Fishing 'under Aboriginal tradition' – s.14 of Queensland Fisheries Act

Stevenson v Yasso [2006] QCA 40

McMurdo P, McPherson JA and Fryberg J, 24 February 2006

Issue

The issue in this case was the application of s. 14 of the *Fisheries Act 1994* (Qld) (the Fisheries Act). That section provides (among other things) that 'an Aborigine may take, use or keep fisheries resources, or use fish habitats, under Aboriginal tradition'. Similar cases have appeared in other jurisdictions – see, for example, *Derschaw v Sutton* (1997) 17 WAR 419.

In a native title context, this case is of interest because of the approach the Queensland Court of Appeal took to issues such as the meaning of 'native title holder' and 'Aboriginal tradition'. Only these issues are noted below. In particular, there is an interesting discussion by President McMurdo of the defence of 'honest claim of right' under s. 22 of the *Criminal Code 1899* (Qld) at [52] to [67] which is not summarised here.

Background

Riccardo Yasso was charged under s. 84 of the Fisheries Act with unlawfully possessing commercial fishing apparatus of dimensions greater than that prescribed, while not holding an authority to do so — namely a 53m long monofilament gill net with a 51mm mesh size.

In brief, the evidence was that Mr Yasso admitted to owning the net in question and to using it to fish on the day in question. He claimed that fishing in this way in the area concerned was a tradition of the Darumbal Aboriginal people, that he had been given permission to fish in this manner by a Darumbal elder and that the area concerned was the traditional country of the Darumbal. The elder concerned confirmed this in evidence. However, the evidence given in this case of use of nets like the one Mr Yasso had in his possession only went back 30 years. Further, the chairman of a body claiming to act as the 'representative' of the Darumbal people, the Darumbal-Noolar Murree Aboriginal Corporation (the corporation), gave evidence that while nets were traditionally used by the Darumbal people for fishing, the corporation had met with the Marine Park Authority and agreed to stop the use of gill nets in the area where Mr Yasso had been fishing. However, there was evidence that not all Darumbal people considered they were bound by decisions of the corporation. Their Honours were divided on whether using a gill net was an acceptable modification of Aboriginal traditional (see below)—at [19] to [26], [50], [93], [115], [116] and [152].

In 2003, Mr Yasso was found not guilty in the Rockhampton Magistrates Court. The magistrate concluded that Mr Yasso was acting as an Aborigine under s. 14 of the Fisheries Act i.e. in the traditional way of an Aborigine taking fish by means of a net. The respondent, an officer of the Queensland Department of Primary Industries, successfully appealed to the District Court, which held that:

- section 14 of the Fisheries Act had no application to a charge under s. 84 of that Act;
- if s. 14 did apply to s. 84, on the evidence Mr Yasso was not an Aborigine;
- if Mr Yasso was an Aborigine, there was no evidence that he took fish under Aboriginal tradition;
- the *Native Title Act 1993* (Cwlth) (NTA) had no application to a charge under s. 84 of the Fisheries Act—at [2].

The essence of Mr Yasso's appeal was whether the District Court was right in overturning the magistrate's finding that he was not liable under s. 84 of the Fisheries Act because of s. 14. Section 14 of the Fisheries Act, headed 'Aborigines' and Torres Strait Islanders' rights to take fisheries resources etc' relevantly provides, subject to certain conditions, that an Aborigine may take, use or keep fisheries resources, or use fish habitats, under Aboriginal tradition. The Court of Appeal approached the matter by examining several key issues, including:

- the correct interpretation of s.14;
- Mr Yasso's Aboriginality;
- the meaning of 'Aboriginal tradition'.

The correct interpretation of s.14

A majority of the court concluded that s. 14 of the Fisheries Act applied to an offence under s. 84 of the Fisheries Act—at [37] and [81] (McMurdo P) and at [129] (Fryberg J), with McPherson JA dissenting.

Mr Yasso's Aboriginality

Mr Yasso identified with both the South Sea Islander community and the Darumbal Aboriginal community. McMurdo P considered there was 'ample' evidence to support the magistrate's finding that Mr Yasso was an Aborigine:

> That word should be given its ordinary meaning subject to the assistance given in the Acts Interpretation Act 1954 (Qld) and relevant judicial interpretation. It does not require an ethnological inquiry of a scientific, historical or scholarly character ... . Pertinent considerations are whether the person said to be an Aborigine is of Aboriginal descent, identifies himself or herself as an Aborigine and is recognized in the Aboriginal community as being an Aborigine—at [38].

The President was of the view that there was 'undisputed' evidence of Mr Yasso's Aboriginal descent through his grandmother, a Darumbal woman, and that it could be inferred from other evidence that he identified as a Darumbal person and was recognised as Darumbal by Darumbal people. Therefore, the magistrate was reasonably entitled to find that Mr Yasso was an Aborigine—at [38].

McPherson JA and Fryberg J agreed, although both were somewhat less impressed with the evidence—at [81] and [133] respectively.

