

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

MUSLIMIN

APPELLANT

AND

THE QUEEN

RESPONDENT

Muslimin v The Queen [2010] HCA 7
10 March 2010
D12/2009

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of the Northern Territory made on 29 April 2009 and in its place order that:*
 - (a) *the appeal to that Court be allowed; and*
 - (b) *the appellant's conviction be quashed and a verdict of acquittal be entered.*

On appeal from the Supreme Court of the Northern Territory

Representation

A Wyvill SC with S W Lee for the appellant (instructed by Northern Territory Legal Aid Commission)

P A Willee QC with L A Taylor for the respondent (instructed by Director of Public Prosecutions (Cth))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Muslimin v The Queen

Criminal law – Statutes – Extension of offence provision – *Fisheries Management Act* 1991 (Cth) ("Act"), s 101, created offence of, in certain circumstances, being in possession of foreign boat within Australian Fishing Zone ("AFZ") equipped with nets, traps or other equipment for fishing – Section 12(2) of Act stated that provisions in Act or regulations made in relation to fishing in AFZ extend, to extent capable of doing so, to fishing for sedentary organisms in or on any part of Australian continental shelf not within AFZ as if they were in AFZ – Section 4 of Act defined "fishing" as one or more forms of identified activity – Where appellant indicted for being in possession of, at a place in the waters above Australian continental shelf not within AFZ, foreign boat equipped with nets, traps or other equipment for fishing for sedentary organisms – Whether indictment disclosed offence – Whether s 12(2) extended operation of s 101 to waters above Australian continental shelf not within AFZ – Whether s 101 a provision made "in relation to fishing".

Words and phrases – "Australian Fishing Zone", "fishing", "in relation to".

Fisheries Management Act 1991 (Cth), ss 4, 12(2), 101.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. The appellant, an Indonesian national, was charged in the Supreme Court of the Northern Territory with an offence against the *Fisheries Management Act 1991* (Cth) ("the FMA"). The indictment alleged that in April 2008, at a place in the waters above a part of the Australian continental shelf not within the Australian Fishing Zone, the appellant had in his possession or in his charge a foreign boat equipped with nets, traps or other equipment for fishing for sedentary organisms. It was alleged that this was an offence under s 101(2) of the FMA.

2 At a preliminary hearing, held before a jury was empanelled, the appellant submitted that the indictment did not disclose an offence because, so he submitted, s 101 of the FMA did not apply outside the Australian Fishing Zone. That submission was rejected¹. The appellant was then tried before Thomas J and a jury and was convicted.

3 An appeal to the Court of Criminal Appeal of the Northern Territory was dismissed² by majority (Martin (BR) CJ and Mildren J; Angel J dissenting). By special leave, the appellant appeals to this Court. He submitted, as he had submitted at the preliminary hearing in the Supreme Court of the Northern Territory, and on appeal to the Court of Criminal Appeal, that s 101 of the FMA does not apply outside the Australian Fishing Zone. He therefore submitted that, because the indictment alleged that the conduct said to constitute commission of an offence against s 101 occurred outside the Australian Fishing Zone, no offence was alleged and he should not have been convicted. That submission should be accepted.

4 The determinative question in the appeal is whether s 12(2) of the FMA extended the operation of the provision which the appellant was alleged to have contravened (s 101) to what happened in the waters above a part of the Australian continental shelf not within the Australian Fishing Zone. To resolve that question, it will be necessary to give close attention to two terms defined in s 4 of the FMA – "Australian fishing zone" (which, in the operative provisions of the FMA, is referred to as the "AFZ") and "fishing".

1 *Aco v The Queen* (2008) 220 FLR 159.

2 *Muslimin v The Queen* (2009) 157 NTR 8.

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2.

Relevant provisions

5 It is convenient to set out the text of some of the relevant provisions at this point.

6 The appellant was charged with an offence under s 101(2). At the time of the alleged offence, s 101(1), (2) and (2A) provided that:

"(1) A person must not, at a place in the AFZ, have in his or her possession or in his or her charge a foreign boat equipped with nets, traps or other equipment for fishing unless:

- (a) the use, or presence, of the boat at that place is authorised by a foreign fishing licence, or a port permit; or
- (b) a Treaty licence is in force in respect of the boat; or
- (c) the boat's nets, traps or other equipment for fishing are stored and secured and the boat is at that location in accordance with the approval of [the Australian Fisheries Management Authority] given under, and in accordance with, the regulations; or
- (d) the boat's nets, traps or other equipment are stored and secured and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route; or
- (e) the use of the boat for scientific research purposes in that area is authorised under a scientific permit.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 2,500 penalty units.

