

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

CHESTER STACEY DENTON

RESPONDENT

HEARD: At Digby, Nova Scotia, on the 27th day of June,
A.D. 1990

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

CHARGE: Section 63(3) of the Atlantic Fishery Regulations

DECISION: The 27th day of September, A.D. 1990

COUNSEL: Michael J. Mackin, Esq., for the Appellant
S. Clifford Hood, Q.C., Esq., for the Respondent

DECISION ON APPEAL

HALIBURTON, J.C.C.

This appeal is against the acquittal of Chester Stacey Denton in a prosecution for an offence, the essence of which is that

on or about the 27th day of July 1989 (he) did unlawfully fish for scallops within eight nautical miles of the shores of...Digby County.

His Honour John R. Nichols, a Judge of the Provincial Court, heard the evidence and acquitted the Accused on the 16th day of November, 1989. Shortly after that date, on December 4th, the Appeal Division of the Supreme Court of Nova Scotia heard an appeal in the case of R. v. Frederick W. Saunders, S.C.C. #02129 (Dec. 21, 1989, unreported). The judgment of MacDonald, J.A., speaking for the Court in that case, deals with issues central to the issues raised herein. The circumstances relating to the offence alleged to have been committed by Denton in this case and the decision of the Trial Judge herein must now be read in the context of the decision rendered by the Appeal Division in the Saunders case. The essence of the matter which this Court must now consider is whether the activities of this Accused **inside the eight mile restricted zone** come within the definition of "fishing" as it must now be applied subsequent to the Saunders case.

THE TRIAL COURT

In connection with the issues raised on this appeal, the relevant findings of the Trial Court are set out at pages

101 and 102 of the transcript. In the course of his decision, Judge Nichols said:

He (Captain Denton) indicates quite fully from his four loran instruments that he..had on board and the two radars, one (of) (sic) which was operational, that he felt he was..outside, all his fishing was done outside the eight mile line, skirting along the edge of the line as shown by the (50) (sic) fathom line that he was negotiating as shown on the red line of C-4 (marine chart of the area).

He indicates at the time that he had plotted his position not only on his loran and had the reading there but also on his radars, had the position marked as just on the edge of the eight mile line.

On cross examination he was asked what, was he, did he go on deck or fish and then check and he said he was always in the seat checking....

On the totality of the evidence, considering the variation and the closeness of the line, I am satisfied that the defence of due diligence is available to Mr. Denton. It is certainly indicated from the equipment he had on board and his observations made from his use of the radar, the evidence given by the pilot as well, puts him in so close to the line that I am giving him the benefit of the doubt that when he was observed by the Fishery Vessel, the Fishery Helicopter, that he was in the process of hauling in his drag, having drifted inside, slightly inside the line, just prior to the drags being landed on board.

I am not satisfied that the Crown has established that he did unlawfully fish for scallops within the eight nautical miles of the shores of Annapolis Basin (sic) and I find him not guilty of the offence as charged.

(my emphasis)

The Appellant/Crown raises the following issues on appeal:

1. The evidence at trial does not sustain a defence of due diligence on the part of the Respondent as suggested by the Learned Trial Judge.

2. The Respondent was in the act of fishing when he was found to be inside the closed area.

THE EVIDENCE

In general terms, the evidence was to the effect that the **Holly Ann II** of which the Accused was the captain was, on the day in question, engaged in fishing for scallops. Having apparently accumulated some quantity of scallops in the shell (shell stock), the vessel drifted for some time during which period the crew was engaged in shucking scallops and had for that time abandoned the "fishing process". During this period, the vessel drifted to within approximately 5½ miles of the shore where it was observed by the Fisheries Patrol vessel, **Cumella**, at approximately 5:30 in the afternoon. The evidence was to the effect that the Fisheries Patrol vessel, **Cumella**, manoeuvred to a point a mile and a half or two miles off the coast and watched the **Holly Ann II** by means of its radar as it proceeded offshore. At the request of the **Cumella**, a helicopter which was also engaged in Fisheries surveillance identified the **Holly Ann II** at a position 7.3 miles off the coast of Digby County at approximately 8:25 p.m. The occupants of the helicopter observed the scallop drags being brought aboard the vessel and were able to observe that the drags contained what appeared to be scallops.

The Accused, Captain Denton, gave evidence. He testified at page 75 that he had been laying too, shucking for

about two hours when they first made visual contact with the patrol boat. While shucking, his vessel had drifted to a point some five miles off land.

So I steamed off the land..to my knowledge, I was eight miles off when I set out...I set my drags out.

