

Date: 19970617

Docket: CAC 134665

NOVA SCOTIA COURT OF APPEAL

Roscoe, Pugsley and Flinn, JJ.A.

Cite as: R. v. Jackson, 1997 NSCA 133

**BETWEEN:**

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ALEXANDER JACKSON

Respondent

) Susan Bour  
) for the Appellant

) S. Clifford Hood, Q.C.  
) for the Respondent

) Appeal Heard:  
) May 16, 1997

) Judgment Delivered:  
) June 17, 1997

**THE COURT:** Appeal allowed and judgment of the trial judge restored per reasons for judgment of Flinn J.A.; Roscoe and Pugsley JJ.A. concurring.

FLINN, J.A.:

The issue in this appeal is whether Justice Haliburton, sitting as a summary conviction appeal court judge, erred in law by ordering a new trial for the respondent. He decided that the decision of the trial judge, Provincial Court Judge Prince, left the appearance that the trial judge imposed a burden of proof on the accused to provide a reasonable explanation for the circumstantial evidence against him.

The respondent was charged, and convicted of two offences contrary to the **Regulations** made under the **Fisheries Act**, R.S.C. 1985, c. F-14. The respondent, a fisherman, was alleged to have taken 685 pounds of haddock in excess of the quantity permitted by the terms of his fishing license. As well he was alleged to have caught undersized halibut. The evidence against the respondent was circumstantial. The fisheries officers were unable to determine, after inquiry, the origin of the fish which was the subject of the charges.

The Appeal Court Judge agreed that the "finger of suspicion" pointed to the respondent because the circumstantial evidence was "quite persuasive". The respondent was landing fish at the time and place in question. He was selling his fish to the Seastar Seafood Plant. The suspect fish were being transported into the Seastar plant when the Fisheries Officers arrived at 8 a.m. The suspect fish had paint chips interspersed throughout the box in a fashion similar to the boxes of fish known to come from the respondent's boat. These circumstances were observed at certain times

when no evidence of the activity of any other fishermen was found. Because of this, the Appeal Court Judge refused to acquit the respondent on the ground, advanced by counsel, that his conviction was unreasonable and not supported by the evidence.

However, the Appeal Court Judge did order a new trial. He referred to the following words of the trial judge:

Before I can convict I must be satisfied that the guilt of the accused is the only reasonable inference from the proven facts. I have considered carefully all of the evidence including the accused testimony. Having assessed the testimony of the accused there is really no explanation beyond the speculative to be found in his evidence and I cannot accept it as an explanation.

In the end therefore I must determine whether on the basis of all of the evidence I am convinced beyond a reasonable doubt of the accused guilt. And having carefully considered all of the evidence I am satisfied that I am. That is so in relation to both counts.

The Appeal Court Judge concluded that the trial judge erred in law because, by not specifically rejecting the respondent's evidence (that he knew nothing about the fish in question), the trial judge, from the above quoted words, left the impression that the respondent had the burden to provide a reasonable explanation for the source of the fish. The Appeal Court Judge said:

The Trial Judge did not pronounce himself with respect to that evidence or any of it. Judge Prince is a competent and conscientious trial judge and while it seems likely he had the appropriate principles in mind, the manner in which he expressed his conclusions leave open a very real question as to whether he applied the appropriate test in finding the Accused guilty. In dealing with his testimony, the Judge observed:

Having assessed the testimony of the accused there is really no explanation beyond the speculative to be found in his evidence...

These words leave open the possibility that, without entirely rejecting Jackson's evidence that he had no knowledge, he intended to place upon the Accused the burden of providing some rational explanation for the appearance of these fish.

I agree with counsel for the appellant that when one reviews the decision of the trial judge, as a whole, it is apparent that he made no reversible error in convicting the respondent.

The trial judge also said the following in his decision, immediately before the quotation to which the Appeal Court Judge made reference:

....There is no real explanation, from the proven facts, beyond speculation. As said in R. v. Jenkins (1908), 14 C.C.C. 21, a decision of the British Columbia Court of Appeal, which is frequently cited,

'There comes a time when circumstantial evidence, having enveloped the accused in a strong and cogent network of inculpatory facts, that the accused is bound to make an explanation or stand condemned. That is not to say that the accused has to explain suspicious circumstances or be convicted because the burden remains the same throughout, proof beyond a reasonable doubt.'

[emphasis added]

Clearly, by his reference to this authority, the trial judge fully recognized that there was no obligation on the respondent to explain away the suspicious circumstances, failing which he would be convicted. Further, the trial judge fully recognized that the burden on the Crown, of proof beyond a reasonable doubt, "remains the same throughout".

This was not a jury trial. Granted, that portion of the trial judge's oral decision, to which the Appeal Court Judge made reference, and taken in isolation, is open to interpretation. However, an analysis of the trial judge's decision, as a whole, demonstrates that the trial judge did not apply any inappropriate test in finding the respondent guilty of the offences; and, with

respect, the Appeal Court Judge erred in so finding (See **R. v. Fickes** (1994), 132 N.S.R. (2d) 314 (N.S.C.A.)).

The trial judge, essentially, made two findings. Firstly, since this was a case of circumstantial evidence, he found that the evidence was consistent with the respondent having committed the offences, and inconsistent with any other rational conclusion. There was no evidentiary basis, he found, to constitute another rational conclusion. Secondly, he found "on the basis of all of the evidence" that he was "convinced beyond a reasonable doubt" of the guilt of the respondent. It is apparent, although the trial judge did not expressly say so, that he did not believe the evidence of the respondent, that the respondent knew "nothing" about the fish in question.

I would allow the appeal, and restore the judgment of the trial judge.

Flinn J.A.

Concurred in:

Roscoe J.A.

Pugsley J.A.



