

THE SUPREME COURT

Finlay C.J.
Griffin J.
McCarthy J.
(74/88)

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND

HIS HONOUR JUDGE DAVID SHEEHY

RESPONDENT

AND

JOHN BOWMAN

NOTICE PARTY

Judgment of McCarthy J., delivered the 4th day of April, 1990.

[NEH DISS]

The Attorney General appeals against the refusal by Murphy J., of an application for judicial review by way of an Order of Certiorari directed to His Honour Judge Sheehy. The application related to an order made in the Circuit Court on the 19th November 1986 in respect of a sum of money lodged in the District Court as surety for the release of the boat the "Mar Tigre" of which the Notice Party was Master. Alternatively, the Attorney General seeks an Order of Mandamus

directed to the learned Judge to determine the matter as to the surety held and to order the payment out to the State of the sum of £11,000.00, the estimated value of the catch and gear found on the Mar Tigre.

In my judgment, the Attorney General is entitled to an order both of Certiorari and Mandamus.

THE FACTS

On the 8th October 1985 the Mar Tigre was arrested within the exclusive fishery limits of the State and its Master was detained. The boat was escorted to Rathmullan, Co. Donegal, and handed over to a Garda Sergeant at Ramelton who, on the 9th October 1985 obtained a Detention Order under section 233(A) of Fisheries (Consolidation) Act 1959, as amended, in respect of the boat and further, on the 10th October 1985 charged the Master with the offence of failing to keep a Log Book of the operations of the Mar Tigre, a sea fishing boat, as required by Article 3 of Council Regulation (E.E.C.) No. 2057-82 of 29th June 1982 and Article 1 of Commission Regulation (E.E.C.) No. 2807-83 of 22nd September 1983 in contravention of the said regulations and of Article 3 of the Sea Fisheries (Control of Catches)

Order 1935, contrary to section 223(a) of the Fisheries (Consolidation) Act 1959 as amended by the Fisheries (Amendment) Act 1983.

On the same date, in pursuance of the powers vested in him by section 235 of the Fisheries (Consolidation) Act 1959 as inserted by section 14 of the Fisheries (Amendment) Act 1978 the District Justice for the District Court area of Buncrana ordered

- (1) That the Mar Tigre be detained in the Port of Rathmullan until the determination of the case against the Master in the Circuit Criminal Court.
- (2) That the Mar Tigre be released if cash or sufficient surety (in the form of a bond under seal drawn on a bank licensed by the Central Bank to carry on the business of banking in the Republic of Ireland (sic)) in the sum of £23,000.00 only be forthcoming for payment, in the event of conviction of the Master in respect of the said offence

"or in the event of his failure to attend for any court when such attendance is required for the purpose of any preliminary examination under the Criminal Procedure Act 1967 in relation to

the offence or any trials, appeals, or other proceedings in relation to the offences or any of them which sum is sufficient to provide for payment of the maximum fine or fines which may be ordered to be paid in respect of the offence and the estimated value of the forfeitures which may be ordered, to be made upon the final determination of any trials, appeals or other proceedings in relation to the offences or any of them."

The sum of £23,000.00 was calculated as follows:-

- (a) £10,000 in respect of the maximum fine on the one and only offence with which the Master was charged at the relevant time.
- (b) £2,000 towards the costs of the proceedings and
- (c) £11,000 towards the estimated value of the catch and fishing gear.

The detailed valuation of the gear totalled £3,495.00 and of the catch totalled £7,113.75, making a total value of catch and gear of £10,608.75. On the 19th November 1986,

at the Circuit Court in Letterkenny, the Master was convicted on the charge of failing to keep a Log Book and fined a sum of £2,000 and ordered to pay an additional sum of £2,000 to the State, in respect of its costs of the proceeding.

