

NOVA SCOTIA COURT OF APPEAL

Jones, Hart and Freeman, JJ.A.

Cite as: R. v. Nickerson, 1993 NSCA 99

BETWEEN:

KENNETH ALTON STODDART

Clyde L. Nickerson

for the Appellant

Appellant

- and -

HER MAJESTY THE QUEEN

Michael A. Paré
for the Respondent

Respondent

Appeal Heard:
March 31, 1993

Judgment Delivered:
March 31, 1993

THE COURT: Application for leave to appeal is denied per oral reasons for judgment of Jones, J.A.; Hart and Freeman, JJ.A. concurring.

The reasons for judgment were delivered orally by:

JONES, J.A.:

This is an application for leave to appeal from a decision of Judge Carver convicting the appellant on a charge that he did on the 24th of August, 1991,

"have in his possession without lawful excuse dead bluefin tuna without numbered tags issued by the Minister attached thereto, contrary to Section 13 of the **Tuna Fishery Regulations**, and did thereby commit an offence under Section 78 of the **Fisheries Act**, R.S.C., 1985, C. F-14, as amended."

On August 24, 1991, the fisheries patrol vessel Cygnus was patrolling a tuna fishing area southwest of Yarmouth known as the "Hell Hole". There were a number of fishing vessels in the area including the appellant's vessel, the "Toby & Trent". Fisheries officer, John Silver observed the Toby & Trent hauling swordfish longline gear. At 12:45 p.m. he noted a tuna fish tied by the tail being hauled on the starboard side of the Toby & Trent. A second vessel, the Katherine & Parker came alongside the Toby & Trent and the tuna was transferred to the second vessel. On inspection he found that the fish was a dead bluefin tuna and was untagged. The officer boarded the Toby & Trent and spoke to the appellant. The appellant admitted that he might have caught the tuna but "I might have thrown it away" and the other boat picked it up. The statements were admitted following a **voir dire** before Judge Reardon who tried the case in the Provincial Court. The appellant testified for the defence. He admitted that his lines had hooked the tuna and that he had instructed the crew to tie the fish to the boat until he had an opportunity to examine it. Judge Reardon entered an acquittal. Judge Reardon stated:

"I'm not satisfied that the Crown has proven beyond any reasonable doubt that the fish that was hanging from the stern and over the side of Mr. Stoddart's boat was a dead bluefin tuna, nor one without numbered tags. That's the first observation that I make. He had a tuna I believe in his possession and one I would say from the evidence of himself that he didn't know for sure whether it was a bluefin tuna or otherwise, but in any event what he did he as quickly as possible and forthwith released it regardless of whether it was a bluefin tuna or another tuna.

I am not satisfied on the evidence that the Crown has proven its case beyond a reasonable doubt, and that

being the case, that reasonable doubt must be resolved in favour of Mr. Stoddart, and accordingly, I find him not guilty."

The Crown appealed to the County Court. The appeal was heard by Judge Carver. Judge Carver reversed the decision and entered a conviction. He stated:

"I find that His Honour Judge Reardon did err in his findings. I find that his decision is unreasonable and cannot be supported by the evidence. His decision that he was not satisfied the Crown had proven beyond any reasonable doubt that the fish that was hanging from the stern and over the side of Mr. Stoddart's boat was a dead bluefin tuna, was one without numbered tags, was in error. From all the evidence the tuna was dead. Also, it was not tagged. From all the evidence it was a bluefin tuna. Fishery Officer Silver was definite on that point. The fact that Captain Stoddart later released it is substantial evidence that he knew it was a bluefin tuna as he was aware that he was entitled to keep all but bluefin tuna when caught as an incidental catch while not directing towards tuna. As to whether the tuna fastened to the stern of the 'Toby & Trent' was the same fish that ended up on the 'Kathleen Parker', there can be no doubt from the evidence. The tuna was not seen at all times but the line attached to it on the 'Toby & Trent' was cut and transferred to the crew members on the 'Kathleen Parker'. It was a manoeuvre that leaves no doubt that the tuna was being transferred from one boat to another. What else could be concluded from the actions of both crews in their dealing with the lines and the fact the same tuna ended up on the 'Kathleen Parker'.

With respect to the trial judge's decision that Captain Stoddart released the tuna as quickly as possible and forthwith, I also find he erred. Captain Stoddart's duty upon incidentally catching the tuna was to forthwith return it to the water. He was not in compliance with that heavy duty upon him when he ordered it to be tied to the stern with it later being transferred by his crew, for whom he is responsible, to the 'Kathleen Parker'. The evidence does not support the verdict that he forthwith returned the tuna to the sea."

The appellant has applied for leave to appeal. The grounds raised in the notice are not the same as the issues now raised in the factum. In reviewing the evidence Judge Carver had to determine whether the verdict was unreasonable. He applied the appropriate

test. We agree that the decision of the trial judge was unreasonable and inconsistent with the evidence submitted on the trial. The onus

was on the appellant to establish that he exercised due diligence in complying with the regulations. There is no merit in the appeal and the application for leave to appeal is denied.

J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.

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REASONS

JUDGMENT

JONES,
J.A.