

Perry v Simlesa and Ors 5 December 2003, 22 January 2004
Mildren, Thomas & Bailey JJ
[2003] NTCA 2, 142 A Crim R 282

The respondents were convicted of breaches of the Barramundi Fishing Management Plan (BFMP) after a hearing in the Court of Summary Jurisdiction. The breaches involved the placing of fishing nets approximately 500 metres and 800 metres respectively landwards of the coast of a river mouth, namely, Perakary Creek. It was inherent in the prosecution case that Perakary Creek was a river for the purposes of the BFMP.

River as defined in the BFMP includes a creek, stream, tidal arm, billabong, lake or other body of water, whether fresh or brackish, that, seasonally or consistently, flows directly or indirectly into the sea. The BFMP defines river mouth to include the body of water delineated by an imaginary line, contiguous with the shape of the adjoining coast, bay or inlet, across a river. The term coast is not defined.

The magistrate had found that Perakary Creek was a river as defined in the BFMP. The magistrate fined the respondents and the boats and fishing equipment of the respondents were forfeited. The respondents appealed to the Supreme Court against conviction, sentence and the forfeiture orders.

The Supreme Court held that although Perakary Creek was a creek or tidal arm as ordinarily understood, unless, at the location of the respondents' nets it was shown also to be a *body of water, whether fresh or brackish, that, seasonally or consistently flows...into the sea...*, it is not a river for the purposes of the prosecution case. As there was no evidence led in the Court of Summary Jurisdiction to establish that water in Perakary Creek was fresh, brackish or simply seawater, the Supreme Court held that the prosecution had not established that the area known as Perakary Creek was a *river* within the meaning of that term in the BFMP. The appeals were allowed and the convictions were set aside. Consequently, the court found it unnecessary to determine the appeals against sentence and the forfeiture orders, as these orders were automatically quashed also.

The prosecution appealed the decision of the Supreme Court to the Court of Appeal. The appellant argued that Perakary Creek was a river within the meaning of that term in the BFMP as the definition was such that in addition to the extended meaning provided in the BFMP, the term *river* also bears its ordinary meaning. Alternatively, it was argued that Perakary Creek was a *creek* or *tidal arm* and that the words in the definition *whether fresh or brackish, that, seasonally or consistently, flows directly or indirectly into the sea* qualify the words *other body of water* but do not qualify the words *creek, stream, tidal arm* etc.

The Court of Appeal unanimously allowed the appeal holding that -

- The facts did not enable the court to conclude that the places where the respondents' nets were found were landwards of the river mouth if the word *river* was given its usual meaning.

- The words in the definition *whether fresh or brackish, that, seasonally or consistently, flows directly or indirectly into the sea* were intended to qualify the words *or other body of water* and cannot qualify the words *tidal arm*.
- Perakary Creek was a *tidal arm* of the sea and therefore a *river* as defined.
- The *coast* used to determine the position of the river mouth, is the line of the mean low water mark of ordinary tides.

The court ordered that the convictions be restored and remitted the matter back to the Supreme Court to deal with the outstanding appeals against sentence and the forfeiture orders.