Judgment 3/2004 **Law Officers of the Crown v The Constables of Sark & Anthony Gilman – Royal Court, 19 January 2004**

Criminal convictions – Court of the Seneschal of Sark – application by the law Officers to Royal Court to quash convictions – Human Rights – Fishing (Sark) Ordinance, 1996 – summons lacking in detail and bad for duplicity – convictions quashed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 19th day of January, 2004 before Sir de Vic Carey, Bailiff; sitting alone.

In the action of THE LAW OFFICERS OF THE CROWN against THE CONSTABLES OF SARK ("the Constables") and ANTHONY GILMAN ("Mr. Gilman") in the terms attached hereto;

THE COURT, having heard Advocate P. Robey for the Crown and in default of appearance by the Constables and Mr. Gilman GRANTED the application QUASHED the convictions recorded against Mr. Gilman on the 26th day of November, 2003 by the Seneschal of Sark, and ORDERED that the Report of Proceedings in the terms attached hereto to be placed on record together with the Grounds for quashing the convictions;

AND THE COURT FURTHER ORDERED that all fines paid by Mr. Gilman be returned to him together with all goods confiscated from him;

AND THE COURT MADE no order as to costs.

S.M. SIMMONDS
Her Majesty's Deputy Greffier

LAW OFFICERS OF THE CROWN

ACTION

THE CONSTABLES OF SARK

("The Constables")

and

ANTHONY GILMAN

("Mr Gilman")

REPORT OF PROCEEDINGS

The facts

1. On the 7th November 2003 Roger James Sendall a British Sea Fisheries Officer was on a routine fisheries patrol aboard Fisheries Protection Vessel 'Leopardess'. Visibility was good and the sea state was rather rough. At 09.00 GMT that day he saw Guernsey registered fishing vessel 'Katrina May' GU 309 attending to static set fishing gear south east of Sark. He noted the position of the vessel and found it to be within Sark territorial waters. He also noted the positions of three end of string pot marker floats, which in his opinion had been deployed by the vessel. These were also within Sark territorial waters.

2. At 09.30 GMT that day he transferred to Leopardesses tender vessel Puma and boarded the Katrina May over her port side at 09.38 GMT in company with Department Officer David Wilkinson. Mr Sendall then spoke to the vessel's skipper Mr Gilman about what he had been witnessed.

3. Mr Gilman was cautioned and asked if he understood why he had been cautioned to which he replied, "… yes for fishing inside the three mile limit…". Mr Gilman went on to say that he had been working two strings of twenty-five parlour pots within the Sark three mile limit earlier that morning. He explained that he had fished the area for around the last ten years.

4. Mr Gilman was then asked to show his fishing diary to the officer, which he did. That confirmed two entries that Mr Gilman explained as being the decca co-ordinates of the two strings of twenty-five parlour pots that he had worked earlier that morning. Those decca co-ordinates tallied with the co-ordinates Mr Sendall had earlier recorded.

5. Mr Gilman was questioned whether or not he was aware of the Sark law that imposed a closed season on fishing for crabs and on using parlour pots. He replied that he was aware of the legislation but that it had never been a problem in the past.

6. Mr Gilman was told that the facts would be presented to the Sark authorities for their consideration and that he should expect to hear from them in due course.

7. These facts are a summary of the statements of Roger Sendall (10th November 2003 and 12th November 2003) and Michael Harris (12th November 2003) which are attached at bundle A.

8. Mr Gilman was subsequently served with a summons (included in bundle A) signed by the Prévôt of Sark. The summons required Mr Gilman,

"To appear before the Sénéschal's Court at the Greffe Office, La Chasse Marais, Sark on Wednesday the 26th November 2003 at 11.30am, to answer charges of contraventions of The Fishing (Sark) Ordinance 1996, Sections 4(1), 12, 13(1) and 13(2)".

The Constable of Sark also claimed costs.

9. It is not apparent that Mr Gilman was provided with any more information as to the nature of the allegation against him prior to the hearing.

10. The hearing convened on the 26th November 2003. Present was Lieutenant Colonel Reginald John Guille MBE Sénéschal of Sark, Alfred William John Adams, Prevôt and John Philip Hamon, MBE, Greffier.

