1990 C.Y. No. 5470

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

SCOTT B. PHILLIPS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Yarmouth, Nova Scotia, on the 12th day of July, A.D. 1990

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 33(2) of the Atlantic Fishery Regulations

DECISION: The 19th day of March, A.D. 1992

COUNSEL: S. Clifford Hood, Q.C., Esq., for the Appellant

Richard W. P. Murphy, Esq., for the Respondent

D E C I S I O N

HALIBURTON, J.C.C.

Scott Phillips has appealed his conviction by James D. Reardon, J.P.C., on the charge that at Yarmouth, Nova Scotia, on or about May 14th, 1989, he, Scott Phillips,

> "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."

The evidence was that a Fishery Officer (Barnes) identified Scott Phillips as the man he saw aboard the vessel on May 14th, 1989, at approximately 1:30 in the morning. He saw him "tying up" at the wharf. He boarded the vessel and spoke to Phillips, asking permission to check the hold for the quantity of groundfish. As a result of his observations, he advised Phillips of his belief that "he was in violation" and "I asked to see the license which he provided".

The documents referred to as "the license" delivered to the witness by Phillips consists of several separate sheets of paper, including a copy of the application for license signed by one Randall Theriault, together with a form of license dated 20th April 1989, and the Conditions of License fixing the trip quota for the vessel for the period May 12th to May 15th, 1989. This latter document is dated May 12th and is signed by Phillips as "license holder". When the vessel was unloaded, it was determined that it had, indeed, exceeded its quota as fixed in the "Conditions of License".

On that initial contact with Phillips, the Fishery Officer had given him the police caution, that is, that he "need not say anything", and had advised him of his "right to Counsel". Some 30 hours later, after the cargo of fish had been weighed and obviously after some further consideration, the Fishery Officer approached Phillips on the following Monday morning, advised him that he was continuing his investigation, and asked him whether he was the "captain" of the fishing vessel. No further Charter right or caution were given. After a **voir dire**, the Trial Judge excluded any evidence as to the response Mr. Phillips gave.

Crown Counsel then sought to elicit some particulars of the activities which the Fishery Officer had observed Phillips to be performing on the vessel. When first observed, he was working on some wiring behind the wheelhouse which I presume would be more or less in the waist of the vessel. There were two other crewmen aboard at the time the vessel tied up and, as already mentioned, it was Phillips who produced the licensing documents which were seized and made an exhibit.

At the conclusion of the hearing and after submissions by Counsel, the Trial Judge made certain findings of fact. He found that Phillips was "different from the ordinary type of crew member" primarily because he had signed the Conditions of License as "license holder". With respect to the "Conditions of License" which imposed the quota limits, Judge Reardon found that it was a "document in...possession" and he went on to say, at page 36:

> This Court is satisfied that Mr. Phillips by his signature to the document previously referred to, the license conditions, was fully aware of these conditions...

Judge Reardon was satisfied as to the quota limit which then applied to this particular vessel and there was no evidence to raise any question about the fact that the catch exceeded that quota limit.

As Defence Counsel pointed out, both then and on this appeal, the general rule is that the captain of a fishing vessel is the person who is charged with such an offence. There was, before the Trial Court, no direct evidence that the Accused was the captain of this fishing vessel. In that regard, Judge Reardon concluded:

> (Page 36)
> The evidence shows the accused's complicity in the offence; and, therefore, it is the finding of this Court that there was the necessary mens rea under Section 21(1) of the Criminal Code by being a party to the offence....

THE ISSUES

The Appellant puts forward the issues in the following form:

> (1) **Whether or not the Learned Trial Judge erred in law in making findings of fact which were not supported by the evidence;**
>
> (2) **Whether or not the Learned Trial Judge erred in law in finding that the accused was guilty of the offence as being a party to the offence?**
>
> (3) **Whether or not the Learned Trial 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?**

ISSUES 2 & 3

Counsel has pointed out, quite correctly, that in dealing with charges of this nature, it is ordinarily the captain of the vessel alone who is named as the Defendant. He argues that to convict the Accused as a "party to the offence" is to depart from the norm and that it was incumbent upon the Crown to notify the Accused that it intended to proceed against him as a party.

Defence Counsel argues in part:

> (Paragraph #57)
> It is inferred from the decision of the Learned Trial Judge that the Appellant was found guilty of the offence as being a party thereto. Proof of knowledge that an offence had occurred was implied from the Appellant's purported signature on a condition of license. As a member of the crew (if in fact he was) the Appellant did not have any way of knowing exactly what the vessel was doing nor the quantity of fish on board nor did he have any way to control this.

It is to be noted that the last statement cannot be drawn from the evidence. The Accused Phillips did not testify and, accordingly, there was no direct evidence before the Court whether he "had any control" or any role in the management of the vessel.

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. I accept the representations of Crown Counsel that the law does not require advance notice to an accused person either by the wording of the information or otherwise that he is being proceeded against "as a party" as opposed to "as the principal".

In his brief to the Court, Mr. Murphy for the Crown has relied on s. 21 of the Criminal Code, as well as a number of authorities with respect to "parties to an offence". Judge Reardon found, as fact, that the Accused was involved in the operations of the vessel to a degree greater than just an ordinary crewman. 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.

ISSUE NO. 1

The Appellant argues that certain findings of fact made by the Trial Judge were not "supported by the evidence". One such finding was that the "license conditions" had been signed by Phillips. Fishery Officer Barnes testified that he thought he had been present when Phillips signed this document but, as Defence Counsel argues: "Mr. Barnes did not witness the

signature"; Fishery Officer Francine Jacquard did. As Defence Counsel argues, there is

> no evidence before the Court by Francine Jacquard or any other source that the signature is in fact that of the Appellant.

Of Fishery Officer Barnes' evidence, he argues: "Nor does he ever state that he believes it to be (his signature)". He argues further that

> (Page 6)
> The Crown did not prove that the Appellant was a member of the crew. The only evidence is that the Appellant was repairing some wiring on the vessel.

These points are well made by Counsel, however, they relate to findings of fact made by the Trial Judge. The Trial Judge not only has the opportunity to assess the evidence given by the witnesses who testify but had also the right to draw appropriate inferences based on all the evidence before him, including the fact that the Accused did not testify. 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.

Mr. Murphy, on behalf of the Crown, has cited the text Salhaney on Canadian Criminal Procedure 4th (1984: Canada Law Book) at page 441 and following, for the proposition generally stated that unless conclusions of fact reached by the Trial Judge are unreasonable or cannot be supported by the evidence which was before him, then such findings of fact cannot be overturned on appeal. I accept that as a correct statement of the law. I cannot conclude on the basis of the evidence that the Trial Judge committed a reversible error in law in reaching the findings he did.

The appeal will, accordingly, be dismissed, the conviction and penalty are hereby affirmed.

DATED at Digby, Nova Scotia, this 19th day of March, A.D. 1992.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

Salhaney on Canadian Criminal Procedure 4th (1984: Canada Law Book) at Page 441