

Docket: CAC 162993

Date: 20001208

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. V. Rayner*, 2000 NSCA 143]

Freeman, Roscoe, and Saunders, J.J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

DOUGLAS V. RAYNER

REASONS FOR JUDGMENT

Counsel:

Lori-ann Veinotte for the appellant

Frank E. DeMont for the respondent

Appeal Heard: September 26, 2000

Judgment Delivered: December 12, 2000

THE COURT: The appeal is allowed per reasons for judgment of Saunders, J.A.;
Freeman and Roscoe, J.J.A., concurring.

SAUNDERS, J.A.:

[1] The respondent, Douglas Rayner, has been employed as a licensed lobster fisherman for more than 25 years. In August 1999 he was charged with unlawfully

possessing female crab, contrary to s. 53(a) of the **Atlantic Fishery Regulations**, 1995, S.O.R. 86-21 and the **Fisheries Act**, R.S.C. 1985, c. F-14.

[2] He pled not guilty and appeared for his trial before Provincial Court Judge David E. Cole in Amherst on March 7th, 2000.

[3] At his trial, two fishery officers, David Austin and Bryan Scallion, gave evidence that the gender of the crabs in the respondent's possession were female. Judge Cole acquitted the respondent because he was not satisfied that the two fishery officers had sufficient expertise to prove beyond a reasonable doubt that the crabs were female.

[4] The Crown appeals the respondent's acquittal to this Court pursuant to s. 830 of the **Criminal Code**. Section 830(1) states:

830(1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

- (a) it is erroneous in point of law
- (b) it is in excess of jurisdiction; or
- (c) it constitutes a refusal or failure to exercise jurisdiction.

[5] Here the Crown's appeal is limited to alleged error in law. The Crown contends that the trial judge erred in law in finding that expert evidence was required to establish the gender of the crabs; and further, in finding that no expert evidence had been tendered with respect to the gender of the crabs found in the possession of the respondent. The Crown asks this Court to set aside Mr. Rayner's acquittal, enter a

conviction and sentence him accordingly or, in the alternative, asks that a new trial be ordered.

[6] Section 834(1) enumerates our powers on an appeal such as this. The section reads:

834(1) When a notice of appeal is filed pursuant to section 830, the appeal court shall hear and determine the grounds of appeal and may

- (a) affirm, reverse, or modify the conviction, judgment, verdict or other final order or determination, or
- (b) remit the matter to the summary conviction court with the opinion of the appeal court,

and make any other order in relation to the matter or with respect to costs that it considers proper.

[7] The primary issue in this appeal is whether these fishery officers were qualified to give an opinion on the gender of crabs and whether or not that opinion evidence could be relied upon by the trial judge as proof of the crabs' gender beyond a reasonable doubt.

[8] Fishery officers David Austin and Bryan Scallion testified on behalf of the Crown. Between them they have over 25 years of experience as officers with the Department of Fisheries and Oceans. Both were working on August 30th, 1999, checking and inspecting fish catches and licenses and conducting a general overview of Regulation enforcement pertaining to lobster, scallop, salmon, and various shellfish and habitat.

[9] While hauling lobster traps for inspection, they noted that a bait bag used for catching lobster contained female crabs. The officers then hauled up other traps,

each found to contain bait bags holding only female crabs. The officers determined that the traps belonged to the respondent, through his tag numbers. The respondent verified his ownership of the three traps at trial. Later that same day, fishery officer Austin boarded the respondent's boat and inspected his catch. He found three full crates of male rock crab that were retained as a by-catch for sale as well as some marketable lobsters. He also found a number of full bait bags containing crabs and a few fin fish. Officer Austin seized the 30 bait bags, later determining that with the exception of one male crab, all of the contents in the bags were female crabs. Each of the 30 bags contained anywhere from three to five female crabs.

[10] Both officers testified as to the differences between male and female crabs. Two distinguishing features are the size of the crab, and the shape of the tail and hind section. Officer Scallion described the differences between male and female rock crabs in considerable detail aided with photographs and frozen specimens introduced during his testimony. The photographs showed three angles of the same two crabs, one male and one female. He testified, in part, as follows:

In these three pictures there are the same two rock crab. The larger one on the right is a male, and the smaller one on the left is a female. The, perhaps the quickest way one would normally segregate between males and females is the size. I have examined tons of rock crab, and I frequently board boats that will have in excess of a ton of rock crab on them, and I've gone through their catch, and gone through their catch thoroughly. In all that time, I may have found two rock crabs that were in excess of four inches. To find a female in excess of four inches is extremely rare.

.....