11. The summons was read out to Mr Gilman and the Constable then proceeded to read from the prepared statements, which have been summarised above.

12. When asked how he pleaded to the charges Mr Gilman admitted to the court that he was guilty of the offences. He was then asked by the Sénéschal whether he had any mitigation. He stated that he was aware of the law but had been fishing within Sark waters for at least the last ten years and understood that it was only a gentleman's agreement and that nothing would ever be done about it.

13. The Séneschal then put further questions to the Constable and Mr Sendall, the Fisheries Officer. One of these questions related to the fate of the catch. The court was told that the Officer

and his colleagues on the Leopardess had simply watched the recovery of the strings and had not confiscated the catch. Mr Gilman was able, upon being asked by the Sénéschal, to clarify that the catch was approximately fifty crabs.

14. The Sénéschal then proceeded to advise Mr Gilman of his powers of punishment. He said that the uniform scale of fines in Sark allowed him to impose a level four fine which was £1,000. He indicated this was less than a level four fine for Guernsey. He also referred to his powers to confiscate and seize the catch and/or equipment.

15. The Sénéschal then stated there was no gentleman's agreement and that in appropriate cases persons caught would be brought before the court. Mr Gilman was then sentenced as follows:

- a fine of £2,000
- an order that the Prevôt seize one string of 25 parlour pots from Mr Gilman and place them for sale to the highest bidder with any monies accruing to go the inhabitants of Sark.
- an order for Mr Gilman to pay the Constables costs of £67.
- an order that he pay court costs of £20

16. The wording used in the report of the proceedings when the sentence was imposed is important, and reads as follows,

"The court informed Mr Gilman that it would not on this occasion impose a custodial sentence but would impose a fine of £2,000 (twice level four) for multiple offences of illegal fishing (potting) in accordance with the provisions contained in The Reform (Sark) Law 1951, as amended, in the close season in Sark waters and for the use of parlour pots which are banned at all times in Sark waters".

17. Mr Gilman was given until the 9th January 2004 to pay the balance of the fine and an initial payment of 10% was taken that day.

LAW OFFICERS OF THE CROWN

ACTION

THE CONSTABLES OF SARK

("The Constables")

and

ANTHONY GILMAN

("Mr Gilman")

Grounds for quashing conviction/sentence imposed on the 26th November 2003 in the Court of the Sénéschal of Sark

1. The Law Officers of the Crown submit the below detailed grounds in support of their application. It is submitted that taken together the grounds disclose such a defective criminal process that it is not in the interests of justice for the convictions or sentence to stand and accordingly the court should use its inherent jurisdiction to intervene and quash both. The reference to Items 1-10 is to the documents attached. In putting forward these grounds the Law Officers of the Crown assume no further documentation beyond the summons provided to Mr Gilman.

Grounds

1. The summons fails to comply with the minimum requirements of the *Human Rights (Bailiwick of Guernsey) Law 2000 ('the 2000 Law').*

It is accepted at the outset that *'the 2000 Law'* is not yet in force in Guernsey. However, it is submitted that irrespective of the enactment and enforcement of *the 2000 Law, The European Convention on Human Rights (ECHR)* should be applied in any event. It is at least desirable that all courts within the Bailiwick should operate in accordance with its provisions. Indeed the courts of Guernsey, wherever possible, conduct themselves in a way which is *ECHR* compliant.

The *ECHR* at Article 6 (3) as quoted at paragraph 16-57 of *Archbold 2004* provides,

"Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."

Article 6, paragraph 3(a) of Schedule 1 of the 2000 law (item 1) repeats this providing that everyone charged with a criminal offence has a number of minimum rights including,

"To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

It is submitted that the summons served in this case fails to meet the minimum requirements of that provision because the summons neither properly sets out the detail, nature or cause of the action against Mr Gilman. In particular it fails to notify him of the date of the offence, the nature of the alleged breach under the provisions the *Fishing (Sark) Ordinance 1996 (the 1996 Ordinance)* and the reason why his alleged behaviour contravened those provisions. It is significant that the offences themselves are not straightforward. They each have different elements that must be proven; one contains an important proviso and another a defence. Taken as a whole the wording of the sections would occupy over a page of *the 1996 Ordinance*. In these circumstances the need for detail and clarity in the wording of the summons is paramount. It is not sufficient to ensure compliance with *the 2000 Law* to abbreviate the four allegations in a single sentence, as has been done in this summons. The summons should state the offence and particularise it.

