

## ***Possessing Unlawful Fish***

In issue 40 of this magazine your Editor expressed his concern about the approach a District Court Judge had taken when dismissing charges against a couple of allegedly amateur fisherman who had been found with 184 kilograms of paua (some of which was allegedly under size) in their possession \*. To try and find out a little more about the reasoning behind the decisions I have obtained a copy of the sentencing notes. The charges against the defendants were dismissed on two grounds.

Dealing firstly with the undersized paua charges, one of the crucial elements that had to be proved was that the paua were in fact undersized. This would appear to be straightforward except for the fact that the seized paua was shucked paua meat and the size regulations govern shell size (25mm for ordinary paua). So how do you prove that the shucked paua had previously inhabited an undersized shell? The Ministry attempted to give evidence through a Fisherys Officer but the Defence objected on the basis that it had not received a Brief of Evidence outlining the evidence that the officer would give on the issue and therefore the defendants lawyer could not properly cross/examine. The judge found that this was unfair and, although he could have adjourned the case to give the defence time to prepare, given the period of time the case had been dragging on he decided to dismiss the charges completely. In this regard the judges decision is relatively unremarkable. Incidentally there is precedent for a Fisherys Officer being allowed to give opinion evidence, based only on experience, that Paua meat of less than 80 grams came from shells which were less than the regulation length.

The dismissal of the second series of charges is more problematic. The defendants were charged under section 232(1) of the Fisheries Act with possessing excess Paua taken in contravention of the Act. The judge decided it was a critical element of this offence that the prosecution had to prove that the Paua had been taken unlawfully. The Ministry did not call any direct evidence on how the Paua had been taken but instead asked the Judge to infer from the number of Paua and other circumstances that they must have been taken illegally. The judge would not have a bar of this and dismissed the charges on the basis that the Ministry had not proved a vital element of the charge. I agree with your Editor's view that the outcome is somewhat strange but may be related more to how the charges were framed or the case argued rather than the judge being unreasonable. Had the defendants simply been charged under the amateur fishing regulations (which can carry fines of up to \$20,000.00) then all the prosecution would have to show is that the Defendants were in possession of more than the daily limit. The prosecution would not have had to have shown that they had been taken unlawfully. The burden of proof would then fall on the defendants to show that although they possessed more than their daily limit they had been acquired lawfully (for example that they had been accumulated during multiple days fishing). However these defendants had been charged with offences under section 232 of the Fisheries Act which allows for significantly greater fines (up to \$250,000.00 and forfeiture of vessels and equipment). Under this section every person commits an offence who buys sells or possesses any fish taken in contravention of the Act. Accordingly you have to show possession and that the fish were taken unlawfully.

One mystery not cleared up by the sentencing notes is what happened to the presumption in s195 of the Fisheries Act whereby anyone found with more than 3 times the daily amateur limit is presumed, in the absence of evidence to the contrary, to have acquired or possess the fish for the purpose of sale. This brings into play the commercial fishing offences provisions.

Your editor may however be heartened to hear of a High Court Justice taking a rather more robust approach to possession of more than the daily allowance\*\*. This decision is also a reminder (as if it was really needed) that skippers need to be vigilant about what occurs on their vessels because if unlawfully taken fish are found on their vessel the skipper can be deemed to be in possession of the fish and be charged under the Fisheries Act. In this case Fishery Officers had been watching two men fishing from a dingy in Kawakawa Bay and had observed them returning to the boat ramp. Mr T (the vessel owner) went to get the car and trailer leaving Mr P to hold the vessel in the water. Both men then secured the boat to the trailer before being tapped on the shoulder by the waiting Fishery Officers. Close inspection of the boat revealed a secret compartment under the floorboards which contained 267 snapper, 74 of which were undersized. Mr T subsequently disappeared but Mr P was prosecuted. A central issue was whether the Ministry had to prove that Mr P knew of the existence of the fish under the floorboards. There was no direct evidence that he was aware of the fish nor that he had taken them. As a side issue I note there was no discussion in this case about whether the Ministry needed to prove that the fish had been unlawfully taken, in contrast to the previous decision discussed above. "Possession" is defined in the Fisheries Act as including being in control of a vessel on which the unlawful fish are found. Therefore the Ministry did not need to prove that Mr P was aware of the fish provided it could show Mr P had control of the vessel. Mr P's actions in holding the vessel in the water and then assisting to put in on the trailer showed that he was jointly in control of the vessel and therefore had possession of the unlawful fish. Counsel for the defence made the general argument that this could mean that an innocent bystander who had very temporary control of the vessel could be held accountable for any unlawful fish subsequently found on that vessel. However the Court ruled that a practical approach had to be taken whereby the control had to be more than transitory or minimal. If you were found to be in control of the vessel the burden of proof would then fall on you to show that the fish had been unlawfully taken by someone else and that you had taken all reasonable precautions to avoid contravention.

So it appears that commonsense and reality do still have a place in the legal war against poachers.

\* Ministry of Fisheries v Morfee, 8-6-04, D.C.J. Behrens QC, District Court Wellington.

\*\* Ministry of Fisheries v Pham 15-6-04, Venning J, High Court Auckland.