

**IN THE DISTRICT COURT
AT NELSON**

**CRI-2017-042-001031
[2018] NZDC 3942**

MINISTRY OF TRANSPORT
Prosecutor

v

ADAM ALEXANDER DUFF
Defendant

Hearing: 28 February 2018

Appearances: J R T Crawford for the Prosecutor
D J C Russ for the Defendant

Judgment: 28 February 2018

NOTES OF JUDGE I G MILL ON SENTENCING

[1] Mr Duff has pleaded guilty to a single charge of, being a master of a ship, that he conducted fishing operations in a protected area. The maximum penalty in respect of this offence is a fine not exceeding \$100,000.

[2] The summary of facts that I have is very detailed, and somewhat complicated, so I will attempt to summarise it.

[3] Transpower is the owner and operator of New Zealand's high voltage electricity transmission grid, and this includes the submarine power cables and telecommunication cables that run through Cook Strait, connecting the South and North Islands. This area, which is within what is known as area 7, Cook Strait, is a protected area, and generally, and for the purposes of this prosecution, fishing and

anchoring is strictly prohibited in this particular area which is the cable protection zone called the CPZ.

[4] Because of the nature of the seabed, the cables lie on the exposed bed itself. The cables provide 15 percent of the North Island's electricity, and can provide more in certain circumstances, and also there are fibre optic communication cables along the same link. The cables, of course, are armour coated but are susceptible to damage, and it is quite clear that the likely costs of repairing a damaged cable are enormous, and the time to do so would be considerable, particularly in respect of the electricity cable but also the fibre optic cable. The consequences of a damaged or ruptured cable are not worth contemplating, as they are very serious.

[5] It is possible, therefore, that fishing operations can damage the cable without the crew being aware of this. This can come about because parts of the cable are suspended because of the irregularity of the seabed, and are vulnerable to fishing equipment and anchors. However, it is well known that lesser contacts can cause damage which, over time, causes serious damage to the cable, and items such as lobster pots or hooks can damage the cable, and expose the armour to further corrosion.

[6] The need for people to remain outside this area, or at least not to fish within this area, is well known, and Transpower has taken considerable steps in informing those likely to use the area, and others, of the protection area.

[7] On 20 June 2016 Mr Duff, who is a commercial skipper of a fishing boat, was fishing near the area. A protection officer on board a patrol vessel noticed him, or at least two red floats on the surface of the water inside the protected zone. Various steps were taken after this, and there was regular communication over the period from 8.43 onwards between the officer and Mr Duff to recover the floats and retrieve the gear. There was various information set forth in the summary of facts as to how this came about, and it seems that at that time Mr Duff informed the officer that he had set the gear a mile south of the zone, but the tide had drifted the other way and the lines had gone into the area.

[8] He was instructed to sever lines and recover floats, but some of the gear, including anchors and lines with hooks on them, have not been recovered.

[9] Mr Duff has been fishing for many years, and told the officer at the time he had been fishing in this manner for 16 years, and he knew about the cables on the seabed. Naturally enough, given the possible consequences of damage from anchors and other fishing gear, Transpower were very concerned about the recovery of the equipment that was unaccounted for as a result of the cutting of the lines. A helicopter search for lines and buoys was implemented at considerable cost. No equipment was located, and during a routine submarine inspection an extension of that inspection was arranged at considerable cost, and no equipment was located, and no damage was detected during that time.

[10] I have had considerable written submissions made to me, and oral submissions today, which have been very helpful indeed. But the major difference between the prosecution and the defence is the starting point for a fine, and what I should assess Mr Duff's culpability at, the prosecution suggesting this was gross recklessness on Mr Duff's part to pursue his fishing operation in relatively close proximity to the zone, in an area where changeable conditions occur, and not allowing for that, and therefore having the equipment dragged into the zone and then having to be cut free is, in the prosecution's submission, recklessness.

[11] The prosecution submit to me that the dominant purpose in sentencing for offences such as these is to denounce the offending and deter the defendant and others, and that I do have to take, however, into account his financial capacity when determining the fine.

[12] As far as the awareness of risk and deliberateness is concerned, which is the main area of contention here, although the informant accepts his explanation that he set the gear out of the zone, it is submitted that he was well aware of the location and the restrictions, and should have been aware of the changeable nature of the environment, and compensated for that. It is accepted that the vessel itself which was fishing was over 500 metres from the cable, but of course the lines and the other equipment had drifted in.

[13] As of the concerns raised in the mind of Transpower, there was considerable cost involved in trying to locate the unrecovered equipment. It is submitted by the prosecution that conducting a fishing operation near the zone should be done while allowing for tidal changes. Ms Crawford this morning has submitted that there is a reasonable inference to be drawn that Mr Duff was pursuing a successful fishing programme, having had success the previous day, and was essentially pushing closer to the zone because he felt he would have more success.

[14] Mr Duff will be entitled to a discount for a guilty plea, and any other matters that are mitigating in the circumstances.

[15] A range of cases have been put before me in relation to similar offending, and it seems that fishing in the zone has come to the notice of the District Court at least on a number of occasions. These cases are very helpful, but of course every case must be determined on its own facts and my assessment of the circumstances and the culpability.

[16] In the case of *R v Watson*¹ Mr Watson had towed approximately 15 metres of net in the water in the protected area for the purpose of repairing his net for fishing. He then pulled the net in, and travelled outside the zone and began fishing. A starting point of \$17,000 as a fine was adopted, and a small discount for his previous good record.

