

**IN THE DISTRICT COURT
AT OPOTIKI**

**I TE KŌTI-Ā-ROHE
KI ŌPŌTIKI**

**CRI-2019-047-000102
[2020] NZDC 10096**

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

RENATA RUHA TE MOANA
Defendant

Hearing: 27 May 2020

Appearances: M Dunn for the Prosecutor
L Hemi for the Defendant

Decision: 30 June 2020

RESERVED DECISION OF JUDGE I D R CAMERON

[1] In a reserved decision of 11 October 2019, I declined the defendant's application for a discharge without conviction. A conviction was duly entered against the defendant on 9 January 2020. The charge is being a commercial fisher, the defendant used approximately 70 rock lobster pots that had escape apertures for undersize rock lobsters with inside dimensions of less than 54 mm wide.

[2] The defendant now submits that there are special reasons relating to the circumstances of the offence which apply. Pursuant to s 255C(2) Fisheries Act 1996, the rock lobsters and the vessel used in the commission of the offence are subject to automatic forfeiture unless special reasons apply.

[3] The facts in relation to this matter are fully set out in my written decision of 11 October 2019, and I do not intend to repeat them in any detail.

[4] For the purposes of this application, the defendant submits that the special reasons relate to the method of construction of the escape apertures. In particular, that of the 70 lobster pots seized that were non-compliant, the vast majority of those were for the reason that weld knobs on steel joints protruded into the apertures, reducing the apertures' width between those welds to less than the mandatory 54 millimetres. The defendant gave affidavit evidence that the only reason those welds were added was to eliminate the sharp edges of the ends of the steel bars where they met the aperture. The defendant's evidence was that the removal of the sharp ends in this way was solely to avoid damage to rock lobsters when exiting or entering such apertures.

[5] In other words, that the addition of the weld knobs was for the benefit of the rock lobster industry. Conversely, the vast majority of pots would have been compliant with the minimum escape aperture width had the welds not been added, accompanied with the risk of damage to the undersized rock lobsters.

[6] Hence Mr Hemi's submission is that the defendant ought not to be penalised for taking measures designed to protect the safety of rock lobsters, and that these circumstances amount to special reasons as to why forfeiture ought not to apply.

[7] The difficulty with that argument is that it undermines the whole purpose of the Fisheries (Commercial Fishing) Regulations 2001. Regulation 79 provides that an escape aperture must not have inside dimensions of “less than 200 mm long and 54 mm wide”. This is a crucial regulation designed to allow undersized rock lobsters to escape pots prior to them being lifted. The material before the Court discloses that the reason for providing for their escape prior to the pots being lifted is the risk of a black market for undersized crayfish, of those crayfish being released into a new geographical area which may not be suitable, the risk of damage to those rock lobsters from larger rock lobsters within the same pot, and the risk of predation on those undersized rock lobsters after they are released from the surface and before they gain the relative sanctuary of the sea bed.

[8] In terms of the facts of this case, detailed in my reserved decision of 11 October 2019, an educational visit by Fisheries officers to the defendant took place on 1 August 2018. The defendant’s pots were found to be non-compliant in terms of minimum sized apertures. The defendant was instructed to rectify the pots before using them again. Importantly, the Fisheries officers left with the defendant a wooden measuring block being of the same dimensions as a legal sized aperture. The purpose of this was so that the defendant could test each aperture by placing the measuring block against the aperture – if it was able to pass through, then the aperture was legal, and vice versa.

[9] Fisheries officers offered to revisit the defendant to check for compliance prior to the use of those pots, but the defendant declined such offer. He states that the reason was that he was anxious to get underway with that season’s fishing. However, the fact remains that had he co-operated more fully then he would have avoided his present predicament.

[10] Mr Hemi in his submissions made much of the fact that para 18 of the defendant’s affidavit states that in all his many years of rock lobster fishing he has never seen a crayfish caught sideways between an escape aperture. He further states that as a result he does not believe that the small rounded knobs in anyway compromised the ability of undersized crayfish to exit through the escape aperture.

Mr Hemi states that it is highly significant that the Ministry for Primary Industries has provided no evidence to the contrary.

[11] The difficulty with this argument is that it does not follow from never having seen a crayfish caught sideways between an escape aperture that undersized crayfish were able to exit through the defendant's non-compliant escape apertures. The reality is that the smaller the width the more difficult it would be for an undersized crayfish to pass through, irrespective of whether or not a crayfish might get stuck in the aperture.

[12] I accept Mr Dunn's submission that there is a need for deterrence in respect of non-compliant pots. I also accept his submission that there is nothing out of the ordinary in the circumstances of this case. The defendant had the opportunity to make his pots compliant, he declined the opportunity for a reinspection, and when subsequently 70 of his pots were found to be non-compliant for a second time he then was able to make them compliant over a weekend so as to receive them back under a bond. There is nothing out of the ordinary in those circumstances. Also, the submissions by defence that the defendant was doing a good thing for the industry by adding the welds so as to eliminate the risk of injury to undersize crayfish overlooks that the defendant created the situation himself by his method of construction of the apertures leaving sharp edges. The regulation is clear. The defendant had a measuring block to ensure compliance, but by his own actions created apertures that remain non-compliant. I add for completeness that the apertures of some of the pots were non-compliant for reasons other than the presence of weld knobs, although the number of pots in that category was undetermined.

[13] For all these reasons, I do not accept there were special reasons surrounding the commission of this offence. Accordingly, and in accordance with s 255C(2) Fisheries Act 1996, the non-compliant lobster pots and the proceeds of sale of the rock lobsters caught by them, and the vessel used in the commission of the offence, are now forfeit to the Ministry for Primary Industries.

[14] I note that counsel will discuss matters such as the level of any fine and the extent of any relief against forfeiture and advise the Court in due course.

I D R Cameron
District Court Judge