... When you pick up the female rock crab and when we're hauling gear, especially rock crab gear that hasn't been fished for that day, we will find both males and female in the, in the trap. Generally speaking, most of them will be male. The female, besides being smaller, if you perhaps looked at the middle picture you could see the rear end of, of both the male and female.

.....

The middle of the three pictures show the, the rear of the rock crab, and the female rock crab has a very rounded rear end. It's, it would be comparable, it would be sort of that sort of angle. On a male, it's a very sharp angle. It would be quite, quite sharp, and that would leap right out at your.

.....

Well, with the male rock crab, as seen in the bottom photo where he's belly up, we always used to say you can see a cowboy with his chaps and vest on, and that's very obvious on the male in the, in the bottom photo. The, the other thing is, there's a central plate that you can see there in his male anatomy. His proboscis is narrower. It's really only have half the width of a female.

THE COURT: What's his proboscis, or do I dare ask?

A. Well, that's the centre section and it folds down to let his reproductive organs function.

Q. With respect to that, to that ... you're looking at the male crab in the bottom photograph. Is that correct?

A. That's correct. And you can sort of see the two cowboy's legs and his chaps, and if you look above, a little vest. And that's very obvious in the male rock crab.

[11] No *voir dire* was sought or convened to test the qualifications of the two fishery officers. Defence counsel did not object to their giving evidence in this regard. Neither officer was cross-examined about their expertise in distinguishing between male and female crabs.

[12] The respondent testified in his own defence. Two other fishermen, Carl Trenholm and Robert Snazelle, testified on his behalf. All three fishermen have

many years of experience. They said that in trying to distinguish between male and female crabs, they considered size and whether or not the crab had any eggs showing on the outside of the shell. Mr. Trenholm testified that the only way he could tell the difference was to crack open the crab to see if it contained spawn. None of the defence witnesses was familiar with the practice of looking for the “chaps and vest” and the “rounded part versus the sharp angle” to distinguish between male and female crabs. They said the first time they heard any of those features mentioned was during Officer Scallion’s testimony.

[13] In filling his bait bags, the respondent testified that he randomly chose crabs. Often crabs are brought up from the sea in the lobster traps. By the terms of his licence, the respondent was allowed to retain as an incidental catch any male crab over four inches in width. Those not kept as the by-catch for resale are considered “free” bait and may be put into the bait bags when the fishermen lowers his traps again to fish for lobster. Mr. Rayner said he did not discern what was being used for bait except that if it had spawn showing, he threw the crab back into the ocean. All others he felt entitled to use for bait. He acknowledged that he had female crab in his boat. He had no explanation as to how, out of approximately 130 crabs seized from the bait bags, only one happened to be male. He said he did not change his practice in using crabs for bait until Fishery Officer Austin informed him that he was

not to use any of the smaller, female crabs. He said he did not understand that he was not allowed to retain female crabs for bait.

[14] The learned trial judge made the following findings. First, he agreed that using the female crabs as lobster bait was a form of retention for the purposes of the offence. Second, he stated that he was satisfied that if the Crown had proven the crabs in question were female, that:

... there was absolutely no due diligence exercised on the part of the defendant in trying to comply with the law, and that he was presumed to know the law, including the regulations, which are law, and he was obliged to determine the difference between a male and a female, and to fail to do so by whatever means he had to do it, he does at his own peril.
(Emphasis added)

[15] I would not disturb the first two findings of the trial judge. They are supported by the evidence.

[16] However, I am of the opinion that the trial judge erred in concluding that the fisheries officers' evidence was not sufficiently probative because it did not meet a criteria or standard he described of "scientific evidence". In his decision the trial judge commented on the evidence required to establish the gender of the crabs in question. He said:

Thirdly, I have come to the conclusion that the ability of the Fisheries officers and the ability of the fishermen in determining which lobsters (sic) are male and female are derived from similar sources. The custom of the trade, the opinions of their peers. And that is not scientific evidence.

.....

But, as I've alluded to many times in the last few minutes, I have no scientific evidence which can satisfy me on anything more than the balance of probabilities that one of these fellows in the picture, which is probably

court exhibit one, is the male and the other is the female. They have distinguishing differences. It takes very, very close inspection, other than size, to determine what those distinguishing differences are. But if you showed me two humans, I wouldn't have much trouble coming to a conclusion, but you show me two crabs, and that's not something I can take judicial notice of. I certainly respect the officers and their experience. I haven't a doubt they're probably right, but I have a legal reasonable doubt, where I cannot be morally certain that they are, because they haven't learned from any better source, at least none they describe to the court, than the accused had. And therefore I don't think the very essence of the crown's case has been proven beyond a reasonable doubt. It's been proven on the balance of probabilities. I think the officers are probably right, but there are some cases, instances where prosecutions are undertaken where you have to go that extra mile.

