NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Croft*, 2003 NSCA 109

Date: 20031015
Docket: CAC 194550
Registry: Halifax

Between:

David Hilton Croft

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Glube, C.J.N.S.; Chipman and Saunders, JJ.A.
Appeal Heard:	October 14, 2003, in Halifax, Nova Scotia
Held:	**Leave to appeal granted but the appeal against conviction and sentence is dismissed per reasons for judgment of Saunders, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.**
Counsel:	Michael K. Power, for the appellant Paul Adams, for the respondent

Reasons for judgment:

[1] After hearing the appellant's submissions we advised counsel that the appeal was dismissed with reasons to follow. These are our reasons.

[2] The appellant David Croft was fishing lobster on May 29, 2001. His catch totalling 100 - 150 pounds was inspected by officers with the Department of Fisheries and Oceans ("DFO"). From this inspection it was determined that the appellant had six "short" lobsters, that is less than 82.5 millimetres when measuring the carapace in a straight line from the eye socket to the end of the carapace. He was prosecuted by way of summary conviction and charged by Information with unlawful possession of undersized lobsters contrary to s. 57(2) of the **Atlantic Fishery Regulation, 1985**, an offence under s. 78 of the **Fisheries Act**, R.S.C. 1985, F-14, as amended.

[3] At his trial in the Provincial Court, the appellant argued that he was using a proper, calibrated and accurate gauge to measure the size of his catch and that he should not be convicted because he had established the statutory defence of due diligence, or alternatively that no criminal liability ought to attach to his conduct on account of the legal maxim *de minimis non curat lex.*

[4] Crawford, J.P.C. convicted the appellant at his trial last year in Bridgewater and sentenced him to a fine of $5,000 payable on or before February 12, 2003.

[5] Mr. Croft appealed his conviction and his sentence to the Summary Conviction Appeal Court (SCAC) where the case was heard by Nova Scotia Supreme Court Justice A. David MacAdam on January 23, 2003. After considering extensive written briefs and the oral submissions of counsel, MacAdam, J. dismissed the appeal.

[6] Mr. Croft now appeals to this court against his conviction and sentence, offering essentially the same arguments as in the courts below.

[7] The several grounds listed in the appellant's notice of appeal were refined by his counsel during argument to three principal submissions. First, whether he met the defence of due diligence available under s. 78.6(a) of the **Fisheries Act**. Second, whether he met the defence of reasonable and honest belief available under s. 78.6(b) of the **Fisheries Act**. Third, whether the legal maxim *de minimis*

non curat lex is applicable to this case. The appellant also seeks to reduce his sentence on the basis that it fails to accord with the principles of sentencing and is unduly harsh.

[8] It is important to recall the standard of review in matters such as this. An appeal may be taken to this Court, with our leave, on any ground that involves a question of law alone, against a decision of the SCAC in respect of an appeal to that court. See **Criminal Code**, ss. 839(1)(a); 822; and 813. Accordingly, in this appeal, we review for error of law made by the SCAC, and not the trial judge. While not framed as such, the appellant's appeal should properly be brought as an application seeking leave to appeal and, if granted, to appeal on any ground that involves a question of law alone - **Criminal Code**, s. 839.

[9] A trial judge's finding with respect to whether a defendant has established a due diligence defence under the terms of s. 78.6 of the **Act** is a finding of fact. **R. v. Starvish** (1987), 79 N.S.R. (2d) 136 (N.S.S.C.,A.D.) and **R. v. Harris** (1997), 121 C.C.C. (3d) 64 (N.S.C.A.). An appellate court has no jurisdiction to interfere with a trial judge's finding with respect to due diligence unless such a finding is patently unreasonable and unsupported by the evidence. **Starvish** and **Harris, supra**.

[10] With respect to Mr. Croft's appeal against sentence, s. 687(1) of the **Criminal Code** defines this Court's authority in such matters. Absent errors in principle or a failure to properly consider appropriate factors we will only vary a sentence if we are convinced that it is demonstrably unfit. **R. v. M.(C.A.)** (1996), 46 C.R. (4^{th}) 269 (S.C.C.).

