mud crabs on the floor of the vessel, some of which were female and undersized male. The Officers located a further mud crab under the floorboards of the vessel.
16. On board the vessel the Officers have also located:
 - A green supermarket bag containing a quantity of other green supermarket bags;
 - A green supermarket bag containing pieces of cut rope similar to those used on the defendant's crab pots;
 - Pieces of styro foam similar to those used on the defendant's crab pots; and
 - 3 large containers containing fuel (as well as the container attached to the motor).
17. The Officers then spoke with the defendant and he advised that he had 5 crab pots, had commenced crabbing the previous evening, was keeping the crabs for a party and did not have a licence to operate the vessel.
18. An Officer then accompanied the defendant whilst he retrieved his 3 crab pots, each of which were baited with chicken and only 1 of which contained a mud crab.
19. The Officer then accompanied the defendant on his journey back to the boat ramp at Deep Water Bend in the Pine River. A further search of the vessel has revealed a further 2 female mud crabs underneath the floorboards of the vessel.
20. The Officers have seized all of the mud crabs and have returned to the Marine Operations Base at Pinkenba. The mud crabs were counted and there were a total of:
 - 32 female mud crabs;
 - 27 undersized male mud crabs; and
 - 5 legal sized mud crabs.
21. On the morning of 11 December 2009 the defendant participated in a translator assisted ROI. He made full admissions to the offences, stating:

- He caught all of the mud crabs using the 5 crab pots;
- He tied all of the mud crabs;
- He caught the crabs for a party;
- He baited all of the crab pots;
- He did not have any markings on the crab pots or floats;
- He was not licensed to operate the vessel;
- He did not measure any of the crabs but put back those that he thought were too small;
- He was not aware that he was in a green zone; and
- He was aware of the rules but caught the crabs anyway.

Indicia of commerciality

22. There are a large number of circumstances arising from each of the interceptions that lead to an inference that the defendant was taking the crabs for a commercial purpose. These indicia include:

- The large number of Mud Crabs that the defendant was found in possession of on both interceptions;
- On both occasions the vessel had a plentiful supply of ULP fuel that would have enabled him to stay out on the water for a period of several days (refer to photographs);
- On both occasions the defendant was in possession of a plentiful supply of pre-cooked and pre-packaged food and drinking water that would have enabled him to stay out on the water for a number of days (refer to photographs);
- On both occasions the defendant was in possession of a significant number of pieces of styro foam and plastic bottles, both of which can be used as crab floats (refer to photographs);
- On both occasions the defendant was in possession of pieces of cut rope of varying lengths that could be used to attach to crab pots (refer to photographs);
- On the first occasion the defendant was in possession of 9 balls of blue twine that could be used, and had been used, to tie any Mud Crabs that were caught (refer to photographs);
- On the second occasion the defendant was in possession of a full cardboard carton containing Steggles chickens, that could be used, and had been used, to bait crab pots (refer to photographs);
- Between the first and second interception the vessel that the defendant was operating had been painted camouflage green (refer to photographs); and
- Between 21 October 2009 and 1 December 2009, Field Officers in the Pinkenba district observed either the vessel that the defendant was intercepted on board on each interception, or the defendant's vehicle, in

and around the Bramble Bay area no less than 15 times. Although the prosecution are unable to prove that the defendant had sole use of either the vessel or the vehicle, it is clear that he did at least have access to both the vessel and the vehicle during the relevant period.