He went on to say that he made a 15 minute tow and (at page 76):

When the helicopter came my drags were almost to the boat. I had 25 fathom of cable left out.

QUESTION: And how long had you been hauling back?

ANSWER: Oh, three, four or five minutes.

QUESTION: Now, to your knowledge, where were you right then?

ANSWER: Right when the helicopter come?

ANSWER: Yes.

ANSWER: I was a bit inside the line.

And later, page 77:

QUESTION: So what you're saying is that on your radar screen, to the best of your recollection, your eight mile ring would be...was it touching that point or was it actually a little inside?

ANSWER: It was actually a little bit inside of it.

QUESTION: Okay, that is when the helicopter came over you, and you had 25 fathoms of cable out?

ANSWER: Yeah.

QUESTION: How much...what was the depth of water there?

ANSWER: Oh, 53-54 fathom.

QUESTION: Now during all the time that you were towing with your gear on the bottom, where were you according to what your radar... (my emphasis)

ANSWER: Eight mile, right on the eight mile line.

QUESTION: You're sure of that?

ANSWER: Yes sir, I am.

And at page 79:

And you said you worked on an edge. That edge is, in fact, ah, a chart fathom line and what is it?

ANSWER: It's a 50 fathom line.

QUESTION: That's where you...what was the depth of water that you were fishing on, on the edge?

ANSWER: On the edge, 52 to 53 fathom.

And at page 80:

And basically from you're saying, it seems that you set outside the line and then the tide which brings you around...

ANSWER: Yeah.

QUESTION: ...follow that edge and then as you come up towards the line and haul up?

ANSWER: Yeah.

QUESTION: And then as you're hauling up, you continue to set in, set in towards the land?

ANSWER: And also we keep the boat in gear too until we get our 50 fathom in and then we take her out of gear. That will set you in even farther.

And in cross-examination, Captain Denton was asked about how often he checked his navigation along this eight mile line or 50 fathom line as the case may be. (Page 84):

ANSWER: Oh, I'm always sitting in the seat, looking.

QUESTION: ...So you weren't out on deck or anything of that sort?

ANSWER: Oh, I'd go on deck for a couple of minutes and help the guys and shuck a little bit.

And at page 86, with respect to his position and the care he was taking to avoid fishing inside the eight mile line:

QUESTION: And you well knew by fishing that close to the line, it was easy for you to actually come over the line...

ANSWER: Oh, when you...

QUESTION: ...within the closed area, correct?

ANSWER: Yes, when you was hauling back, yes but then your gear is not on bottom. It's coming up in the water.

QUESTION: Now, you've stated that, that you knew that you were inside the line and you knew that because you looked at the radar and that was at a point that you were doing what?

ANSWER: We was hauling back. We only had about 25 fathoms left.

QUESTION: And you're suggesting that you were not fishing at that point in time?

ANSWER: No, we weren't. Our gear was not on bottom.

QUESTION: Even though your gear was still in the water though, correct?

ANSWER: That's right but...

QUESTION: The drags weren't aboard as yet?

ANSWER: No.

FINDINGS

ISSUE NO. 1

A finding of due diligence is a finding of fact and ought not to be disturbed on appeal unless the facts cannot reasonably be supported by the evidence. From the decision of Dickson, J., as he then was, in R. v. City of Sault Ste. Marie,

[1978] 2 S.C.R. 1299, it is clear that the defence of due diligence will be available only

if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

The evidence of Captain Denton and the evidence which was apparently accepted by the Trial Judge was that he was fishing on the eight mile line. His evidence was that he was being reasonably careful not to come inside that line until he had commenced the operation of hauling back his gear. In the course of this process, his practice was to turn towards the shore to avoid the possibility of the towing warp fouling his propeller, and at some later stage in the process, stopping the propeller and permitting the vessel to drift while the final stages of recovering the drags proceeded. His evidence was that it was at this stage after turning towards shore and after the drags were off the bottom but before they were on board the vessel that the patrol helicopter hovered over them and determined his position. By his own evidence, he was slightly inside the line. The crew of the patrol helicopter fixed the position at seven and three-tenths miles from shore.

In these circumstances, the defence of due diligence cannot apply. If the process of recovering the scallop drags is "fishing", the Accused did not have a mistaken belief in a set of facts, that is, his location, which could render him innocent. Accepting his evidence as the Trial Judge did, Captain Denton's mistake was in relying on a definition of

"fishing" which is contrary to the result in Saunders. Accordingly, his error was one of law and not of fact. Likewise, there is no suggestion that he took all reasonable steps or any steps to avoid having his vessel come within the eight mile restricted area while he was in the process of recovering his drags. To the extent, then, that the Trial Judge may have found the Accused not guilty on the basis of the exercise of due diligence, I find that he was in error.