Aside from *the 2000 Law* there is no further guidance in Guernsey on the minimum requirement for the wording or form of such a summons. In these circumstances, it is submitted, recourse can be had to English law which offers helpful guidance.

At paragraph 1-420 of *Stones Justices Manual 2003* (item 2) a summons is required to provide,

'*…such particulars as may be necessary for giving reasonable information of the nature of the charge…*'.

This approach follows the *Magistrates Court Rules* at paragraph 100 (1) attached at item 3. As there is no information in the summons about the nature of the charge it is submitted the summons is defective.

Guidance is further given at paragraph 1-420 (item 2) on the level of information needed to describe the offence which,

'…should be described in the information clearly and definitely without uncertainty. Where a particular act constitutes the offence, it is enough to describe it in the words of the statute…'

It is submitted the summons issued against Mr Gilman fails to meet these minimum requirements. There is no description of the alleged act by Mr Gilman which constitutes the offence. The summons should have at least referred to some information about the conduct observed by the Sea Fisheries Officers or should have used the wording of the *1996 Ordinance* to explain the alleged offences.

One of the key purposes in requiring this detail is to reduce the risk of error and injustice when the summons is put to the accused and the facts then presented to the court. Without reasonable detail there is always a risk that the behaviour alleged (and in this case accepted) does not actually disclose an offence being committed. This is because the court will not be possessed of sufficient detail of the elements of the offence to properly conclude the offence is, on the facts presented, made out and the plea thus proper. This absence of the detail of the allegation also risks injustice to the defendant. For example whilst Mr Gilman may have been aware that he was doing something wrong by fishing within the three mile limit did he know *the 1996 Ordinance* did not apply to Lady Crabs?

The practical effect in this case is that Mr Gilman's plea to the offence contrary to section 4 (1) of the *1996 Ordinance* is on the face of it not made out. That section (item 4) provides,

"… a person shall not in this island, take, have in his possession, buy, sell or offer for sale any lobsters, crawfish or crabs of any kind, other than those commonly known as Lady Crabs during the period commencing on the 20th day of October in each year and ending on the 20th day of March next year following both days inclusive……".

No offence is committed by anyone possessing 'Lady Crabs'. The summons does not specify any detail as to the type of crabs caught. When the facts were read out to Mr Gilman the error was not corrected as the type of crabs caught were not expressly stated. In these circumstances the prosecutors have failed to satisfy the court that the

crabs caught by Mr Gilman were in fact crabs covered by the provision. It is evident no crabs were seized and that no Fisheries Officer (or any other person) inspected the catch or offered any opinion as to what crabs had been caught. It was only from further questioning of Mr Gilman by the Seneschal that it was established that there was indeed any catch at all.

Additionally, as this questioning came after the plea had been entered, one doubts how the court was satisfied at the time of plea itself that the crabs were in Mr Gilman's 'possession' (under section 4 (1) of *the 1996 Ordinance*). The problem must have arisen from the failure to specify in the summons the precise manner of alleged offending. Section 4 (1) as set out above contemplates a number of ways of offending including possession, buying, selling etc. Fortunately, this error was corrected by Mr Gilman's admission of the number of crabs he caught. This is highly undesirable and against the protection from self-incrimination afforded to Mr Gilman. It should have been referred to by a witness for the prosecution as it was a vital element of the offence.

The error in omitting to refer to the type of crab is not so easily resolved. One cannot assume Mr Gilman, by his plea, accepted the crabs caught were those covered by section 4 (1). On the evidence available (in the form of the statements and the report of the proceedings) there is no suggestion he accepted this fact. Mr Gilman was in these circumstances convicted of an offence that was not properly established or accepted. The injustice has arisen due to the inadequate detail in the summons and the failure to correct the problem when Mr Gilman appeared before the court.

It is conceded that there is no absolute requirement to specify the date of the offence as per *Archbold 2004 paragraph 1-125* (item 5) yet it is good practice. It is highly desirable in cases such as this, where the date of offence is important, because it minimises the risk of further injustice arising. In the present case sections 4(1) (as quoted above) and 12 of the *1996 Ordinance* only apply to the closed season.