23. It is submitted that the court can have regard to these indicia of commerciality in determining whether or not the fish were taken in trade or commerce.
24. A finding that the defendant took the Mud Crabs for trade or commerce is a seriously aggravating factor and should in itself lead the court to consider imposing a significantly higher penalty. Further, pursuant to section 83 of the *Fisheries Act 1994 (Qld)*, where a person is convicted of an offence against the Act involving the taking or possession of fish and the court is satisfied that the fish were taken in trade or commerce, the court may impose a fine of not more than 5 times the wholesale value of the fish that were taken. The court may impose this fine in addition to any other penalty that is imposed and the court may regard fish taken or possessed in contravention of this Act to have a wholesale value equivalent to the wholesale value of fish of the same or a similar species or type taken lawfully.
25. The wholesale value of the Mud Crabs that the defendant was found in possession of during the first interception was \$550.
26. The wholesale value of the Mud Crabs that the defendant was found in possession of during the second interception was \$680.
27. The wholesale values are calculated based on advice from Mr Harry Nguyen from Raptis Fish Markets, who has advised that the average wholesale price for A Grade Mud Crabs was \$22/kg and for B Grade Mud Crabs was \$13/kg, at the time of the interceptions. Assuming that the female and undersized Mud Crabs were B Grade and the legal males were A Grade and based on an average female weighing 800g and an average male weighing 740g.
28. Therefore, if the court is satisfied that the defendant did possess the Mud Crabs for trade or commerce an additional penalty of no more than \$2,750 could be imposed in relation to the November offences and an additional penalty of no more than \$3,400 could be imposed in relation to the December offences. A total of no more than \$6,150.
29. If the court is not satisfied that a penalty pursuant to section 83 should be imposed, it is submitted that the court would still have regard to the indicia of commerciality that has been outlined in determining an appropriate penalty to impose for each of the charges relating to the possession of Mud Crabs.

Penalty

30. The unlawful possession of Mud Crabs is regarded as a serious fisheries offence and there is a strong need for deterrence (both general and specific) with offences of this nature.

31. In the defendant's favour, he did cooperate with investigating authorities, both at the time of interception and later by way of recorded interviews. He also comes before the court with no prior convictions. However, against this the defendant was intercepted on 2 separate occasions occurring within 1 month of each other, and the second set of offences were committed just 1 week after the defendant had participated in an interview where he was specifically advised as to the unlawfulness of possessing regulated Mud Crabs.
32. Further, on both 7 November 2009 and 1 December 2009, the defendant had been crabbing within a Marine National Park zone (Green Zone). It is noted that the defendant was subsequently issued with an infringement notice in relation to this.

The November offences

33. In relation to the offences that occurred in November, the third charge alleges that the defendant was in possession of 40 Mud Crabs in excess of the permitted number of ten (10). These 40 Mud Crabs incorporate the 17 female and 25 undersize male Mud Crabs that the defendant is alleged to have been in possession of, as well as possessing 3 unmarked crab pots and one (1) commercial fishing net.
34. It is very difficult for QBFP Officers to investigate crabbing offences and for this reason the use of unmarked apparatus is regarded as being very serious.
35. Schedule 5 of the *State Penalties Enforcement Regulation 2000* (Qld) makes provision for the imposition of infringement notices for contraventions of regulated fishing apparatus declarations. Where the contravention involves the sale, purchase, use or possession of a net that is a commercial fishing apparatus, an infringement notice to the value of 10 penalty units can be imposed (\$1,000). So, for the possession of the commercial fishing net I would be submitting that a penalty of **\$1,000** is appropriate and for the possession of the three (3) unmarked crab pots, I would be submitting that a fine in the range of **\$500 to \$1,500** is appropriate
36. I would submit that for the possession of the regulated Mud Crabs a penalty of between **\$5,000 and \$10,000** would be within range, having regard to the authorities of PHAM, LY and DANG and TRAN, and depending on whether or not the court is satisfied that the Mud Crabs were taken for trade or commerce.
37. Therefore the total penalty range I would submit for in relation to the November offences is **\$6,500 - \$12,500**.

The December offences

38. In relation to the December offences, the third charge alleges that the defendant was in possession of 54 Mud Crabs in excess of the permitted number of ten (10). These 54 Mud Crabs incorporate the 32 female and 27

undersize male Mud Crabs that the defendant is alleged to have been in possession of. The defendant is also alleged to have been in possession of five (5) unmarked crab pots and used one (1) additional crab pot than the four (4) permitted to take crabs.

