

Date: 19971125

Docket No. CAC 139239

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Harris, 1997 NSCA 203

Freeman, Jones and Roscoe, JJ.A.

BETWEEN:

JAMES LLEWELYN HARRIS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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) S. Clifford Hood, Q.C.
) for the Appellant
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) Susan Y. Bour
) for the Respondent
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) Appeal Heard:
) November 25, 1997
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) Judgment Delivered:
) November 25, 1997
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THE COURT:

The appeal is allowed and the verdict of acquittal restored as per oral reasons for judgment of Roscoe, J.A.; Jones and Freeman, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

This is an appeal from a decision of Justice Hiram Carver allowing a summary conviction appeal from Judge Robert Prince of the Provincial Court. Judge Prince had acquitted the appellant of a charge that he failed to comply with a condition of a fishing license contrary to the **Fishery General Regulations** made under the **Fisheries Act**, R.S.C. 1985, c. F-14. The appellant was alleged to have taken 847 pounds of haddock in excess of the quantity permitted by the terms of his fishing license.

At trial, it was established that the appellant had a ground fish license which specified that he was not permitted to fish for haddock or cod, but that when fishing for other species, he was permitted to have as a by-catch, ten per cent of the total weight of the other species in cod or haddock. After a fourteen day fishing trip on his vessel, the **E.T.2**, the total catch excluding cod and haddock was 16,195 pounds. The maximum haddock allowed as by-catch was therefore 1,619 pounds. The weight of haddock was determined by the fisheries officer to be 2,466 pounds.

The appellant testified that in the hold of his boat he had eight pens for storing fish. Each pen was roughly the same size, about seven feet high, four feet wide at the top and smaller in width at the bottom because of the shape of the hull. One side of each pen

was enclosed by seven pen boards, each board roughly eight inches high. It was his custom to estimate the weight of fish by noting how they measured on the pen boards. He had instructed his crew member who worked in the hold to “put a pen of ice on the bottom and three pen of hake, and leave the rest for the haddock.” Each pen board represented 500 to 600 pounds. He did not check on the work of the crew member who had, in fact, placed only two pen boards of hake in the pen before adding the haddock. The appellant also testified that this method had always worked in the past for him.

Judge Prince found that the facts established that the appellant did have more than the allowable quota of haddock. However he found that the appellant had established a defence based on s. 78.6 of the **Fisheries Act**:

Due diligence defence

78.6 No person shall be convicted of an offence under this Act if the person establishes that the person

- (a) exercised all due diligence to prevent the commission of the offence; or
- (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

Judge Prince concluded that the appellant had demonstrated, on the balance of probabilities, a reasonable and honest belief in the existence of facts which if true, would have rendered his conduct innocent.

Justice Carver, on appeal by the Crown, determined:

. . . While the trial judge may have correctly concluded the accused's belief was honestly held, I find he erred in concluding that such belief was reasonably held when one reviews the manner of determining the amount of haddock caught and his total reliance upon his crew member to make that determination without the accused making any checks personally on the haddock being brought on board over a considerable number of days.

I find the decision of the trial judge is unreasonable and one not supported by the evidence. . .

The issue on this appeal is therefore whether Justice Carver erred in law in reversing the decision of the trial judge on the question of the reasonableness of the appellant's belief.

In **R. v. Starvish** (1987), 79 N.S.R. (2d) 136 this Court dealt with a similar issue, that is, whether a Summary Conviction Appeal Court judge had erred in reversing the finding by a trial judge that the accused American fishing captain had established a due diligence defence on a charge of fishing inside Canadian waters. Justice Macdonald, for the court stated at paragraphs 7 and 8:

[7] Judge Haliburton in a well thought out and clearly written decision summarized the law relating to strict liability offences. He then however substituted his opinion for that of Judge Reardon and found that the latter's decision was unreasonable. He reached this conclusion in part because the so-called "Starvish line" was .9 miles on the Canadian side of the Hague line whereas the "Viking Queen" was 1.2 miles inside the Hague line or one third of a mile on the Canadian side of the line as drawn on his chart by Capt. Starvish.

[8] Judge Reardon had the distinct advantage of seeing and hearing the various witnesses including Capt. Starvish. He concluded that the latter had taken all the care that a reasonable man might be expected to take under the circumstances to avoid crossing into Canadian waters. In other words Judge Reardon found that Capt. Starvish had shown that he was not negligent in crossing the Hague line. This was a finding of fact. It was reasonable and it was supported by the evidence. It is my opinion therefore that Judge Haliburton exceeded his jurisdiction in reversing such finding. In **R. v. Gillis** (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), Mr. Justice Jones speaking for this court said that although the Crown has a right of appeal on questions of fact in summary conviction cases, a verdict of acquittal should only be set aside where it is “unreasonable or cannot be supported by the evidence”. See also: **R. v. Harper**, [1982] 1 S.C.R. 1; 40 N.R. 255, at p. 14; 65 C.C.C. (2d) 193, at p. 210.

Accordingly, if the trial judge’s decision was reasonable and supported by the evidence, Justice Carver should not have allowed the appeal. There is, in our opinion, ample evidence which supported the trial judge’s conclusion that the appellant’s belief was reasonable, especially when viewed in the context of the trial judge’s finding that he believed the evidence of the appellant. Although Justice Carver indicated that the appellant should have periodically checked to see if the crewman had followed his instructions, the appellant testified that after the fish were in the pen, one could only see what was on the top and how much of the pen the fish occupied. When he did check to get the information to complete his fishing log, he assumed that his instructions had been followed. The only way he could be certain the instructions were carried out would be to be present in the hold at all times fish were being loaded into the pens. Presumably, the captain of a 45 foot fishing boat often has other responsibilities requiring his attention. As indicated, the method

had worked for three years previous. As well, the appellant testified that the particular crewman had followed the directions correctly for about a year and a half. While obviously not a perfect method, there was evidence upon which the trial judge could find that it was reasonable in the circumstances. The appellant's excuse for the haddock overrun was not the inaccuracy of his system for estimating the weight of his catch, but the failure of his crew member, on whom he relied, to carry out his instructions. Whether he acted reasonably was a question of fact for the trial judge. For the learned Summary Conviction Appeal Court judge to have found otherwise, in the face of supporting evidence believed by the trial judge, was an error of law.

The appeal is allowed and the verdict of acquittal restored.

Roscoe, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.