(2A) Strict liability applies to subsection (2)."

It will be observed that s 101 is directed to identified circumstances *in the Australian Fishing Zone*.

7 Section 12(2) extends certain provisions of the FMA to fishing for sedentary organisms in or on any part of the Australian continental shelf not within the Australian Fishing Zone. It provides that:

3.

"Where by this Act (other than Part 5), or the regulations, provision is made in relation to fishing in the AFZ or a fishery, such provision, to the extent that it is capable of doing so, extends by force of this section to fishing for sedentary organisms, in or on any part of the Australian continental shelf not within the AFZ or the fishery as if they were within the AFZ or the fishery."

8 The provisions extended by s 12(2) are those "made in relation to fishing in the AFZ or a fishery". "[T]o the extent that it is capable of doing so", the extension worked in respect of each of those provisions is extension "to fishing for sedentary organisms" and is extension "in or on any part of the Australian continental shelf not within the AFZ or the fishery as if they [the sedentary organisms] were within the AFZ or the fishery". "[F]ishery" is defined in s 4 of the FMA as "a class of activities by way of fishing" and includes activities identified by reference to certain identified matters (such as species of fish; area of waters or seabed; class of boats). The references made in s 12(2) to a fishery may be put aside from consideration as not relevant to this matter. As earlier indicated, attention must be directed to what is meant by the Australian Fishing Zone and to the definition in the FMA of "fishing".

9 Subject to some qualifications that are not presently relevant, the Australian Fishing Zone is defined³ as: "(a) the waters adjacent to Australia within the outer limits of the exclusive economic zone adjacent to the coast of Australia; and (b) the waters adjacent to each external territory within the outer limits of the exclusive economic zone adjacent to the coast of [that territory]". The exclusive economic zone is defined⁴ in the FMA by reference to the *Seas and Submerged Lands Act* 1973 (Cth). The latter Act gives⁵ the expression "exclusive economic zone" the same meaning as in Arts 55 and 57 of the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982 ("UNCLOS"), parts of which are set out in the Schedule to the *Seas and Submerged Lands Act*. At the risk of undue abbreviation, the exclusive economic zone (and thus the Australian Fishing Zone) can be described as the area up to 200 nautical miles from the baselines from which the breadth of Australia's territorial sea is measured. There are places at which the Australian

3 *Fisheries Management Act* 1991 (Cth), s 4.

4 s 4.

5 s 3.

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continental shelf extends beyond the boundaries of the exclusive economic zone. The appellant's vessel was intercepted at such a place.

10 Section 4 of the FMA defines fishing as:

- "(a) searching for, or taking, fish; or
- (b) attempting to search for, or take, fish; or
- (c) engaging in any other activities than can reasonably be expected to result in the locating, or taking, of fish; or
- (d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons; or
- (e) any operations at sea directly in support of, or in preparation for, any activity described in this definition; or
- (f) aircraft use relating to any activity described in this definition except flights in emergencies involving the health or safety of crew members or the safety of a boat; or
- (g) the processing, carrying or transshipping of fish that have been taken."

Each paragraph of the definition refers to an activity. In argument in this Court, the respondent pointed particularly to the reference in par (e) to "preparation for ... any activity" described in the definition. But like all other elements of the definition, this part of par (e) refers to an activity: the activity or "operation" of preparing to fish.

The course of proceedings below

11 It is necessary to say a little more about the course of proceedings below. As noted at the outset of these reasons, after an indictment had been filed charging the appellant with an offence against s 101(2) of the FMA, a preliminary hearing was conducted in the Supreme Court of the Northern Territory, by Riley J, to determine whether, as the appellant alleged, the indictment did not disclose an offence. Presumably, the relief that was sought was the quashing of the indictment. The appellant's application was heard together with other similar applications made by others charged with offences against the FMA, but it is not necessary to consider those other applications.

5.