ISSUE No.2

It is argued on behalf of the Respondent that he was not "fishing" at the time he was observed, nor at any other relevant time. The Accused concedes that his fishing vessel was inside the eight mile line but that before his vessel had actually penetrated the eight mile line, he had commenced the process of recovering his drags. There is no evidence in the transcript describing the length of the towing warp used by the Accused on the day in question. The evidence is that he was actually fishing for scallops along the 50 fathom line which roughly coincided with the eight mile restricted zone. What is clear in the evidence is the Respondent's position that at the time of observation, while still in water having a depth of nearly 50 fathoms, his scallop drags were only 25 fathoms down. The significance of that point is, of course, that while scallops have some limited ability to swim, or at least some limited mobility, scallops are a shellfish, or indeed a mollusc, and habitually rest on the ocean bottom. To be effective in the

process of catching them, it is general knowledge that the drags are towed over the bottom and not in mid water. Thus, while it may be as a matter of law that Captain Denton was "fishing" with only 25 fathoms of his towing warp extended, the prospect of his catching any scallops at that particular phase of the process would have to be remote.

In these circumstances, can it be said that Judge Nichols was correct in accepting what must best be described as the opinion of the Accused that "all his 'fishing' was done outside the eight mile line...".

Section 2 of the Fisheries Act R.S.C. 1985, c. F-14, defines fishing as follows:

"Fishing" means fishing for, catching or attempting to catch fish by any method.

On my reading of Saunders, Macdonald, J.A. appears to have determined what will be the definition of "fishing" at least in the Courts of this province. In that case, the Accused had embarked on a fishing trip seeking to catch haddock and had, instead, caught pollock. It was, at that time and place, an offence to catch pollock but, having caught them, the Accused determined the only reasonable course for him to follow was to land them.

While with respect to the Saunders case it might be argued that a Court was dealing only with a question of "fishing for" as opposed to articulating a definition of "fishing", Mr. Justice Macdonald specifically approved and reiterated the definition enunciated by the Supreme Court of Canada in The Ship

1897

"Frederick Gerring Jr." v. Her Majesty The Queen, [1987] 27
S.C.R. 271.

In Gerring, an American fishing vessel, a seiner, having entrapped a catch of herring in international waters, drifted within Canada's three mile limit before the trapped fish had been removed from the seine. In those circumstances, it was found that the seiner had been "fishing" within the three mile limit. Mr. Justice Sedgewick is quoted from that case in the Saunders decision as follows:

"...The question is whether this vessel was 'fishing', when, for two hours or more, her crew were baling (sic), or scooping out, by means of a dip-net, from the area of water surrounded by the seine, the one hundred and thirty barrels (more or less) of mackerel which they finally secured. The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what 'fishing', according to the ordinary acceptance of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty."

(my emphasis)


Counsel for the Respondent has urged upon the Court that "reason" and a "knowledge of fishing practices" would distinguish this case from the Gerring case on the basis of the facts. Certainly the species of fish taken are very different and the activities relating to recovering those fish are very different. I find, however, that I am bound by the decision in

Saunders, and that had Saunders been decided before the Accused herein went to trial, Judge Nichols could not have found that the Accused was not "fishing" while he was in the process of retrieving his drags with their catch of scallops, even though he might have determined as a matter of fact that all the scallops actually entrapped in the drags had been so entrapped outside the line.

Applying the decision in Saunders and Gerring, I conclude that Judge Nichols made a reversible error in law with respect to whether or not the Accused was "fishing" on the basis of his own testimony and, accordingly, I would reverse the decision of the Trial Court and enter a conviction against the Accused. Counsel will, of course, be heard with respect to an appropriate sentence.

I would add only this afterthought. While the definition of "fishing" enunciated in Gerring may appear to be unduly pedantic, it does have obvious practical merit from the point of view of enforcement. When a fishing vessel is caught, red-handed as it were, with its scallop drags or its otter trawl gear in the water, it would surely be impossible for either enforcement officers or the Courts to determine with any degree of accuracy or equity whether the fish were caught within or without a defined area.

DATED at Digby, Nova Scotia, this 27th day of
September, A.D. 1990.



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

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CASES AND STATUTES CITED:

R. v. Frederick W. Saunders S.C.C. #02129, December 21, 1989,
unreported

R. v. City of Sault Ste, Marie [1978] 2 S.C.R. 1299

Fisheries Act R.S.C. 1985, C. F-14

The Ship "Frederick Gerring Jr." v. Her Majesty The Queen,
[1987] 27 S.C.R. 271