Date:19990609
C.A.C. 152969

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Nickerson, 1999 NSCA 168
Pugsley, Flinn and Cromwell, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Gordon S. Campbell
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
WARREN SAMUEL NICKERSON	)	S. Clifford Hood, Q.C.
	)	for the respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal heard:
	)	May 21, 1999
	)	
	)	Judgment delivered:
	)	June 9, 1999
	)	
	)	

THE COURT: Leave to appeal granted, appeal allowed per reasons for judgment of Cromwell, J.A.; Pugsley and Flinn, JJ.A. concurring.

CROMWELL J.A.:

[1] The respondent , Mr Nickerson, was convicted by Judge Prince in the Provincial Court on a charge that he:

> being the operator of a class A-39 fishing vessel, to wit: "B.J. Marie", [did] unlawfully fish for species of groundfish, to wit: cod, pollock and wolffish in stock area 4X during the closed time, contrary to Section 87(1) of the Atlantic Fishery Regulations, 1985, as varied by Maritimes Region Variation Order 1997-095 and did thereby commit an offence pursuant to section 78(A) of The Fisheries Act of Canada, R.S.C., c. F-14, as amended.

[2] On Mr Nickerson's summary conviction appeal to the Supreme Court, Justice Haliburton allowed the appeal. There was (and is) no dispute that Mr Nickerson was in fact fishing during a closed time. However, Justice Haliburton found that Mr Nickerson had done so as a result of an officially induced error of law and should therefore be acquitted.

[3] The Summary Conviction Appeal Court judge held that Mr Nickerson had made an error of law in thinking that the fishery was open when it was closed. This error was officially induced because, in the judge's view, Mr Nickerson reasonably relied on advice that the judge found had been given by a dockside monitoring company (MacKenzie Monitoring), a body which the judge found was an appropriate one to give such advice.

[4] The appellant Crown seeks leave to appeal that decision to this Court. The appeal is limited to questions of law. In my view, it is only necessary to address the third of the three errors of law alleged by the Crown which is that the Summary

Conviction Appeal Court judge erred in reversing reasonable findings of fact made by the trial judge.

[5] Unlike appeals to this Court in summary conviction matters, appeals to the Summary Conviction Appeal Court on the record may address questions of both fact and law. Hallett, J.A., for the Court, recently described the role of the Summary Conviction Appeal Court judge in **R. v. Miller** (1999), 173 N.S.R. (2d) 26 (C.A.) at pp. 27-29:

> On an appeal to a summary conviction appeal court (in this Province, the Supreme Court of Nova Scotia), from a summary conviction, on the ground that the verdict is unreasonable or unsupported by the evidence, the duty of the Supreme Court judge as an appellate court is explained in **Yebes v. The Queen** (1988), 36 C.C.C. (3d) 417. McIntyre, J., for the Court, stated at p. 430:
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> > ..... The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. The process will be the same whether the case is based on circumstantial or direct evidence. (emphasis added)
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> .....
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> On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable. Assessing whether a guilty verdict is unreasonable engages the legal concept of reasonableness (**Yebes, supra** at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(i) of the **Code** entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of the trial judge which is what the appellate court judge seems to have done in this appeal.

[6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns**, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[7] In my view, the present case is almost the mirror image of **Miller**. In **Miller**, the Summary Conviction Appeal Court judge erred by restricting his review to the question of whether there was some evidence to support the trial judge's conclusions. In the present case, the Summary Conviction Appeal Court judge, in effect, retried the case on the transcript of evidence. He substituted his views concerning the credibility and weight of evidence for those of the trial judge. This was done with respect to the trial judge's findings that he did not accept that Mr Nickerson had been told the fishery

was open or not closed, with respect to the trial judge's conclusion that MacKenzie Monitoring was not an agent of the government and with respect to whether there were other readily available sources of information about closures. In each instance, the Summary Conviction Appeal Court judge did not ask himself whether the findings of the trial judge were unreasonable or unsupported by the evidence but instead made findings of credibility and weight based on his review of the transcript. He applied the wrong test in conducting his appellate review and in doing so, he erred in law.

[8] I will illustrate the Summary Conviction Appeal Court judge's application of the wrong standard of review by examining one instance in which this occurred in more detail.

[9] Central to the issue of officially induced error is the factual question of whether the accused was induced by an appropriate official to make the error. The position of the defence in this case was that Mr. Nickerson had enquired and been assured by MacKenzie Monitoring that the fishery was not closed.

[10] The trial judge made a clear finding on this issue which was adverse to the accused. The judge stated that he did not accept that Mr. Nickerson "... was told that the area was open or not closed..."

