

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Leahy, 2005 NSPC 52

Date: 20050826

Docket: 1249126

Registry: Sydney

Between:

The Queen

v.

John Gary Leahy

Judge: The Honourable Judge Brian Williston

Heard: Sydney, Nova Scotia

Oral decision: August 26, 2005

Charge: did, between August 22, 2002, and September 6, 2002, inclusive, within the Canadian Fisheries Waters adjacent to the Province of Nova Scotia, while carrying out an activity under the authority of a licence, contravene or fail to comply with a condition of the licence by fishing for Snow Crab in a division or subdivision other than Area 23D, contrary to s-s 22(7) of the Fishery (General) Regulations, SOR/93-186, thereby committing an offence under s. 78 of the Fisheries Act, R.S.C. 1985, c.F-14.

Counsel: Mr. Denis Lavois, for the Crown
Mr. Ralph Ripley, for the Defence

By the Court:

[1] John Gary Leahy is charged with contravening a condition of his license by fishing for snow crab in a sub-division other than Area 23D, contrary to the Fishery General Regulations thereby committing an offence under s. 78 of the federal Fisheries Act. I, first of all would like to thank Mr. Lavois who represented the Crown, and Mr. Ripley who represented the defence for the able way in which each presented their case and for all their assistance, not only in respect to the way in which the case was presented and calling of evidence but also with respect to their submissions and the legal submissions as well.

[2] The Defendant, John Gary Leahy, has been a fisher for thirty-one years. He owns and operates the fishing vessel Patches III, a forty-five foot fibreglass Cape Islander. Initially he worked in the ground fishery and in the year 2002 he was issued a temporary crab fishing license by the federal Department of Fisheries and Oceans which was valid from May 27, 2002, until September 30, 2002, and later he was issued an amended license for the same period of time.

[3] In order to properly manage the fishery, the Atlantic Crab fishery has been divided by regulation into various zones. Area 23, which is the subject of this

proceeding, has been divided into four sections: 23 A, 23 B, 23 C and 23 D. As a condition of his license, the defendant was restricted to fish in area 23 D and in August 2002 was not permitted to fish in any other area other than 23 D. The conditions of his license included a definition of Area 23 D where he was permitted to fish and contained, as well, a number of monitoring and reporting requirements. Included in these conditions was the requirement that Mr. Leahy maintain an electronic monitoring system onboard his vessel. This vessel monitoring system (VMS) permitted the vessel's location to be monitored twenty-four hours a day and the fisher was required to ensure that the system was fully operational and in use during the entire fishing trip from the time the vessel left port until the vessel returned.

[4] There was considerable evidence presented by the Crown about the use of this navigational equipment, known as the "black box", in the monitoring of the accused's vessel Patches III on the dates in question.

[5] Trevor Fradsham, a Systems Analyst Project Manager, for the Department of Fisheries and Oceans gave expert evidence on the Vessel Monitoring System (VMS) including the collection, analyses and dissemination of positional

information obtained from vessels. He testified how the signals are picked up from these vessels by global positioning satellites and that the data which fixes the position of these vessels is transmitted to the Department of Fisheries and Oceans from the service provider. He indicated that the accuracy of this GPS positioning of each vessel is plus or minus 20 metres.

[6] Michael Eagles, Senior Advisor Invertebrates with the Department of Fisheries and Oceans testified regarding the management of the fishery in fishing zones 23 A, 23 B, 23 C and 23 D in order to maintain and conserve the fish stocks.

[7] Joseph Pelrine testified regarding his work at the Sydney Detachment of Department of Fisheries and Oceans in 2001 and 2002 in monitoring the crab fishing fleet with the data provided by the Global Positioning System (GPS) instruments on board the vessels. Mr. Pelrine had extensive background as a fisheries observer at sea with a working knowledge of LORAN C navigational equipment and the information it provided.

[8] During the month of August 2002 the signals received on an hourly basis from the Patches III indicted that the vessel had slowed down while going through

Area 23 B both on its way out and way back from 23 D. As a result, the suspicion of the Department of Fisheries and Oceans was aroused and it began to monitor the fishing trips of Patches III more closely. Mr. Pelrine testified regarding the data received in four different trips of the Patches III in August 2002 which showed a definite slowing down and a slight diversion of course as it passed through the same area of zone 23 B.

