S.C.C. No. 02704

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Chipman, JJ.A.

Cite as: R. v. Phillips, 1993 NSCA 39

BETWEEN:

SCOTT B. PHILLIPS	)	S. Clifford Hood
	)	for the appellant
appellant	)	
	)	Michael A. Paré
- and -	)	for the respondent
	)	
	)	
HER MAJESTY THE QUEEN	)	Appeal Heard:
	)	January 13, 1993
respondent	)	
	)	Judgment Delivered:
	)	January 21, 1993

THE COURT: All three grounds of appeal dismissed per reasons for judgment of Matthews, J.A.; Hallett and Chipman, JJ.A. concurring.

MATTHEWS, J.A.:

The appellant was charged with the offence that on or about May 14, 1989, he

> "being a person fishing under the authority of a license, to wit: a license issued to Sea Track Fisheries Limited, dated the 20th day of April, A.D. 1989, and conditions of license dated May 12th, 1989, did fail to comply with a condition of such license in that he did take a quantity of fish, to wit: a combination of cod, haddock and pollock in excess of that which was permitted to be taken contrary to section 33(2) of the **Atlantic Fishery Regulations**, 1985, c.F-14, as amended."

After a trial at Yarmouth on November 20, 1989, Provincial Court Judge J.D. Reardon by decision rendered March 19, 1990, found him guilty of the offence. He was fined $1000.00 or in default 100 days and the fish taken in excess of quota, some 15,361 pounds, were ordered forfeited to the Crown.

That decision was appealed to the County Court where by oral decision dated July 12, 1990, Judge C.E. Haliburton on a preliminary issue, allowed the appeal. The latter decision was set aside by this Court on February 22, 1991, and the matter returned to the County Court to be heard on its merits. (see 106 N.S.R. (2d) 91).

That was done and by written decision dated March 19, 1992, Judge Haliburton dismissed the appeal, affirming both the conviction and penalty imposed by Judge Reardon.

At trial the Crown called as witnesses two fisheries officers, Barnes and MacIsaac. It is of some importance to this appeal that no one testified on behalf of the defence.

At approximately 1:30 a.m. on May 14, 1989, Barnes boarded the dragger, Sea Track IV, which he had observed tying up at the Yarmouth wharf. The appellant and two others were aboard. Barnes had, on at least one other occasion, seen the appellant on board that vessel. Barnes testified that he asked the appellant's permission to inspect the

hold. After that inspection he advised the appellant "that I had reason to believe that he was in violation of the ground fish quota". He then asked the appellant to see the vessel's license. The appellant produced the license with the quota conditions attached.

The commercial fishing license for the vessel had been issued to the owner, a limited company, Sea Track Fisheries Limited on April 20, 1989. The license was not valid unless license conditions were attached. Those conditions were issued on May 12, 1989, and were valid from that date to May 15, 1989. By the terms of the conditions the vessel was limited to a total catch per trip of 25,000 pounds of combined haddock, cod and pollock. There were, in fact, 40,361 pounds of cod and pollock on the vessel.

Barnes testified, and the exhibit discloses, that above the line designating "Signature of license holder" on the license conditions is written "Scott Phillips". When asked in cross-examination if he were present when the document was signed he replied "I believe I was". Questioning on that point was not pursued further. The exhibit discloses that beneath the line for the "Signature of license holder" is a line for the "Signature of fishery officer" and in writing, "Francine Jacquard".

Barnes further testified that it was usual practice for an individual other than the license holder to sign the conditions if he had the authority of the license holder to do so. Here, as I have previously stated, the license holder was a limited company.

The appellant did not hold a commercial fisherman's registration card on the date the conditions document was signed.

A unique feature of this case is that although it was agreed that the respondent was one of the crew on the vessel there was no direct evidence as to whether or not he was the captain. At trial appellant's counsel argued that in cases of this sort, the captain is always charged, and that it was incumbent upon the Crown to prove that the accused was the captain of the vessel. The Crown submitted that, even though there may not have been evidence directly establishing that the appellant was the captain of the vessel, there was evidence showing that he was "at least a party to the offence".

In its factum before us the Crown asserts:

> "The trial judge made a number of findings which are germane to the disposition of this appeal. They are as

follows:

> (a) The trial Judge did not consider Mr. Phillips to be 'an ordinary crew member' (p. 88).
>
> (b) Mr. Phillips was closely connected with the vessel's operation. '...I say this in particular because the exhibit before the Court, the licensing conditions wherein there appears the signature of the license holder to be that of the accused, Scott Phillips. And that officer Barnes was satisfied or believed that he was present when the signature was placed on this document. This is why the remark I have made is that he is different that the ordinary type of crew member" (p. 88).
>
> (c) Scott Phillips signed the conditions of license under the authority of the owner (p. 89).
>
> (d) '...Mr. Phillips by his signature to the document previously referred to, the license conditions, was fully aware of the conditions and as such takes him out of the ordinary ambit of the, of the ordinary crew member' (p. 89).
>
> (e) 'The evidence shows the accused's complicity in the offence...' (p. 89).
>
> (f) The appellant was guilty of the offence as charged (p. 89).
>
> (g) The vessel was in excess of quota by some 15,000 pounds."
>
> ...

