



SC/CRIM/02/1988

JUDGMENT

Regina

v

Sei-Jung Kim

Before
D.R. Davis, Chief Justice

GIVEN ON

2nd August 1988

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Supreme Court of the Falkland Islands

Review Case no. 2 of 1988

REGINA v. SEI-JUNG KIM

(Magistrate's Court Criminal Case no.

MC/CRIM/22/88)

JUDGEMENT ON REVIEW

Captain Sei-Jung Kim appeared before the Summary Court in Stanley on the 29th April 1988 charged with the following offences:-

- "(1) That you were the master of a certain fishing boat, namely the No. 5 Chun Yong, which was not authorised to fish by a licence granted under the Fisheries (Conservation and Management) Ordinance 1986 and which was fishing in the fishing waters at 49 degrees 38minutes South, 59 degrees 44.30 minute West on 25 April 1988 CONTRARY TO SECTION 4 (1) FISHERIES AND MANAGEMENT Ordinance 1986
- (2) That you, being the master of a certain fishing boat, namely the No. 5 Chun Yong, that had fish on board, did fail prior to the entry of the boat into the fishing waters on or before the 25 April 1988, to notify a Fisheries Protection Officer of the amounts, descriptions, sizes and presentation of fish on board the boat. CONTRARY TO SECTION 5 (1) (a) FISHERIES (CONSERVATION AND MANAGEMENT) ORDINANCE 1986"

Captain Sei-Jung Kim pleaded guilty to both counts and was sentenced by the court on Count (1) to a fine of £75,000 and the confiscation of his vessel's catch, and on Count (2) to a fine of £5,000.

It appears that on the evening of the 25th April 1988 the vessel No. 5 Chun (or Chung) Yong was observed by a Falkland Islands Government Fisheries patrol boat to be fishing within the Interior Conservation and Management Zone (referred to henceforth as "the Zone" of the Falkland Islands fishing waters, as defined in section 2 of the Fisheries (Conservation and Management) Ordinance 1986 (henceforth referred to as "the Ordinance"). The "Chung Yong" (as I shall call her) was amongst other vessels which were also fishing. The first of these vessels to be checked by the master of the patrol boat was found to be licensed to fish in the fishing waters, but the "Chung Yong" was found not to be licensed. The patrol boat therefore approached the "Chung Yong" which immediately stopped fishing and set off towards the perimeter of the Zone. The patrol vessel pursued the "Chung Yong" displaying her blue beacon, with her searchlight directed onto the "Chung Yong" and calling repeatedly on the "Chung Yong" to stop. After about one hour the "Chung Yong" indicated that she intended to comply with the patrol boat's order and she was ordered to make towards Port William. She complied.

In mitigation of the offences, Captain Shakesby of Sullivan Shipping Services, who appeared in the Summary Court on behalf of Captain Sei-Jung Kim, said that the "Chung Yong"

satellite navigation equipment had been out of order since the 20th April, that Captain Sei-Jung Kim had not therefore been able to fix his position accurately and on finding himself amongst a group of fishing vessels engaged in fishing, assumed, wrongly that they were outside the Zone and consequently started fishing himself. Captain Shakesby said that Captain Sei-Jung Kim now realised that he had been negligent in not ascertaining his position from the other fishing boats amongst whom he had found himself.

In an undated letter received by the Attorney General on the 16th May 1988, Mr P.S. Butler, a solicitor representing Captain Sei-Jung Kim, wrote to the Attorney General asking that the record of the proceedings in the Summary Court against Captain Sei-Jung Kim be referred to the Supreme Court for review. Mr Butler based his request on two grounds:-

- (1) that the fines totalling £80,000 and the confiscation of the "Chung Yong's" catch worth £37,500 had been imposed without any inquiry into Captain Sei-Jung Kim's means. He gave Captain Sei-Jung Kim's gross earnings for 1988, comprising his basic salary and share of fishing profit, as being unlikely to exceed £13,200. Out of those earnings Captain Sei-Jung Kim would have to pay tax in the region of £1,100, leaving him around £12,100 to support himself, his wife, two dependent children and his father. He stated that Captain Sei-Jung Kim had no capital assets;
- (2) that statements made to the Summary Court by the prosecutor as to the profitability of squid fishing in the Falkland Islands' fishing waters in April were inadequate and misleading, and he explained why.

As to ground (1), in a subsequent case in the Summary Court against Captain Sei-Jung Kim it was established that the defendant's annual income for 1988 was £12,872 on which Mr Butler told the court he believed the defendant might have to pay tax in the region of £1,000 but he was not entirely sure of this.

The Attorney General, in a letter to me forwarding Mr Butler's request for a review of the proceedings against Captain Sei-Jung Kim, said that he did not dispute that Captain Sei-Jung Kim's means and circumstances were as stated. The Attorney General agreed that the "Chung Yong's" catch of 175 tons was repurchased by the vessel's owners for £37,500 and he agreed that this gave the catch a value of £214 a ton. The Attorney General agreed that the Summary Court had not inquired into the means of the defendant (as, in his view, it should have done) before sentencing the defendant to the payment of a fine.

It is a well-established principle of sentencing that once a court has decided that it can properly deal with an offender by fining him, the amount of the fine should be determined by the gravity of the offence - with particular reference to the profit the offender may have received from it - and then reduced if necessary to a sum within the offender's means - see the 42nd edition of Archbold's Criminal Pleading, Evidence & Practice paragraph 5 - 108, citing R. v. Ashmore [1974] Crim. L.R. 375, R. v. Baxter [1974] Crim.L.R. 611 and R. v. Thompson [1974] Crim. L.R. 720.

It is also well-established that it is wrong in principle to sentence an offender to the payment of a fine which is beyond his own capacity to pay on the assumption that someone other than the offender would pay the fine - see R. v. Lewis [1965] Crim. L.R. 121 and R. v. Baxter cited above.

As with an appeal against sentence, in exercising the powers of review conferred on me by section 53A of the Administration of Justice Ordinance, I should not interfere with the sentence passed by the Summary Court unless that sentence was manifestly excessive or wrong in principle.

In the case under review it is not disputed by the Crown that the defendant's present annual income is in the region of £12,100.

Taking into consideration (as the Summary Court clearly did) the large profits to be made from fishing in the Falkland Islands' fishing waters, the difficulties of patrolling the fishing waters to prevent fishing by unlicensed fishing vessels and the consequent need to impose a deterrent sentence, to impose on an individual on Count (1) of the charge a fine of £75,000 and on Count (2) a fine of £5,000, without inquiring as to Captain Sei-Jung Kim's means, was not only wrong in principle but was manifestly excessive as a sentence. Furthermore some credit in assessing sentence must be given to the defendant's plea of guilty to the charge. An appropriate sentence, in my view, in all the circumstances (and I take into consideration the points made by Mr Butler in Ground (2)), would be a fine of £2,000 on Count (1) and a fine of £500 on Count (2), and I substitute fines for those amounts for the fines imposed by the Summary Court. Consequentially, I direct that the balance of £77,500 of the fines imposed by the Summary Court, if already paid, be refunded.

I make no alteration to the order of the Summary Court that the catch of the "No. 5 Chung Yong" be confiscated, and this is accordingly confirmed.

2nd August 1988


D.R. Davis

Chief Justice.