Supreme Court of New Zealand
Te Kōti Mana Nui

11 OCTOBER 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

SHARK EXPERIENCE LTD v PAUAMAC5 INC & OTHERS

(SC 86/2018) [2019] NZSC 111

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Background

The appellant, Shark Experience Ltd, ran a business offering the opportunity to view great white sharks from dive cages. The cages were lowered off the side of boats to the east of Stewart Island. Divers watched and photographed the sharks, which were attracted to the area by the use of berley and bait. The Director-General of Conservation issued authorities to Shark Experience to undertake these activities.

The first respondent, PauaMAC5 Inc, an incorporated society, represents commercial pāua quota owners who operate in the same area. It fears its pāua divers' lives are being put in danger by the operation of shark cage diving businesses in their place of work.

It is an offence under s 63A of the Wildlife Act 1953 (the Act) to "hunt or kill" a great white shark as they are an absolutely protected species under the Act. Section 2(1) defines the phrase "hunt or kill" broadly, to include:

> … the hunting, killing, taking, trapping, or capturing of any wildlife by any means; and also includes pursuing, disturbing, or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not; and also includes every attempt to hunt or kill wildlife and every act of assistance of any other person to hunt or kill wildlife

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PauaMAC5 issued proceedings in the High Court claiming shark cage diving was an offence because it amounted to "hunting or killing" great white sharks. PauaMAC5 also challenged the Director-General's powers to authorise shark cage diving. The Director-General also considered that, without authorisation, shark cage diving was an offence under s 63A.

Courts below

The High Court held that the Director-General had no power under the Act to authorise shark cage diving. The Court made no formal finding on whether shark cage diving was nonetheless an offence under s 63A. PauaMAC5 appealed.

The Court of Appeal held that shark cage diving was an offence under s 63A. The Court said shark cage diving was to "hunt or kill" the great white shark because it amounted to "pursuing" or "disturbing" the sharks, even though this was not within the common usage meanings of the words "hunt" or "kill". The activity was "pursuing" the sharks because it lured them to the dive cages. The activity was "disturbing" the sharks because it caused them to deviate from their natural swimming patterns. The Court of Appeal made a declaration that "Shark cage diving is an offence under s 63A Wildlife Act 1953". Shark Experience appealed to the Supreme Court.

Supreme Court

The Supreme Court granted leave on the question of "whether the Court of Appeal was correct to hold that shark cage diving is an offence under s 63A of the Wildlife Act 1953".

Shark Experience submitted the Court of Appeal was incorrect to adopt an extended definition of the phrase "hunt or kill". It argued the language used in the Act required a meaning that linked the prohibited conduct to the common usage meanings of the words "hunt" and "kill". For example, "disturbing" undertaken for the specific purpose of hunting or killing. Shark Experience also argued the Court of Appeal's definition overcriminalised conduct and was inconsistent with Magna Carta 1297 and the New Zealand Bill of Rights Act 1990. It submitted the Court of Appeal's declaration should be set aside and sought a declaration that shark cage diving was not unlawful.

The respondents supported the Court of Appeal's interpretation. PauaMAC5 submitted the definition of "hunt or kill" was so broad so as to include conduct that did not necessarily involve an intention to hunt or to kill great white sharks. The Attorney-General submitted that a declaration that shark cage diving was an offence was appropriate.

Decision

The Supreme Court has unanimously allowed the appeal and set aside the declaration issued by the Court of Appeal. Winkelmann CJ, in a judgment in which William Young, Glazebrook and O'Regan JJ joined, held the phrase "hunt or kill" in s 2(1) is given a broad, inclusive definition. The defined phrase is held to capture the following conduct, irrespective of whether the conduct occurs in the course of hunting or killing in the common usage sense of those words:

a) "pursuing" means to intentionally chase but does not include luring or attracting or merely following the animal at a safe distance;

b) "disturbing" means an action which physically or mentally agitates the protected animal to a level creating a real risk of significant harm; and

c) "molesting" means intentionally troubling, distressing or injuring a protected animal.

The overall statutory scheme and the Act's purpose – that of absolute protection of wildlife – supports this broad interpretation.

Justice Ellen France, whilst largely agreeing with Winkelmann CJ, took a different view on the particular definitions given by the Chief Justice to the words "pursuing" and "disturbing" in the s 2(1) definition of "hunt or kill".

The appeal was allowed because all members of the Court considered this was not an appropriate case to make a declaration or to make a finding as to whether shark cage diving using attractants is an offence under s 63A. This is because:

a) The focus of the case has shifted throughout the proceeding and there was insufficient evidence on the points disputed in the Supreme Court to make that finding. In particular, the evidence in the High Court was directed to a different interpretation of the phrase "hunt or kill".

b) This was not an appropriate case in which the discretion to issue a declaration should be exercised. A declaration in this case could usurp the role of a fact-finder, such as a jury, in future cases if criminal prosecutions were brought for shark cage diving activities. Furthermore, the lack of evidence on this point meant the factual basis for any declaration was contested and incomplete. The Court did note, however, that the judgment sets out the principles against which the lawfulness of any future shark cage diving operation can be assessed.

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