In his decision, Judge Haliburton reviewed the evidence and noted, in particular, that:

> (a) Scott Phillips was on the vessel when it was boarded by fishery officer Barnes at 1:30 a.m. after being seen tying up at the wharf;
>
> (b) it was Scott Phillips who produced the licence and the conditions to the fishery officer who asked to see the licence;
>
> (c) the conditions of licence was signed by

> Scott Phillips as 'licence holder';
>
> (d) when he was first observed, Scott Phillips was working on some wiring behind the wheelhouse;
>
> (e) although there was no direct evidence that Scott Phillips was the captain of the vessel, there was also no evidence that he was not.

Judge Haliburton rejected the appellant's argument that Scott Phillips could not be convicted as a party to the offence in the absence of proof that he was the captain of the vessel on this particular trip:

> 'While I agree with Counsel that it is customary that only the captain be charged, there was no evidence before Judge Reardon that Phillips was not the captain. While it is novel, in my experience, to proceed against a person "found on" as a party, I know of no rule that would prevent each and every member of the crew from being charged with the offence as parties. ...
>
> Clearly, the offence was committed by the operators of the vessel. Phillips was one of those operators. To conclude that he was party to the offence then, was not unreasonable.'

The County Court Judge also rejected the appellant's argument that the trial Judge's finding of fact was not supported by the evidence.

> 'There was a legible signature on the "Conditions of License". The name was clearly that of the Appellant. The obvious inference was that it was the signature of the Appellant. The Appellant was aboard the fishing vessel at the time it tied up after a fishing trip. The obvious inference was that the Accused was, at the very least, a member of the crew. Having inferred that the Accused had, in fact, signed the "Conditions of License", the further logical inference flows from that that he acted under some special agency of the owner.'"

The Notice of Appeal sets out four issues:

> "1. THAT the Learned Summary Appeal Judge erred in law

> in making findings of fact which were not supported by the evidence;
>
> 2. THAT the Learned Summary Appeal Judge erred in law finding that the accused was guilty of offence as being a party to the offence.
>
> 3. THAT the Learned Summary Appeal Judge erred in law when he denied the accused full answer and defence and denied the accused natural justice by denying the accused full answer and defence to an allegation that the accused was a party when such allegation was neither averred in the information, nor in the conduct of the trial by the Crown, nor alleged in any of the productions provided by the Crown to the accused under the disclosure rules and did thereby violate the accused's right to make full answer and defence as guaranteed by the **Charter**.
>
> 4. THAT the Learned Summary Appeal Judge erred in granting an Order of Forfeiture in violation of the Appellant's guarantee against double jeopardy as set forth in Section 11(h) of the **Charter of Rights and Freedoms** and further that such Order of Forfeiture is an additional penalty to the punishment set out in the **Fisheries Act**.

The fourth issue was abandoned.

Issue No. 1:

> "THAT the Learned Summary Judge erred in law in making findings of fact which were not supported by the evidence."

Applying the reasoning applicable to appeals under s. 686(1)(a)(i) of the **Code**, "a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine and to some extent at least, reweigh and consider the effect of the evidence". **R. v. W.(R)**, [1992] 2 S.C.R. 122 at 131, applying **R. v. Yebes**, [1987] 2 S.C.R. 168.

It is clear, in my opinion, that Judge Haliburton properly carried out that function.

As has been said in innumerable cases, it is not his duty on appeal, nor ours, to retry the case, nor should we. The burden of proving guilt beyond a reasonable doubt is upon the Crown. An appellate court should not interfere with the findings and conclusions of fact, where they are reasonable and supported by the evidence.

I agree with the summation of the Crown in its factum:

> "The evidence at trial disclosed facts sufficient to establish the Crown's case:
>
> > (a) That Scott Phillips was, on May 14, 1989, on board the fishing vessel Sea Track IV when it was seen at 1:30 a.m. tying up at the wharf;
> >
> > (b) That Sea Track Fisheries Limited held a license dated April 20, 1989, with respect to the fishing vessel, Sea Track IV;
> >
> > (c) That the aforementioned fishing license was subject to conditions of license dated May 12, 1989, which restricted its catch on any given trip to 25,000 pounds combined total weight of cod, haddock and pollock;
> >
> > (d) That the said conditions of license were endorsed by Scott Phillips;
> >
> > (e) That Scott Phillips had been asked by officer Barnes to see the license and he produced the license and conditions;
> >
> > (f) That the vessel's catch exceeded the allowable quota by 15,361 pounds;
> >
> > (g) That the fish on board was fresh."

With no evidence to the contrary, the inference properly may be drawn from the fact that because the appellant responded to Barnes' request to inspect the hold and that it was the appellant who, on request, produced the license and signed the conditions that the appellant was more than an ordinary crew member.