[17] In *Ministry of Fisheries v Alfred Fishing Limited*² again fishing in the protected area was detected around 3.00 am, and it was accepted that the fishing equipment had been deployed at some point inside the zone. It was accepted that the fishing gear never left the surface of the water. A starting point of \$20,000 was adopted in that case in the Nelson District Court, increased because of previous offending.

[18] Again, in the case of *Ministry of Transport v MacDonnell*³ the fisherman had deliberately set crayfish pots in the zone, and had previously been spoken to about doing that, and in that case \$30,000 was considered to be the appropriate starting point,

¹ *R v Watson* DC Auckland CRI-2011-090-6041, 3 December 2013.

² *Ministry of Fisheries v Alfred Fishing Limited* DC Nelson CRI-2008-042-1047, 14 May 2009.

³ *Ministry of Transport v MacDonnell* DC Blenheim CRI-2010-006-1842, 30 November 2010.

and therefore the prosecution submit to me that a starting point in the region of \$30,000 would be appropriate in this case, and that it is at the upper end of the sort of cases that I have been referred to.

[19] It is noted, and this is important, that no action is taken against the owner of the vessel, and no forfeiture is sought in spite of the seriousness of the offending.

[20] In submissions today, Ms Crawford emphasised the potential risks to the cable presented by the facts in this case as the prosecution see them. The possibility that, given the strong tides and conditions in Cook Strait, the anchors and other equipment could drift into the area if they are not already there, there is the potential for significant damage to occur. She emphasised that this was commercial fishing, and therefore one would expect a professional approach to risk-taking, that the risk in this case was not remote, and that the culpability could not be described in terms of carelessness but recklessness.

[21] It is suggested by her that the risk from unrecovered equipment cannot be underestimated, and that the amount of money that Transpower has expended on searching for the equipment is directly relevant to the risk perceived in this case.

[22] Mr Russ, on behalf of Mr Duff, describes in his submissions how the long lines actually were used by the vessel, and how they were set out with buoys and anchors and risers, and really emphasises in his submissions that not all of the gear that was released under instruction at the time, by cutting the lines, was either in the zone or would have gone into the zone, and that the initial setting of the lines was well within the compliance policy of the company itself, and the exemptions that it had. And so the gear was set responsibly and, at that time, there was a strong southerly wind, and the tide was setting in a southerly direction, and the lines were well clear of the zone.

[23] His submission is that Mr Duff observed one set of buoys had floated into the zone later, and he began retrieving the gear, and was contacted by the Transpower vessel and ordered to cut the gear free, which he did, and he emphasises the limited amount of gear that was actually cut free in the zone. He emphasised that in those circumstances the perceived recklessness by the prosecution is unfounded, and that

this was carelessness when circumstances worked against Mr Duff, and that he took all steps reasonably possible in the circumstances to minimise the risk, that he cut the gear free upon instructions, and that although one can appreciate the concern that Transpower had, there is little or no evidence of any great potential risk to the cable because most of the gear was either recovered at the time or would have sunk in an area outside the zone. He emphasises that it is not an offence to fish outside the zone, and any other gear lost would be in the same position.

[24] He submits to me that the *Watson* case is the most similar case from those cited to me. A starting point of around \$17,000 would be appropriate. Both counsel agree that a discount of 25 percent should be available for a guilty plea, notwithstanding the delays involved which are explicable, and that I need to consider Mr Duff's financial position so far as it is known to me.

[25] It is emphasised that Mr Duff is an experienced skipper, aware of the policy his company has, aware of the proximity he was into the zone. It was just an unfortunate series of events that occurred that make him guilty of this offence.

[26] So, on the one hand, we have clear evidence of him fishing, albeit not necessarily intentionally for a start in the zone or at least having fishing gear in that zone, of some of that gear being cut free in the zone and the potential for damage, and that any damage to the cable must be viewed as extremely serious, and any potential for damage also serious.

[27] So what I make of that is that I think it is to overstate Mr Duff's culpability to say this is gross recklessness. It is understating it to say it is simply careless. I think it is careless, but it is seriously careless given Mr Duff's experience and the conditions in which he was fishing, and his knowledge of the zone being close by.

[28] In this case, fishing gear was released in the zone. There is a potential for damage, although none has been detected. In my view, assessing it as best I can on the facts in front of me, the starting point so far as the fine is concerned is one of \$25,000. In this case there is very clear evidence of Mr Duff's co-operation both at the time and since the incident. There is also evidence of his previous good character

as far as these activities are concerned and, in my view, there should be a discount allowed for those matters before taking into account the guilty plea.

[29] For those factors which I consider to be mitigating I allow a reduction of \$5,000 to a \$20,000 fine, from which I deduct 25 percent for his guilty plea, making a fine of \$15,000 appropriate.

[30] The remaining issue is his ability to pay the fine. I do not have a lot of information concerning that, but it is clear that he is in gainful employment as a skipper of some experience and no doubt in demand, that he appears to have a modest income and has sole responsibility for the support of his family, and it appears some financial strain in respect of his property as a result of damage from Cyclone Fehi.

[31] As best as I can ascertain, he would have to pay the fine off over a period of time, but I will make a small allowance in respect of his ability to pay when coming to the final assessment of the fine.

[32] Taking into account his limited resources, my final decision therefore is that he is convicted and fined \$12,000 with Court costs of \$130, and is to pay a solicitor's fee of \$500.

I G Mill
District Court Judge