

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Newell, 1993 NSCA 158

**Hallett, Matthews and Roscoe, J.J.A.**

**BETWEEN:**

BILLY MILTON NEWELL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Gregory M. Warner, Q.C.  
for the Appellant

Michael A. Paré  
for the Respondent

Appeal Heard:  
June 15, 1993

Judgment Delivered:  
July 15, 1993

**THE COURT:**

Appeal dismissed per reasons for judgment of Hallett, J.A.; Matthews and Roscoe, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of Carver C.C.J. allowing an appeal from the dismissal by Reardon P.C.J. of a charge that the appellant had "on board a vessel lobster traps without valid tags issued by the Minister securely attached to the frames of the traps in the manner for which the tags were designed contrary to **s. 62(1)** of the **Atlantic Fisheries Regulations**, 1985."

**Section 62(1)** provides:

" 62(1) Subject to subsection (3), no person shall fish with or have on board a vessel a lobster trap unless a valid tag issued by the Minister is securely attached to the frame of the trap in the manner for which the tag was designed and in such a manner that the tag is readily visible when the trap is not in the water."

The issue in the case was whether the tags were securely attached to the frames of the wire traps. Some sixty (60) traps on board the vessel had attached to the wire mesh forming the bridle (the end that is hauled from the water) of the trap, a small square of wire mesh to which the tag was attached on 18 of the 60 traps. The small square was attached to the trap by binder rings. There was evidence that the small square, referred to by the witnesses as a "patch", could be easily removed from the trap. The theory of the fisheries officers was that the patch and the tag attached to it could be easily removed and attached to another lobster pot defeating the purpose of the regulations controlling the number and use of tags for the lobster fishery. The tags, when properly fastened, are locked and cannot be removed from the frame of the trap without obviously damaging the tag.

The evidence of the appellant before the learned trial judge was that he attached the patches to his lobster pots to protect the guide strings from chaffing against the rocks. He testified as follows:

" Witness: And this attached to here ... see, and I put this patch over here to protect this guidestring from chafing, because as soon as your traps come out of the water, right?

Mr. Warner: Um-hmm.

Witness: That wire tends to haul into the rocks - that end there won't haul into a rock, because this end is coming up - that will haul into a rock, so it won't chafe that, because you're gonna have to keep taking your gloves off quite a bit of time to guide that over and put a new guidestring on it. It's gonna slow you up, so that's why I put - put that there.

. . .

Q. Okay; maybe you'll take a seat again, and we'll keep going. Now, you say you have these patches, they're not to repair the trap or to cover any holes in the trap; the patches have a specific purpose?

A. They're - they're - they're to protect my guidestring."

A fisheries officer testified that the "frame" of a wire trap was the whole trap. In cross-examination the appellant made the same comment as evidenced by his testimony:

" Q. I just wanted to go back for a moment, Mr. Newell, to the point of the frame of the trap. If you were asked a question, "what's the frame of this trap"; what would your answer be?

A. I - the frame's the whole body of it as far as I'm concerned. It's got wire and stuff.

Q. Okay; would you answer be that the frame is - is this wire patch?

A. It would be as strong as the rest of the wire on the trap.

Q. Once you attach it, right?

A. Once you hog-ring it on, you mean?

Q. Right?"

The appellant was further questioned about the patch that he had attached to the trap. He was questioned whether or not the trap would catch lobsters without the patch. The following questions and answers are relevant:

" Q. I understand that, but physically it - does it still work the same way in catching a lobster . . . if you took this little patch

away?

A. It will - it will fish. It will catch lobsters. I mean, that had no - no difference in the - in the fishing of the trap.

Q. And this patch has nothing to do with the fishing of the trap?

A. Well, it - it protects my guidestring.

Q. Other, other than that?

A. Yeah."

The learned trial judge dismissed the charge; he concluded his judgment as follows:

" We're all quite aware as to what wooden traps are and where the frames are on the wooden traps. It's quite obvious from the evidence adduced at this trial that nobody can say what the frames of the particular traps are. Crown have tried to pinpoint that very issue, but they have failed. What we have to then resolve ourselves to is, how are they so affixed? Were they securely affixed . . . attached to this particular or these particular traps? And we have 18 in total.

Alright, now Mr. Newell has gone through a rigid cross examination by the Crown, Mr. Dipersio; and I find on that that he is not in any way led me to believe that he's other than telling the truth. He has explained the reason for the patches. I have accepted that reason for those patches as to why they were put there and for the reinforcement purposes in the evidence of Mr. Newell.

I am not satisfied that the Crown in anyway have proven their case. I believe that when we look at the evidence of Mr. Newell, he certainly asked the question as to how. He did everything that he was supposed to do, and when he came across a tag that was faulty, he turned it in and obtained another.

I do not find in any of the evidence that Mr. Newell attempted to commit the offence for which he has been charged. I find him not guilty, and he is free to go.

We do not take possession of the traps, they are bulky. That'll be returned to the fishery officers for the requisite period of time that they have to hold them."

The Crown appealed the dismissal of the charge to the summary conviction appeal court. The Crown asserted that the learned trial judge erred in his consideration of **s. 62** of the **Atlantic Fisheries Regulations** by failing to reasonably interpret the word "frame" and by failing to reach any conclusion as to whether the wire patches were a part of the frame of the wire trap.