Section 12 (item 4) provides,

> *"A person shall not place or leave a pot intended or adapted for use for taking fish of any kind in the territorial waters of this island during the period commencing on the 20th day of October in each year and ending on the 20th day of March following, both days inclusive."*

To properly establish the offence the burden rests on the prosecutor to show the alleged activity took place within the offending dates. The summons does not do this. The injustice in this case that could have arisen by this particular omission has fortunately been avoided by the dates specifically being referred to by the Constable when reading the statements.

Taken as a whole, the above detailed actual and potential injustices provide clear justification for the setting aside of the convictions and sentence. It is submitted Mr Gilman has not had his basic rights protected.

2. The summons is bad for duplicity.

There is little doubt that the summons, whilst appearing at first glance to be a single offence, in fact includes four separate offences. It alleges contraventions of section 4(1), 12, 13(1) and 13(2) of *the 1996 Ordinance* which are all separate offences (see the Ordinance attached at item 4).

The Sénéschal himself must have thought he was sentencing Mr Gilman for more than one offence because he imposed a sentence for what he called 'multiple offences'. As stated he was relying on his powers in the *Reform (Sark) Law 1951*, as amended. Section 23 (3) (as amended by *Order in Council XVII 1971* and *Order in Council XII 1991*) at item 6 allows him to impose an 'aggregate punishment' for 'several offences' but the punishment must not exceed twice the amount of a level 4 fine. A level 4 fine was correctly identified as being a maximum of £1000 (as per *The Uniform Scale of Fines (Sark) (Amendment) Ordinance 1992* at item 7). The maximum fine available, for what he observed as multiple offences, was accordingly imposed.

Guernsey law has no specific provision dealing with duplicity but helpful recourse can be had to English law. Guidance is provided in *Stone's Justice Manual 2003* at para 1-421 (item 8) which succinctly states,

"An information must be for one offence only…"

The *Magistrates Court Rules 2001* rule 12 (1) (item 9) confirm this providing,

"Subject to any Act past after 2nd October 1848, the Magistrate's Court shall not proceed to trial of an information that charges more than one offence".

Further guidance is provided in *Archbold 2004* at paragraph 1-135 (item 10). This states specifically,

"The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences…".

In these circumstances it is submitted that the summons served on Mr Gilman is bad for duplicity. The rule against duplicity must, amongst other things, be designed to prevent confusion when sentencing. This is not a confusion which has been avoided in this case.

As has already been noted, the Sénéschal imposed the fine for 'multiple offences' but in doing so the court has failed to properly particularise to what offence(s) the penalty applies. The confusion arises because the summons is duplicitous. In particular the court decision records the offences were, '*…illegal fishing…in the closed season in Sark waters'* and, '*…the use of parlour pots which are banned at all times in Sark waters…'* With respect, at no point in the sections for which Mr Gilman was summonsed is there reference to 'illegal fishing' and it is not sufficiently clear to what the Sénéschal was addressing his mind at that point. This problem might have arisen because of the failure of the summons to refer to the detail of the *1996 Ordinance* meaning the Sénéschal did not refer to the particular provision when sentencing. The problem develops on consideration of *the 1996 Ordinance*. It is not made clear from the report that Mr Gilman was even expressly sentenced for the offence under section 4(1) for his alleged possession of the crabs. Neither does it appear that he sentenced him in respect of carrying the parlour pots contrary to section 13 (2). He does expressly refer to him being sentenced for using the parlour pots but this single indication fails to clarify the confusion. If the Sénéschal was of the view there were four offences before the court and he was not imposing any separate penalty for one or more of the offences then he should have expressly said so.

In these circumstances the sentence must be set aside because a reviewing court cannot be satisfied the Sénéschal was properly addressing his mind to all the provisions allegedly breached, a problem that has arisen due to the duplicitous summons. The sentence also fails to allow a

reviewing court and Mr Gilman to see what penalty was imposed for what offence. This prevents the court from satisfying itself as to the correctness of the sentence.

The Law Officers respectfully ask the court to conclude on these grounds there has been actual injustice to Mr Gilman and thus the convictions and sentence should be quashed.