A lot depends on how a case like this goes for the fishermen as well as for the crown. And the fact that I'm about to acquit for the reasons I have just set out does not mean that the fishermen in the Northumberland Strait should all run out and do what they please with the crabs, because I'm sure if they do they will be apprehended and they will be prosecuted, and there will be somebody here with the curriculum vitae that qualifies them ... in other words, the written qualifications and the various letters after their names, et cetera, that qualify them to say what is a male and what is a female.

...I realize that the officers have a theory and they believe in that theory, and they took some considerable care to distinguish these little critters on the basis of that theory. ... I don't admire the practices of the defense witnesses in dealing with somebody else's livelihood, and with the conservation issue. And I daresay there are places they could have gone to determine what's male and what's female, the same places that ultimately, I'm sure, the crown witnesses could have gone, and no doubt will go, to put the stamp of legitimacy on what is only opinion, and not from people who have the qualifications of experts who can convince me beyond a reasonable doubt which of these is which. And I find the accused not guilty.

(Emphasis added)

[17] This extract just quoted from the decision of the trial judge, as well as the several exchanges between counsel and the judge during argument, have led me to the conclusion that the trial judge imposed too high a standard for the reception of

opinion evidence in this case. I should note in passing that Judge Cole was mistaken when he said:

... but, I have a legal reasonable doubt, where I cannot be morally certain .

R. v. Lifchus, [1997] 3 S.C.R. 320; and more recently, **R. v. Starr**, 2000 S.C.C. 40; however, his error does not form the basis of my allowing this appeal.

[18] Where the judge erred was in concluding that the Crown was bound to produce *scientific evidence* in order to provide sufficient proof of the gender of the crabs found in Mr. Rayner's possession. In doing so the trial judge misconstrued and misapplied the nature and purpose of expert evidence. Mr. Justice McIntyre, writing for the majority, in **R. v. Béland**, [1987] 2 S.C.R. 398 described the function of an expert at p. 415:

The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.

[19] In this case, Officers Austin and Scallion had special knowledge and expertise regarding the identification of male and female crabs. They were able to describe, in detail, specific features which allowed them to identify the crabs in the respondent's possession as being female. For example, Officer Scallion testified:

Q. ...what, what, if any, formal training do you have in, in biology or fishing and, that would allow you to say these things?

A. Well, my experience is just hands-on experience, what I've been told by other Fishery officers and fishermen. I have no formal biology training. I routinely handle lobster. I know the difference between male and female lobster. I consider that harder judgment to make. I find it actually easier to tell the difference between male and female crab. When I first started on, it was actually fishermen that told me the, when you're looking at the male rock crab you always look for the cowboy with his chaps, and over time just handling them, and having seen female crab crushed and digging out their row (sic) bags or their, their insides. After [a] while you learn how to tell the difference.

Q. Is it, is it necessary to break open a crab to determine its sex?

A. No, no, not in any way.

[emphasis added]

[20] Their skill in this respect was beyond the experience of the trial judge.

Their testimony provided assistance to the trial judge regarding the determination of the gender of the crabs in question, a necessary element to the offence with which the respondent was charged. In **R. v. Mohan**, [1994] 2 S.C.R. 9, Justice Sopinka affirmed that the admission of expert evidence depends upon the following criteria: relevance; necessity in assisting the trier of fact; absence of any exclusionary rule; and a properly qualified expert.

[21] In this case the fishery officers' testimony regarding the gender of the crabs was relevant to the issue of whether or not Mr. Rayner was illegally in possession of female crabs. Since the identification of the gender of these crabs was beyond the experience of the trial judge, such testimony was necessary to assist the trier of fact. There was no exclusionary rule preventing the officers from

testifying. Defence counsel did not raise any objections regarding their ability to testify on that subject. Nothing in the cross-examination was directed towards impugning the qualifications of the two officers to provide such evidence.

[22] It is not a requirement that a person be formally educated in a particular area in order to be qualified as an expert. People who are qualified by some particular or special knowledge, skill or training can give an opinion on a matter in issue that falls outside common or popular understanding. This knowledge and expertise can be gained through either study or practical experience or observation. See for example, **R. v. Mohan, supra; R. v. Marquard**, [1993] 4 S.C.R. 223.