[9] Mr. Pelrine compiled an assessment as to where and when the vessel would be expected to be slowing down on its way back to port on August 23, 2002, using the data from the signals received on the earlier trips. This information was in turn passed on to Fisheries Officer Joseph Claude Maillet who was standing by in Dartmouth, Nova Scotia, to board a surveillance aircraft to go to that area. Mr. Pelrine also spoke to Fisheries Officer Maillet while the aircraft proceeded to that area indicating the most recent positions of Patches III and confirming that it was proceeding where it had been predicted to proceed.

[10] Fisheries Officer Maillet testified that he was the officer in charge of the surveillance aircraft which at approximately 1930 hours patrolled to the area where the Patches III was predicted to be on August 23, 2002. While en route the aircraft

proceeded to the last known reference co-ordinates provided by the VMS on the Patches III. The surveillance aircraft arrived at that location at 2130 hours that night at an altitude of 3000 feet and the radar operator activated the night time visualization system known as FLIR (Forward Looking Infrared) camera device which locates “warm bodies” and is magnified. Fishery Officer Maillet observed the vessel for an hour and 20 minutes on the FLIR and saw it alter course and change speed and stop. He also saw what appeared to be some kind of activity being carried out and a couple of bodies going over to the stern of the boat three to four times. On its fifth pass when the vessel was again seen to alter course and slow down, the surveillance aircraft dropped its altitude down to 200 feet and pictures were taken, with flash, in five passes over the vessel. At this time the vessel was positively identified as the Patches III. These pictures were digitally produced and presented as exhibits. In one photo, exhibit “N”, which has been enhanced by brightening, a line and buoy can clearly be seen in the water. Fishery Officer Maillet testified that a square object can be seen on the stern which he indicated at first looked like a trap but he indicated that he could not be one hundred percent certain that it was a trap and he was extensively cross examined with respect to that.

[11] Linda Taylor, a Data Management System operator with Provincial Airlines, was a member of the flight crew that night and testified regarding the co-ordinates where the aircraft was located when it went down to take pictures of the vessel that night. The co-ordinates were 4440.21 north latitude and 05940.94 longitude in crab fishing zone 23 B. These co-ordinates were in turn provided to Fisheries Officer Gavin Hendsbee on board the Coast Guard patrol vessel Signus.

[12] Fishery Officer Gavin Hendsbee directed the captain of the Coast Guard vessel, Signus, to proceed to these co-ordinates on September 5, 2002. When the Signus arrived at the location in crab fishing zone area 23 B in the early afternoon of September 5th, 2002, pink buoys were observed in the water. Five of these pink buoys were located within a couple of cables of the co-ordinates given to the Signus. (One cable is 1/10 of a nautical mile or approximately 600 feet.) Fishery Officer Hendsbee along with Fishery Officer Kate Pyke and Fishery Officer Nicole Butler began the process of hauling these buoys and crab traps out of the water.

[13] The pink buoys, white trailing buoys and the crab traps were photographed when brought on board the Signus. These photographs were entered as exhibits

and Fishery Officers Hendsbee, Butler and Pyke testified regarding the markings on these buoys.

[14] On one buoy the word “Patches” appears to have been modified to “Batches”. As well, numbers relating to Mr. Lahey’s telephone number appeared to have been modified.

[15] Tags attached to the gear were identified through the documentation tendered in the trial as tags issued to Mr. Leahy for crab fishing zone 23 D.

[16] The co-ordinates where the fishing gear was located were noted and passed on to Captain James Warren who plotted the positions on Exhibit “NN”.

[17] Captain James Warren was called by the Crown as an expert regarding nautical charts and the plotting of positions. He plotted positions of the Patches III on the outbound and inbound trips referred to by Mr. Pelrine in relation to the VMS positions as the vessel passed through area 23 B. As well, he plotted the positions of where the surveillance aircraft was located in its observation of the Patches III on August 23, 2002, and the positions of where the fisheries officers on

board the Signus located the buoys and traps on September 5, 2002. From the evidence of Captain Warren, there is no question that the buoys and traps were in the vicinity of the location of the Patches III and the surveillance aircraft as recorded on August 23, 2002.