39. For the possession of the five (5) unmarked crab pots I submit that a penalty range of **\$1,000 and \$2,500** is appropriate and for the one (1) additional crab pot a penalty of **\$500** is appropriate.
40. For the possession of the Mud Crabs in December, I would submit that the penalty that is imposed should be significantly higher than the penalty that is imposed for the offences that were committed on 7 November 2009. I would submit that having regard to the following factors, a penalty range of **\$10,000 - \$15,000** would be appropriate (depending on whether the court is satisfied that the Mud Crabs were taken for trade or commerce):
 - the authorities of PHAM, LY and DANG and TRAN;
 - the seriously aggravating circumstance that this second set of offences occurred less than 1 month after the defendant had been intercepted by QBFP in on 7 November 2009 and just 1 week after the defendant had participated in an interview in relation to these offences on 23 November 2009; and
 - the fact that 3 baited crab pots had already been returned to the water and a further 2 crab pots had been baited and were ready to be returned to the water, leading to an inference that the interception of the defendant prevented him from catching a larger quantity of Mud Crabs.
41. There for the total penalty range I would submit for in relation to the December offences is **\$11,500 to \$18,000**.
42. Combining the penalties for the November and December offences, I would submit that an overall penalty range of **\$18,000 to \$30,500** is appropriate.
43. This is clearly a wide penalty range and depends significantly on whether the court is satisfied that the Mud Crabs were taken for trade or commerce. Even if the court is not satisfied that the fish were taken for trade or commerce it is suggested that the indicia of commerciality should be regarded by the court in determining the appropriate penalty to impose, and that this would persuade the court not to impose a penalty at the lower end of the range that has been submitted.
44. Pursuant to section 49 of the *Penalties and Sentences Act 1992* (Qld) the court is able to impose a single fine where an offender is found guilty of 2 or more offences that are either founded on the same facts or form, or are part of, a series of offences of the same or a similar kind.
45. On this occasion the prosecution are seeking for a single fine to be imposed in relation to the possession of the Mud Crabs on 7 November 2009 (charges 1, 2

and 3 of the first complaint) and a single fine to be imposed in relation to the possession of the Mud Crabs on 1 December 2009 (charges 1, 2 and 3 of the second complaint) and for separate fines to be imposed in relation to charges 4 and 5 of the earlier complaint and the later complaint.

46. The offence of possessing regulated Mud Crabs is a serious offence and this kind of offending is becoming increasingly prevalent. On this basis it is important for the prosecution to be able to rely on comparative tables when making submissions to a court as to the appropriate penalty to impose. This is the basis upon which the prosecution is seeking for separate penalties to be imposed in relation to charges 4 and 5 of each of the complaints and for single penalties to be imposed in relation to the possession of Mud Crabs on 7 November 2009 and 1 December 2009.
47. Section 48 of the *Penalties and Sentences Act 1992* (Qld) provides that a fine “must as far as practicable, take into account (a) the financial circumstances of the offender; and (b) the nature of the burden that payment of the fine will be on the offender.”
48. The prosecution are not in a position to submit to the Court what the defendant’s financial circumstances are. However, it is respectfully submitted that given that there is capacity for a fine imposed by the Court to be referred to SPER (pursuant to sections 50(b) and 51(b) of the *Penalties and Sentences Act 1992*) or for the court to order that the fine be paid by way of instalments (pursuant to section 50(a) of the *Penalties and Sentences Act 1992*), that even a penalty at the higher end of the range submitted would not have a crushing effect.

The recording of convictions

49. Having regard to the following factors the prosecution is seeking that the court should exercise its discretion, pursuant to section 12(1) of the *Penalties and Sentences Act 1992* (Qld), and record a conviction:
 - the serious nature of these offences;
 - the number of Mud Crabs that the defendant was found to be in possession of at each interception; and
 - the fact that the defendant was so undeterred from committing further offences that just one week after he participated in an interview and was specifically advised that it was unlawful to possess undersized and female Mud Crabs and a number of Mud Crabs in excess of the bag limit, the prosecution is seeking the recording of convictions for these offences.

Costs of the Court

50. The prosecution are seeking an order that the defendant pay the costs of the court (\$73.80) for each of the complaints and summons that have been filed, pursuant to section 19A(2) of the *Justices Regulation 2004* (Qld).

Forfeiture

51. The prosecution is seeking the forfeiture of the following seized items:

- 1 monofilament net in green bag;
- 9 bundles of blue twine;
- 1 white plastic bottle;
- 1 red igloo esky;
- 1 white storage box with 2 knives; and
- 1 hessian sack;
- 5 green supermarket bags; and
- 1 ball of string.