The Crown may, of course, appeal on a question of law but may also appeal to the summary conviction appeal court on questions of fact alone as noted by Mr. Justice Jones writing for this court in **R. v. Gillis** (1981), 45 N.S.R. (2d) 137 at p. 144:

" ...it is clear that a county court judge on an appeal does have the power to consider the record and reverse the trial judge on issues of fact."

With respect to the scope of the powers of a summary conviction appeal court in dealing with questions of fact on such appeals Mr. Justice Jones stated at p. 148:

" As Parliament has conferred a right of appeal on the Crown on questions of fact in summary conviction cases, then I see no reason why the same tests should not be applied as on an appeal by an accused. It seems to me that where Parliament has been silent, then it is appropriate to adopt the test which is set out in the applicable sections. Accordingly a verdict of acquittal should only be set aside where it is "unreasonable or cannot be supported by the evidence." In applying that test it is not the duty of the appeal court to retry the case and findings on issues of credibility should only be interfered with in very rare circumstances."

In that case Mr. Justice Jones concluded that, as it was open to the county court judge to review the evidence which he did and ordered a new trial, there was no error in law which would entitle the appeal court to intervene. An appeal to this court is only on a question of law and requires leave (**s. 839 C.C.C.**, R.S.C. 1985, c. C-46).

In his decision Judge Carver stated that by virtue of **s. 686(1)** of the **Criminal**

**Code** he could allow the appeal if the verdict was "not supported by the evidence or is erroneous in point of law". He recognized that it was his duty to re-examine and reweigh the evidence to determine if the verdict of the trial court was unreasonable or unsupported by the evidence. After reviewing the learned trial judge's decision Judge Carver stated:

" In my opinion, the trial court should have, in the first instance, determined what was the frame of the wire trap and then have determined if the patch was a part of the frame of the trap. The regulation directs that a valid tag be securely attached to the frame of the trap.

The confusion seemed to be over just where was the frame of the trap. With the older, wooden traps there was an inside frame, but the newer, wire ones have no like construction. The trial judge had the benefit of seeing the wire traps as they were exhibits before the court. They are not the same as the wooden traps with the inside framework but do they need that to have a frame? A turtle has as much a frame as does a human being but their frames are totally different. Are we not talking about a similar difference but yet both traps have a frame? The trap was before the trial court. From its presence the trial judge could have determined if it had a frame.

The next question was whether the patch was a part of the frame of the trap? This was not addressed by the trial judge. The patch was an addition by Mr. Newell to the trap. It was there for a purpose but it was not a part of a regular lobster pot. It was something added by Mr. Newell.

In not making those findings which were necessary to dispose of the case, the trial judge erred."

Judge Carver went on to find that the patch to which the tag was fastened was not part of the frame of the trap. Judge Carver also rejected the defence of officially induced error. He allowed the appeal and directed the verdict of acquittal be set aside and a conviction entered. He remitted the matter to the trial court for sentence.

On the appeal to this court the appellant asserts that Judge Carver erred in law in finding that evidence existed upon which he could determine whether a wire trap had a frame

and if it had a frame of what that frame consisted and that he erred in law in finding on the evidence that a patch was not part of the frame of the wire trap and that the learned summary conviction appeal court judge erred in law in not remitting to the trial judge the issue of whether the patch was part of the frame of the trap. The appellant also asserts that Judge Carver erred in law in finding that the defence of officially induced error was not available to the appellant. I am of the opinion that there was evidence to support Judge Carver's finding that the patch was not part of the frame of the lobster pot. Accordingly, this does not raise a question of law which would entitle this court to intervene (**R. v. Gillis**, supra, at para. 24). I am also satisfied he properly interpreted the meaning of "frame" as used in **s. 62(1)**).

Counsel for the appellant did not advance any argument either in his factum or orally before us that the matter should have been remitted to the trial judge to determine whether the patch was part of the frame of the trap. I would assume he abandoned that ground; Judge Carver had the power to decide the issue.

With respect to the defence of officially induced error the appellant asserts in his factum:

" that the accused Newell clearly adverted to the possibility of an illegality and was bona fide uncertain as to the law; that Fishery Officer Jacklyn was an official responsible for the enforcement of the lobster trap Regulation; that Fishery Officer Jacklyn, in error, in direct response to an inquiry by the accused, told the accused that tags should be securely attached to the trap (and did not say securely attached to the frame of the trap); that the accused clearly relied upon the erroneous advice; that in light of the ambiguity of what constitutes the frame of a wire trap and the clarity of what Fishery Officer Jacklyn said, and the prior inspection of the accused's vessel by Fisher Officer d'Entremont, it was reasonable for the accused to rely upon the erroneous advice of Fishery Officer Jacklyn."

The position of the respondent is that there was no evidence that any appropriate fisheries official advised the appellant that he could have fixed his lobster trap tags to a

"patch" which could then, in turn, be affixed to a wire mesh trap. The respondent asserts that the only officer Mr. Newell spoke to concerning the matter told him to securely fasten the tags to the trap itself. At no time was Mr. Newell told that affixing the tags to the patch was sufficient. The respondent asserts that this was an assumption made by Mr. Newell. Both the trial judge and Judge Carver rejected the defence of officially induced error. This issue does not raise a question of law but turns on the fact findings by the trial judge and the summary conviction appeal court judge. The findings are supported by the evidence.

Leave to appeal is granted but the appeal ought to be dismissed.

Hallett, J.A.

Concurred in:



NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

BILLY MILTON NEWELL

Appellant

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REASONS

JUDGMENT

HALLETT, J.A.