It was further ordered that the fishing gear and catch be forfeited; that the said sums for fine and costs be deducted from the sum of £23,000 lodged in Court and that the balance together with all accrued interest be paid out to the solicitor for the Master. This was despite an application on behalf of the Attorney General to take into account the amount of the surety lodged to cover the value of the gear and catch. The Master is not an Irish resident and as the gear and catch were released on payment of the surety there was and is no way of forfeiting the gear and catch. It may safely be assumed that the catch found on the vessel on the 8th October 1985 had ceased to exist by the 19th November 1986 and that the gear had been used for its proper purposes in the interval.

THE LAW

Section 235(2)(a) of the Fisheries (Consolidation) Act 1959, as inserted by section 14 of the Fisheries (Amendment) Act 1978 provides as follows:-

"Where, in respect of an offence or offences under a provision of Chapter II or III of this Part, an order is made under subsection (1) of section 234 or subsection (1) of this section in relation to a sea-fishing boat, a District Justice may, at his discretion, by order directed to a sea fisheries protection officer, require the boat to be released if security, which in the opinion of the Justice is satisfactory, is given for payment, in the event of conviction of the defendant in respect of the offence or offences or in the event of his failure to attend before any court when such attendance is required for the purposes of any preliminary examinations under the Criminal Procedure Act, 1967, in relation to the offence or offences or any trials, appeals or other proceedings in relation to the offence or offences, of a sum that in the opinion of the Justice is sufficient to provide for:-

- (i) payment of the maximum fine or fines ordered, or which may be ordered, to be paid in respect of the offence or offences,

- (ii) the estimated amount of the costs (if any) of any trials, appeals or other proceedings in relation to the offence or offences awarded, or which may be awarded, against the defendant concerned, and
- (iii) the estimated value of any forfeitures ordered, or which may be ordered, to be made upon the final determination of any trials, appeals or other proceedings in relation to the offence or offences."

Section 317 of the Fisheries (Consolidation) Act 1959, as amended by section 2(5)(b) of the Fisheries (Amendment) Act 1978 provides:-

"(1) Where -

- (a) any thing, which, either as a statutory consequence of conviction or by an order of a District Court, is forfeited under this Act or any instrument made thereunder, is lawfully seized, or
- (b) any thing is ordered by a District Justice under paragraph (b) of section 302 to be forfeited,

the Minister may direct that such thing shall -

- (i) be returned to the person who appears to him to be the owner thereof, or
- (ii) be sold or otherwise disposed of in such manner as he thinks fit.

(2) Where the Minister, in pursuance of subsection (1) of this section, directs a thing to be sold, the net proceeds of the sale shall be paid into or disposed of for the benefit of the Exchequer in such manner as the Minister for Finance shall direct.

(3) Subsection (1) of this section shall not apply to any thing forfeited under section 265, where the Court gives a direction under the said section 265 in relation to such thing."

Section 2(5)(b) of the 1978 Act provides:-

"Part XIX of the Principal Act shall apply to the fines and forfeitures provided for by this section and the Tables to this section as it applies to the fines and forfeitures referred to in that Part and references in sections 316 and 317 of the Principal Act to a District Justice and the District Court shall, in the case of a conviction by a court other than the District Court, be construed as references to that other court."

The relevant part of the Tables to the section identifies forfeiture of any fish or fishing gear found on the boat to which the offence relates as a statutory consequence of conviction of the offence under section 223(a) of the Principal Act.

THE ARGUMENT

As recounted in the Judgment of Murphy J., in the High Court Counsel for the Master successfully argued:-

- (1) That there was no express statutory power enabling the Trial Judge to substitute a different order for an Order of forfeiture of gear and catch; the correctness of this proposition was not disputed.
- (2) That the substitution of a cash payment for an order forfeiting the catch and gear would be inconsistent with section 317 as amended as it would deprive the Minister of the statutory power conferred upon him of returning "the thing" to the apparent owner or of effecting its sale.
- (3) That to construe the statute so as to allow the Trial Judge to order the making of the deduction in respect of catch and gear would be to amend the legislation and not to interpret it.