[11] After carefully reviewing the entire record together with the written and oral submissions of counsel we see no merit to any of the grounds of appeal. The activity caught by Atlantic Fishery Regulations, s. 57(2) punishable under s. 78 of the **Fisheries Act**, is a strict liability offence. It provides:

> **57(2)** No person shall possess, in a Lobster Fishing Area set out in column I of an item of Schedule XIV, a lobster of a length that is less than the length set out in column III of that item.

> The charge is made out simply by proving the *actus reus*, which is then subject only to the limited statutory defences provided in the **Act**.

[12] Section 78.6 provides:

> 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.

[13] Section 78.6(a) permits a defence of due diligence. Section 78.6(b) allows a defence based on reasonable and honest mistake of fact. This is essentially a statutory codification of the two defences to strict liability offences described in **R. v. City of Sault St. Marie**,(1978) 40 C.C.C. (2d) 353 (S.C.C.). Both the trial judge and the SCAC judge recognized that in order to obtain the benefit of the due diligence defence, Mr. Croft was obliged to prove on a balance of probabilities that he was duly diligent in fishing for lobster, that is that he had taken all reasonable steps to ensure that his lobsters were not undersized or, put another way, that he was in no way negligent. **R. v. Chapin** (1979), 45 C.C.C. (2d) 333 (S.C.C.); **R. v. Belliveau** (1986), 76 N.S.R. (3d) 234 (N.S.S.C., A.D.); **R. v. Gerhardt** (1989), 91 N.S.R. (2d) 276 (N.S.Co. Ct.). They also recognized that the question of whether the appellant took all reasonable steps to avoid violating the Regulation was a question of fact for the trial judge. **Belliveau**, supra, at ¶ 11. Based on the evidence adduced at trial we see no error of law on the part of the SCAC judge in concluding that the trial judge's rejection of the due diligence defence was not patently unreasonable.

[14] In his factum counsel for the respondent objected to what was described as a last minute attempt by the appellant to raise a new argument, that is that he held a reasonable and honest belief in facts that would render his conduct innocent

pursuant to s-s. 78.6(b) of the **Act**. While the respondent's assertion may be technically correct, it does appear to us from the record that this argument was at least tangentially made in the courts below and that no prejudice would be occasioned for us to address it here. It is important to remember that proof of an *honest* belief is only one part of establishing the defence available under s. 78.6(b) of the **Fisheries Act**. Not only must an accused show the honesty of his or her belief, but that it was a *reasonable* belief having regard to all of the circumstances. Based on the evidentiary record here, a finding that Mr. Croft had failed to satisfy this additional requirement, and had therefore not established a defence, would not be unreasonable.

[15] Neither do we see any error on the part of the SCAC judge in affirming the trial judge's finding that the legal maxim *de minimis non curat lex* had no application to the circumstances of this case. We share that opinion. This is, as we have said, a strict liability offence. Moreover, it is one where compliance is measured in millimetres. Parliament has decided where it chooses to draw the line. In this sense it is much the same as imposing a limit of 80 mg of alcohol in 100 ml of blood in the **Criminal Code** provisions prohibiting the operation of a motor vehicle, vessel, aircraft or railway equipment while impaired. There is no tolerance or margin extended for "almost" or "close" compliance. The public interest in protecting our commercial fishery is hardly a trifling matter. The maxim has no application here.

[16] Finally, as to Mr. Croft's appeal against sentence, we, like the SCAC judge, are not persuaded that the $5,000 fine imposed following his conviction is clearly unreasonable or manifestly excessive, in other words demonstrably unfit. **R. v. Shropshire**, [1995] 102 C.C.C. (3d) 193 (S.C.C.); **R. v. C.A.M.** (1996), 105 C.C.C. (3d) 327 (S.C.C.); **R. v. Muise** (1994), 94 C.C.C. (3d) 119 (N.S.C.A.); and, **R. v. Tran**, [2000] N.S.C.A. 128.

[17] For all of these reasons leave to appeal is granted, but the appeal against conviction and sentence is dismissed.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.