[23] With respect, the trial judge seems to have lost sight of that distinction. For example this is apparent from the following extracts of the exchange between the judge and Crown counsel during final argument:

THE COURT:

.... the way it came to mind was these gentlemen over here have had no ... on my left, the defense ... have had no training in distinguishing from, you know, bona fide, legitimate, academic type training in distinguishing a male from a female, and neither have the crown witnesses. They're both going on what they've been told by their buddies in the trade.

.....

MR. DRYSDALE:

That being said, Your Honour, we have the evidence before the court of two experienced Fisheries officers who have been reviewing and inspecting lobster and crab catches between them for approximately 25 years.

THE COURT:

And maybe they've gotten it wrong every time.

MR. DRYSDALE:

Well, Your Honour ...

THE COURT:

Because they haven't been trained.

MR. DRYSDALE:

If Your Honour, if, if, if Your Honour ...

THE COURT:

From the books, so to speak, as to what a male and a female is.

MR. DRYSDALE:

Well I think, Your Honour, that ...

THE COURT:

Maybe they have it backwards.

MR. DRYSDALE:

I agree with Your Honour. There is no, there is no textbook here in front of you. I don't have a textbook.

THE COURT:

And they haven't even suggested ...

MR. DRYSDALE

But they have been ...

THE COURT:

... that they consulted a text.

MR. DRYSDALE

They have been reviewing these catches for 25 years, Your Honour.

They've been looking at these for 25 years based on their training, based on their experience as Fisheries officers. ...

[24] These exchanges, coupled with the trial judge's decision, make it clear to us that the trial judge declined to consider the fishery officers' testimony because, to his mind, it did not constitute "scientific evidence" in that it was not the product of university level studies, research or instruction. In this he erred.

[25] The two fishery officers gained their particular expertise and knowledge through practical experience. Each had been trained as a fishery officer and had between 10 and 15 years of experience. As such they had sufficient skill and knowledge to identify the gender of a crab. Mr. Scallion's evidence that he had personally observed and removed the roe from the insides of female crabs was not

merely, as found by the trial judge, a “theory” based on the opinions of his “buddies”. It is not necessary that they hold scientific degrees, or have taken university level courses in biology or possess “various letters after their names” in order to provide expert opinion evidence on this issue.

[26] Finally, I do not consider the failure to conduct a *voir dire* to be fatal to the reception of the fishery officers’ testimony. Counsel for the respondent did not raise this issue nor object to the officers providing testimony on this subject. Counsel and the trial judge all proceeded on the basis that no challenge was made to the officers’ status to give such evidence. In those circumstances, the fact that the two officers were not formally qualified, does not mean that they were not experts, that their evidence was inadmissible, or that they did not have sufficient skill and experience to identify the gender of the crabs.

[27] On the issue as to the failure to have a *voir dire*, the following passage from Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (2d, 1999) at p.623, for which **Mohan, *supra*** and **Marquard, *supra*** are cited as authority, is applicable:

If opposing counsel wishes to challenge the admission of the expert’s testimony, he or she should do so immediately after the expert has stated his or her qualifications and prior to the witness testifying on the matter in issue. If such a challenge is raised, the issue becomes a preliminary question for the judge alone to determine and opposing counsel can cross-examine the witness as to his or her qualifications. Thus, the question whether the proffered expert has the requisite qualifications to testify on a particular

subject is a question of law. However, if no objection is raised before the expert testifies on substantive matters, then any cross-examination as to qualifications goes only to the weight, not to the admissibility of his or her testimony. Similarly, where an expert has been more narrowly qualified than her or his expertise, opposing counsel has an obligation to object if the witness testifies beyond her or his area of expertise. If opposing counsel objects, the trial judge has a discretion to permit the party producing the witness an opportunity to further qualify the expert. In the absence of an objection, a technical failure to qualify a witness who clearly has the expertise in the area does not mean the witness's evidence should be ignored. If, however, the witness is not shown to possess the expertise to testify in the impugned area, the failure to object is not fatal and the evidence must be disregarded. [emphasis added]

[28] In summary, the trial judge did, by insisting that there be “scientific evidence” offered to prove the gender of the crabs in question, err in misconstruing the requirements for opinion evidence, thereby failing to give proper consideration to the testimony of the two fishery officers. That error may have been pivotal in that it may have contributed to the conclusion that there remained a reasonable doubt, necessitating the acquittal of the respondent. However, since the respondent’s counsel had not completed his summation before the trial judge interrupted with his view of the requirement for scientific evidence on the gender issue, and since I am not certain that a conviction would have resulted if the evidence had been properly considered, I would not be prepared to substitute a conviction for the verdict entered at trial. I would therefore allow the appeal and remit the matter to a differently constituted Provincial Court for trial.

Saunders, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.