Fryberg J commented that:

> Mr Yasso gave evidence that he was a Darumbal person, and on that point he was strongly challenged [including by some Darumbal people]. His evidence was not particularly impressive. His grandmother was Darumbal (and therefore his father was half Darumbal) and, putting it at its highest, he himself identified as Darumbal in addition to his identification as a South Sea Islander. Against him was the fact that he had initially described himself when intercepted by the fishing inspectors only as a South Sea Islander...although later in the conversation he described his ancestry as "aboriginal and South Sea Islander"; he had been accepted only as an associate member of the Aboriginal Corporation created to represent the Darumbal people, when he would have been accepted as a full member were he perceived by the Darumbal as one of themselves; and he seemed to have had little contact with the Darumbal people. As Mr Hatfield [chairman of the corporation] said, apparently with some vehemence:
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> [Mr Yasso] ... didn't assert any Darumbal heritage that night. ... Why didn't he say that [he was Darumbal] when he applied for membership? All of a sudden he's caught fishing, he's in trouble and 'I'm a traditional owner, you know.' So, you know, you've really got to get your facts in order, eh?
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> Mr Yasso denied going to the meeting and denied that conversation. An adverse finding would not have been surprising. But the magistrate did not find adversely to Mr Yasso. He believed him. Mr Yasso was entitled to the benefit of that finding on the appeal to the District Court. ... There is no suggestion that the case falls into that unusual category where an appellate court may reverse a finding made at first instance based on an assessment of credibility—at [138], footnotes omitted.

The meaning of 'Aboriginal tradition'

Their Honours considered at length whether there was sufficient evidence that Mr Yasso was in possession of the net the subject of the charge 'under Aboriginal tradition' so that the prosecution had established the element in the charge of unlawfulness—at [39], [80], [82] and [134].

The evidence before the magistrate as to the traditional fishing rights on which Mr Yasso claimed to rely was not extensive. However, in McMurdo P's opinion:

> [T]he definition of "Aboriginal tradition" in the *Acts Interpretation Act 1954* (Qld) does not require the establishment of native title under the common law ... but refers to "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people". The ordinary meaning, consistent with the dictionary, definitions of "tradition", is "the handing down of statements, beliefs, legends, customs, etc., from generation to generation, especially by word of mouth or practice—at [47], footnotes omitted.

Fryberg J considered that this was not a case involving 'situations where the very existence of an aboriginal [sic] tradition, as well as its characteristics, were in issue'. It was not a test case on native title:

> This case involved a prosecution for a relatively minor breach of the Fisheries Act. It arose in a context where local aborigines [the Darumbal people], with the support of the

> Department [of Primary Industries], were trying to protect their traditional fishing ground from those whom they regarded as outsiders. It occupied less than a day in the ... Magistrates Court. The magistrate delivered an ex-tempore decision, for which he is to be commended. The parties were under no obligation to turn the case into an expensive preview of proceedings which might be expected to take place on the hearing of the pending native title claim of the Darumbal people. ... This court should be astute to prevent the loser from belatedly attempting to widen the ambit of the issues, particularly when the attempt is made by fresh counsel on the basis of an error imputed to his predecessor—at [137].

His Honour was of the view that 'tradition' in the statutory context relevant to this case:

> [N]eed not find its expression in or be sanctioned by rules; need not be traced back to any particular year (whether 1788 or 1828); and, most importantly, need not give rise to a right or interest or any kindred concept, or even be recognised by the common law—at [140]. (His Honour is referring here to some of the elements of proof of a native title claim.)

McPherson JA, in dissent, was of the opinion that the meaning of 'tradition' in the Fisheries Act must be read so as to be consistent with the NTA, otherwise it would be invalid through operation of s. 109 of the Commonwealth Constitution—at [90].

Note that the NTA does not define 'tradition'. Rather, it has been given its content in the context of the NTA through High Court interpretation—see for example, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) at [46] and [87].

Whether Mr Yasso was taking or catching fish 'under' (which his Honour took to mean 'by virtue of') Aboriginal tradition was 'the real question'. McPherson JA felt the evidence did not demonstrate:

> [A]n Aboriginal tradition of using 50 m long drag nets to catch fish in 1828 or at any time prior to 30 years ago, and none at all to show that monofilament nets of the dimensions here in question (50m with a 51mm mesh size) were ever used as part of that tradition; or what quantities and for what purposes fish might be taken under that tradition—at [82] and [91].

His Honour was of the view that: 'A generation is usually computed at 30 years ... . Thirty years of usage does not prove a tradition or usage that has passed from generation to generation'—at [90].

Burden of proof

McPherson JA and Fryberg J (McMurdo P dissenting) considered that the legislature intended to place the burden on Mr Yasso of proving on the balance of probabilities that he was an Aborigine acting under Aboriginal tradition—at [43] and [94] to [97].

Decision

The appeal was allowed with costs to be assessed.

Comment — s. 211and meaning of 'native title holder'

Mr Yasso was not legally represented at any stage of the proceedings. His case at trial and on appeal was principally directed toward establishing that the Fisheries Act did not prohibit him from having possession of the net because s. 211 of the NTA applied. Indeed, when originally confronted by a fisheries inspector, Mr Yasso produced 'a laminated double-sided page' containing a copy of s. 211 and indicated that he believed this entitled him to use the net in question—at [19], [112] and [156].

The prosecutor submitted to the magistrate that s. 211 had no application because Mr Yasso was not a 'native title holder' within the meaning of that Act and 'you only become a holder once the Federal Court has made a determination or an agreement's been reached ... by consent and the Federal Court has okayed it': see s. 224 of the NTA. On the evidence there were only claimants under the NTA. Both the magistrate and the District Court judge accepted that submission, despite the fact that Murrandoo Yanner successfully relied on s. 211 in High Court proceedings prior to any determination by the Federal Court recognising him as a native title holder—at [117], [119] and [155] and see *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53.

While the Court of Appeal did not decide the question of whether or not s. 211 applied, McMurdo P and, arguably, McPherson JA apparently agreed with the lower courts' interpretation of 'native title holder'. However, Fryberg J took the view that this was 'wrong' because: 'A decision of the Federal Court on a native title application is declaratory of the existing position' but his Honour said 'nothing' about whether or not a s. 211 'defence' may have been available in this case—at [5], [73] and [155].