

04/74

SUPREME COURT OF VICTORIA

CLARKE v MILOJEVIC

Gillard J

23 July 1973

EVIDENCE – CHARGES IN RELATION TO THE TAKING OF UNDERSIZE ABALONE – METHOD OF MEASURING ABALONE – MEASURING INSTRUMENT USED – ACCURACY OF – STATEMENT BY INFORMANT THAT MAJORITY OF ABALONE WERE HALF AN INCH UNDERSIZED – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: FISHERIES ACT 1958.

The defendant was charged with six offences under the provisions of the *Fisheries Act* 1958 in relation to the taking of undersize abalone.

[Ed. A great deal of the judgment deals with a gap in the proof identifying the particular batch of abalone the concern of three of the informations. In the judgment, Gillard J made reference to the acceptability of producing the Admiralty Charts in order to fix the point at which the offences occurred as being in Victorian waters the purpose of Section 75 of the Act. The question of the measurement of abalone by "an abalone rule" and the accuracy of that rule was a matter in issue.]

The Magistrate dismissed the charges. Upon order nisi to review—

HELD: Order absolute. Informations referred to the Magistrates' Court for re-hearing.

1. **There was sufficient proof given of its accuracy by relevance to the measurement from the engineer's rule, from the robustness of its construction, and from the care taken of it. But, quite apart from the question of the measurement by the abalone rule, the important evidence to the prosecution's case was the statement by the witness that allowing for a margin of error in favour of the fisherman the abalone was from half to one inch undersize with a majority only being half an inch undersize.**

2. **That evidence, given without objection, was until rebutted clear proof that the fish were undersize. Therefore there was a *prima facie* case calling upon the defendant to give an answer to the allegation of the prosecution.**

3. **Accordingly, the order nisi in each case should be made absolute on the basis that there was evidence to establish a *prima facie* case, and the informations should be referred back to the Magistrate for re-hearing.**

GILLARD J: ... The inspector was then cross-examined by the legal representative of the defendant and he was asked what instrument he used to measure the abalone, and he said it was his abalone rule, and he was asked, "When was the last time you checked the rule?" and the witness said "About 12 months ago." He was then asked, "How do you know it is accurate?" He said, "Because the steel engineer's rule I checked it against proved this."...

In re-examination he was asked to provide the Court with a detailed description of the abalone rule used on the occasion. The witness replied "The rule is an alloy aluminium casting, triangular in shape, about half inch thick with raised lugs about three quarters of an inch high on each corner which are part of the casting. Between each raised lug the facing is machined square with the base plate, or at least it appears to be square with the base plate. Between each raised lug there is the appropriate measurement, also formed in raised casting.

There are three different measurements on the instrument, four inches, four and a half inches and four and three quarter inches. Also part of the raised casting are the words 'Fisheries and Wildlife Dept. Vic'. It is a very robust construction. It was made about three years ago." He said he did not know where it was made but it was issued by the department. He was then asked this question, which I feel is completely damning to the defendant's submissions. 'What was the degree to which the fish were undersize?' The witness replied, 'From half an inch to one inch undersize with the majority only being half inch undersize.'

In an answering affidavit it is suggested that in that last question the witness also said, "There is a margin of error allowed in favour of the fisherman." From that it was urged that the abalone rule must be regarded as defective, or alternatively that proof must be given of its accuracy.

In my view there was sufficient proof given of its accuracy by relevance to the measurement from the engineer's rule, from the robustness of its construction, and from the care taken of it. But, quite apart from the question of the measurement by the abalone rule, the important evidence to the prosecution's case was the statement by the witness that allowing for a margin of error in favour of the fisherman the abalone was from half to one inch undersize with a majority only being half an inch undersize.

In my view, that evidence, given without objection, was until rebutted clear proof that the fish were undersize. Therefore there was a *prima facie* case calling upon the defendant to give an answer to the allegation of the prosecution. It seems evident, from what I have been told by Mr Liddell, that in any future hearing evidence will be given to rebut the evidence given by the prosecution. Accordingly, in my view the order nisi in each case should be made absolute on the basis that there was evidence to establish a *prima facie* case, and the informations should be referred back for re-hearing.