12 Much of the argument before Riley J appears to have been directed to questions of international law and, in particular, the operation of UNCLOS. In refusing the applications made, Riley J held⁶ that the relevant provisions of the FMA were not ambiguous, and that⁷, contrary to the submissions of the appellant, there was no inconsistency between international law and the interpretation of ss 12 and 101 advanced by the prosecution. Little separate attention appears to have been directed in argument before Riley J to the proper construction of s 12(2).

13 In his notice of appeal to the Court of Criminal Appeal, the appellant advanced several grounds, including the ground that Riley J had erred in holding that s 101 was "'capable' of extending to fishing for sedentary organisms in or on any part of the Australian continental shelf outside the Australian Fishing Zone". It is not necessary to notice the other grounds advanced. In the Court of Criminal Appeal, the application of s 101 beyond the Australian Fishing Zone was seen, at least in part, as turning on whether s 101 was a provision made "in relation to" fishing as defined in s 4. (It will be recalled that s 12(2) identified the provisions extended in operation as provisions "made in relation to fishing in the AFZ".)

14 The Court of Criminal Appeal divided in opinion. The Chief Justice⁸ and Mildren J⁹ concluded that s 101 was a provision made "in relation to" fishing as defined, and was a provision capable of extending to fishing for sedentary organisms outside the Australian Fishing Zone; Angel J¹⁰ concluded that "s 101(2) had no operation with respect to the appellant's activities ... because there was no real or sufficient nexus between those activities and fishing in or on the Australian continental shelf". A deal of reference was made in the reasons of the members of the Court to considerations of international law that were said to support the conclusions expressed about the construction and application of the relevant provisions. But all members of the Court, rightly, treated the determinative question as one of construction of the FMA.

6 (2008) 220 FLR 159 at 164-165 [24].

7 (2008) 220 FLR 159 at 165 [28].

8 (2009) 157 NTR 8 at 10 [4].

9 (2009) 157 NTR 8 at 24 [81].

10 (2009) 157 NTR 8 at 15 [29].

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6.

The construction of s 12(2)

15 It is trite to say that s 12(2) must be construed as a whole with proper regard to the context provided by the entire Act. It is no doubt important to observe that s 12(2) identifies the provisions whose operation is extended by describing those provisions as ones "made *in relation to* fishing". The words "in relation to" are to be read with their ordinary meaning. But the observation that s 12(2) identifies the subject of the extension worked by the sub-section as provisions "made in relation to fishing" must not be permitted to obscure two further features of the sub-section. First, its central concern is "fishing" as defined in the FMA – one or more forms of identified activity. Second, the extension worked is an extension of provisions made about the activity of fishing in one area (the Australian Fishing Zone) to the same kinds of activity in another area (the continental shelf).

16 Section 101 appears in Pt 6, Div 5 (ss 99–105) of the FMA. Division 5 is headed "Foreign boats – additional enforcement provisions" and creates a range of offences. Several of the provisions, notably ss 99, 100, 100A and 100B, are directed expressly to the activity of fishing. By contrast, s 101 is directed not to that activity but to the existence of a state of affairs, namely having possession or charge of a particular kind of boat: a foreign boat *equipped* for fishing. Section 101 is not directed to the activity of fishing. Section 101 is directed to having possession or charge of a particular kind of boat: a foreign boat *equipped* for fishing. Section 101 is not a provision of the FMA "made in relation to fishing in the AFZ". It is a provision in relation to having possession or charge of a particular kind of boat. More particularly, and contrary to the respondent's submissions, it is not a provision in relation to "operations at sea directly in support of, or in preparation for" any of the activities described in the definition of "fishing" in s 4 of the FMA. Section 101 is thus not a provision that is the subject of the extension which is worked by s 12(2).

17 This being the proper construction of s 12(2), it is neither necessary nor appropriate to go on to consider whether extension of operation of a provision like s 101 to areas outside the Australian Fishing Zone would be consistent with international law generally or UNCLOS in particular.

Conclusion and orders

18 The indictment preferred against the appellant did not disclose an offence. Although that would ordinarily lead to an order that the indictment be quashed, the appellant did not seek that relief. Instead, the appellant sought orders allowing the appeal to this Court, setting aside the order of the Court of Criminal

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7.

Appeal of the Supreme Court of the Northern Territory made on 29 April 2009 and in its place making orders that the appeal to the Court of Criminal Appeal be allowed, the appellant's conviction quashed, and a verdict of acquittal entered. The respondent did not submit that those orders were inappropriate. The orders sought by the appellant should be made.