In addition, the conditions are required to be attached to the license in order that the license be valid; the license must be kept in the vessel; and the vessel was fishing for the benefit of the owner. Without explanation to the contrary it was reasonable for the trial judge to conclude that the appellant signed the document containing the conditions and that he did so with the authority of the owner.

I would dismiss this ground of appeal.

Issue No. 2:

> "THAT the Learned Summary Appeal Judge erred in law finding that the accused was guilty of offence as being a party to the offence."

Section 33(2) of the **Atlantic Fishery Regulations**, 1985, c. F-14 is applicable:

> "33.(2) No person fishing under the authority of a licence shall contravene or fail to comply with any condition of the licence."

In **R. v. Newell** (1988), 87 N.S.R. (2d) 157 at p. 162 Freeman, C.C.J. (as he then was) remarked:

> "For the purpose of section 33(2) 'fishing' appears to mean following the pursuit or vocation of fishing, and not the mere taking of fish. 'Fishing under the authority of a license' would appear to be broad enough to include the whole of the fishing voyage from wharf to wharf; the requirement for compliance with the condition of a license is intended to apply to the entire operation."

In my opinion it follows that each member of a crew "fishing under the authority of a license" is subject to the terms and conditions of that license and each may be charged under s. 33(2) of the **Regulations**. It matters not that the custom is to charge only the captain.

It was therefore open to the trial judge on the facts of this case to find the appellant guilty as a principal or in the alternative, as a party to the offence pursuant to s. 21(1) of the **Criminal Code**.

> "21(1) Every one is a party to an offence who
>
> (a) actually commits it,
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it."

Issue No. 3

> THAT the Learned Summary Appeal Judge erred in law when he denied the accused full answer and defence and denied the accused natural justice by denying the accused full answer and defence to an allegation that the accused was a party

> when such allegation was neither averred in the information, nor in the conduct of the trial by the Crown, nor alleged in any of the productions provided by the Crown to the accused under the disclosure rules and did thereby violate the accused's right to make full answer and defence as guaranteed by the **Charter**.

The essence of the appellant's submission on this issue is that it was incumbent upon the Crown to specifically indicate either in the Information or "in the conduct of the trial" that it was relying upon the provisions of s. 21 of the **Code**. The appellant reiterates that the Crown did not prove that he was the captain of the vessel and that no precedent can be found where anyone other than the captain has ever been charged with an offence under the **Fisheries Act** or the **Regulations**. I have previously considered the latter part of this argument.

The appellant also relies upon s. 11(a) of the **Charter**:

> "11 Any person charged with an offence has the right
>
> > (a) to be informed without unreasonable delay of the specific offence..."

In **R. v. Fell** (1981), 131 D.L.R. (3d) 105, (Ont. C.A.), decided prior to the **Charter**, the respondent was charged in conjunction with two corporations under the **Combines Investigation Act**, R.S.C. 1985, c. C-46. At p. 110 Martin, J.A. speaking for the Court said:

> "He (the trial judge) held, however, in substance, since the Crown initially contended that the respondent was liable as a principal, the imposition of liability on the respondent on the basis that he was a party as an aider or abettor under s. 21, after the defence has elected not to call the respondent, infringed the respondent's right to make full answer and defence and that he was accordingly, precluded from considering whether the respondent was liable as a party under s. 21."

The court concluded that the trial judge erred (see p. 111-2):

> "We are also of the view that the learned trial Judge erred in holding that the position taken by the Crown precluded him from considering whether the respondent's liability had been established as an aider or abettor, and hence as a party under s. 21 of the **Code**. The indictment alleged that the respondent has committed the offence charged; it was sufficient to

> support a conviction, either on the basis that the respondent personally committed the offence or was a party as an aider or abettor under s. 21 if the facts proved warranted a conviction on either basis: See **R. v. Harder** (1956), 4 D.L.R. (2d) 150, 114 C.C.C. 129, [1956] S.C.R. 489. The fact that Crown counsel took the position that the respondent was liable as a principal did not relieve the trial Judge from the obligation of considering the respondent's liability as an aider or abettor under s. 21".

I agree with that conclusion.

See as well **R. v. Thatcher** (1987), 32 C.C.C. (3d) 481.

Further, the charge was clearly stated. The appellant was represented at trial by competent, experienced counsel. The well known provisions of s. 21 apply whether or not they are set out in the Information or at the beginning of trial.

For the same reasons, in my opinion, there was no breach of s. 11(a) of the **Charter**. The appellant was charged with having failed to comply with conditions of the license under s. 33(2) of the **Regulations**. That is clear and that is the offence for which he was found guilty.

I do add that there was no suggestion on behalf of the appellant at trial that his **Charter** rights were infringed. No application under the **Charter** of any kind was made at that time. In particular there was no application for an adjournment nor to reopen the case and call evidence in order to meet any argument by reason of the application of s. 21 of the **Code** or the alleged violation of the appellant's rights under s. 11(a) of the **Charter**.

In consequence I would dismiss all three grounds of appeal.

J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.