[11] Mr. Nickerson gave three versions of the critical conversation with MacKenzie

Monitoring. First, he made a written statement roughly one week after the offence was committed. In his evidence at trial, he confirmed that he did not disagree with anything in this statement. The relevant part of the written statement is as follows:

> A. I called up and got a hailing number. I asked if I could go out and if there are any rumors of us being shut down. They said not that they know.
> .....
> Q. Did you hear any rumors that your group was shut down?
> A. Never heard a thing, nothing. They should know whats going on, we're paying those fellows to look after ya. I'm on 100% monitoring. (emphasis added)

[12] The second version is found in Mr. Nickerson's evidence-in-chief:

> Q.And what did you do before you went out on that trip?
> A. I called in to MacKenzie's Monitoring and got a number and went out. I asked 'em, ah especially, because my son had left two days before ...
> Q. Now your son had left two days before, what quota group was he in?
> A. He was under the same group, and ah, I got my number and stuff and I heard rumors cause when he left he said that it might be shut down, keep your set on, so I ...
> Q. Keep your set on, what does that mean?
> A. Yeah, well keep the set on in case they put it over the air to say that it was closed down.
> Q. Now did that mean while you were on land and on the water?
> A. No, it meant when we was on the water.
> Q. Yes, okay. So when you talked to MacKenzie's did you have a discussion about that?
> A. Yes, I had, I asked 'em, I said I heard rumors it might be shut down, is it? She said no. So she give me my hail out number and I went out. (emphasis added)

[13] The third version emerged in cross-examination:

> Q. I understand from your testimony Mr. Nickerson that ah, your son had left and gone a trip two or three days previous to this?
> A. Two days.
> Q. And you mentioned that he had heard rumors ...?
> A. No. He called and got his hail out number.
> Q. Yes.
> A, And when he went fishing they give it him and his, he asked 'em if it was going to be shut down and they said no and they give his hail out number and he went out. And I called up and that's why I asked, I said is there any, have you heard any rumors it's going to be shut down, ... not that I know of.
> Q. This is what you said. I thought from your testimony, your direct testimony, that you said your son had heard rumors.
> A. Well he called up, he, I don't know if he heard, he called up and he asked 'em

> for I went cause this is what, his wife told me, when I got ready to go, I said, he's gone fishing, I said well I'm gonna go then if it gives, pick a day, cause I only got one day a week I'm gonna pick a half decent day. So I surmised it must be alright, but I called up, when I called up and I got, went through the same process and they told me to go, what are you supposed to do? (emphasis added)

[14] In addressing this issue, the Summary Conviction Appeal Court judge said:

> My reading of the transcript and of the decision of the Trial Judge does not, in any way, erode the credibility of Nickerson, nor the fact that when he contacted MacKenzie Monitoring Limited to "hail out", he had heard rumours of a possible impending closure and inquired of the agency whether there was a closure or whether he could obtain the necessary hail number. He was advised that he was not affected by any closure and given a hail number, on the basis of which he believed he was authorized to fish.
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> .....
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> ..... I have come to a different conclusion from that of the Trial Judge who clearly gave the issue careful consideration. I have reached a different conclusion, in part, perhaps, because of placing a different inflection on the evidence; that is to say, the personalities and the environment in which the parties operate .....
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> There is no doubt on the evidence that Nickerson had heard rumours of a closure. .....
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> The Trial Judge's review of that evidence demonstrates his ambivalence. In the face of the more cogent evidence of Mr. Nickerson, the conclusion of the Judge that "I do not accept that he was told that the area was open or not closed" is not supportable. (emphasis added)

[15] As is apparent from these portions of his reasons, the Summary Conviction Appeal Court judge substituted his view for that of the trial judge concerning the credibility and cogency of evidence rather than, as he ought to have done, asked himself whether the findings of the trial judge were reasonable and supported by the evidence. The Summary Conviction Appeal Court judge appears to have overlooked the fact that Mr. Nickerson's evidence about "hearing rumours" contradicted itself and

that he said both in his written statement and during cross-examination that MacKenzie Monitoring had told him simply that they were not aware of rumours of a closing. This is consistent with the trial judge's finding that Mr. Nickerson was not told that the fishery was open or not closed and quite different from the Summary Conviction Appeal Court judge's finding that Mr. Nickerson "... was advised that he was not affected by any closure....."

[16] Having found an error of law, it is necessary to consider its effect. Had the Summary Conviction Appeal Court judge applied the correct legal test, he inevitably would have concluded that the trial judge's findings were reasonable and supported by the evidence.

[17] I would conclude, therefore, that the Summary Conviction Appeal Court judge erred in law, that leave to appeal should be granted, the appeal allowed and the conviction entered at trial restored.

[18] The Summary Conviction Appeal Court judge stated in his reasons that, had he dismissed Mr Nickerson's conviction appeal and affirmed the conviction, he would have reduced the fine imposed at trial. In this Court, Mr Nickerson, while arguing that the Crown appeal should be dismissed, submitted, in the alternative, that if the conviction were to be restored by this Court, the penalty should be reduced in accordance with the views of the Summary Conviction Appeal Court judge. Assuming

without deciding that the fitness of the sentence is properly before us and that the fitness of the sentence is a question of law alone (see **R. v. Morash** (1994) 129 N.S.R. (2d) 34), I am not persuaded that the sentence imposed at trial is unfit and I would not vary it.

Cromwell, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.