Counsel for the Attorney General has pointed to the scheme of the Act of 1959 as amended in 1978 and invited the Court to interpret the Act so as to remedy the mischief that would be initially caused by the detention of the boat, its gear and its catch. Section 235(2)(a), it is said, is called in aid by the Master of the boat; a surety is demanded in respect of a payment to be made which represents the value of a possible forfeiture; the forfeiture is a statutory consequence of the conviction; it follows that where a surety has been given the duty is on the Court of Trial to order payment out to the State of a sum equivalent to the value of whatever is the subject of forfeiture. The scheme, it is argued, is then complete. It is in the nature of things that, whenever an Order is made under section 235(2)(a) requiring the boat to be released, then, if there is a subsequent conviction, the gear and catch will not be physically forfeited but, rather, the surety will be called upon for discharge of the value as agreed or proven.

Counsel relied upon a principle stated in Craies on Statute Law (7th Edition) at p. 111 -

"If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential)

to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty to infer that the statute by implication empowers that detail to be carried out."

The authorities cited in support of this proposition are not in any sense analogous to the situation here; further, the statutory scheme requiring construction in this case arises in penal legislation and must be strictly construed. I do not think it appropriate to apply a principle such as suggested in Craies to the statute now under review.

In *Kostan -v- Ireland*⁽¹⁾, section 221 of the Fisheries Consolidation Act 1959, as amended, was declared invalid because it authorised the summary trial of a fishery offence which was not a minor offence. This resulted in the enactment of the Fisheries (Amendment) Act 1978; in particular, there followed the substituted sections 234 and 235. Sub-section 2(a) of Section 235 enables a District Justice to require the boat to be released if security is given for payment of a sum that in the opinion of the Justice is sufficient to provide for fine, costs, and forfeitures ordered to be made.

(1) Unreported: High Court (McWilliam J.) 10th February 1978

The learned Circuit Court Judge ordered that the sums for fine and costs be deducted from the sum lodged in Court and the balance be paid out to the Solicitor for the Master. If he had no power to make a like order in respect of a sum representing the value of the catch and gear, I pose the question as to whence he had power to order the sums for fine and costs to be deducted; after deduction what was to be done with the amount deducted? I pose the question merely to identify what appears to me to be the essential fallacy. The sum lodged in Court was a surety for three different categories of prospective liability; the order for deduction was made, not because of any express statutory power, but, rather, because a cash surety had been given, initially to the District Court and thence to the Circuit Court, to meet the amount of such sum or sums as might be ordered to be paid. In my view, it was part of the entire statutory scheme that all or any of these sums would be paid out of the sum lodged; why, otherwise, would the Judge make an order in respect of the sum in Court? In my view, where a sum is paid as a surety the statutory scheme does not contemplate forfeiture in kind. That being so, the sum paid stands in the place of

the thing or things to be forfeited and is answerable as such to the order of forfeiture. The forfeiture is a statutory consequence of the conviction. Its operation on the surety should be stated in the Order of conviction.

This is not in conflict with section 317 which would be clearly appropriate to such a case as where there is an immediate forfeiture within the State. As Murphy J., pointed out, the argument founded on section 317 is quite inappropriate to a case where the subject matter of the potential forfeiture has been removed from the jurisdiction of the courts.

The Order of the Circuit Court recites the conviction in respect of an offence under Sections 232(A) and 232 of the 1959 Act, and orders that the Defendant's fishing gear and catch be forfeited. The offence was correctly identified in the indictment as being contrary to Sections 223(a) and 232 of the 1959 Act; the forfeiture, as the statutory consequence of conviction under section 223(a), was in respect of

- (a) any fish and
- (b) any fishing gear

(See Ref. Number 4 in Table 1 of Section 2 of the Fisheries (Amendment) Act, 1978). The statutory reference in the Order is a typing error; the misnomer in the forfeiture part of the Order is of no materiality, but should be avoided .

In the circumstances, in my judgment, an Order of Certiorari should go together with an Order of Mandamus to the learned Circuit Court Judge directing the deduction from the sum lodged in Court of an amount equivalent to the value of the fishing gear and the fish, the rendition of this sum together with the sums for fines and costs to the State, and of the balance, including accrued interest, to the Master.

W. H. C. G. J.

5.4.90.