[18] Fishery Officer John Williams testified that he along with other fisheries officers boarded the Patches III when it arrived at its home port of Louisbourg on August 24, 2002. On that date Fishery Officer Williams received a green rope and buoy which he kept in his exhibit locker and was presented to the court as exhibit "JJ". This rope and buoy will be referred to in the consideration of the defence evidence.

[19] On September 7th, 2002, Fishery Officer Williams boarded the patrol vessel Signus and took possession of the five buoys which were presented in court as exhibits.

[20] The defence called six witnesses.

[21] The accused, John Gary Leahy, testified that in the fishing season of 2002 he did not have all the same traps at the end of the season. He was restricted by license to 45 traps. Early in the season after three weeks down time due to engine trouble and other factors he discovered that 11 of his traps were missing. He stated that he had an observer on board when he made this discovery. Although he recovered 6 or 7 of these traps, he had to release 5 traps and he received replacement tags from the Department of Fisheries and Oceans.

[22] Mr. Leahy testified that after the 1st of July 2002 the fishing zone 23 B in the area of the Eastern Hole had more and more traps being added until the end of August. He marked the locations of these traps on his plotter with a red "X" and instructed his crew to keep clear of them. He stated that on every trip the crew had to slow down and manoeuvre around them. He stated that they would travel a distance of 30 miles at a speed of no more than 1000 RPM or 4 to 5 knots which was down below half speed. He indicated that the reason for keeping the speed at no more than 1000 RPM was to allow the freeing of any rope that might become tangled in the propellers by putting the engine in reverse. According to the accused, rope became entangled in the propellor 4 or 5 times that season. Mr. Leahy recalled that the night of the flyover by the surveillance aircraft stood out in

his mind and was the last time that season his vessel was hooked up in a buoy. He indicated that a fisher's first response is to try to save it by a number of manoeuvres because it is valuable gear belonging to another fisher. On the night of the flyover the accused stated that the flash from the aircraft taking pictures lit up everything and he wanted to save it as well to prove that he wasn't hauling gear. He stated that they spent a couple of hours trying to get it clear from the propellor but in the end had to cut it off. When the vessel returned to port on August 24th it was met by the fisheries officers. Mr. Leahy gave the buoy to Fishery Officer Williams and had a diver go into the water to retrieve the rope from the blade. The rope in turn was also given to the fishery officers.

[23] Mr. Leahy identified the buoys retrieved by the patrol vessel Signus on September 5th as definitely his. He testified that on no occasion were any of the traps placed in those areas by him. He further stated that he has never used expensive trail buoys like the ones seized by the Signus and would never use a swivel between a buoy and a mooring as seen in the photographs taken on board the Signus as it would be a very dangerous object to have on the stern of his vessel in respect to safety of his crew.

[24] Stanley Hunt testified that he was hired to dive down to the propeller to retrieve the rope the day that the fishery officers were at the wharf. He stated that the rope did not appear to have been there too long and had melted at one point. This rope was given to the fisheries officers and was referred to in the evidence of Fishery Officer John Williams.

[25] Crew members, Gary Leman, James Dicks and David Lahey, and Lahey here is spelled differently, it's L A H E Y, no relation to the accused, also testified regarding the increased number of fishing gear in the area in question from the middle of July to the end of August 2002 and the need to manoeuvre around them slowly. As well, the crew members testified regarding their attempts to save the gear caught in the propeller of the Patches III the night the surveillance aircraft flew overhead and took pictures of the activity.

[26] The defence also called Vernon Robert Googoo who in 2002 was captain of a crab fishing vessel fishing under a permanent communal fishing license issued to Eskasoni First Nation. Mr. Googoo testified regarding the increased number of boats fishing in the area in question, 23 B, after the end of July 2002 and the need to proceed through that area with caution due to the heavy traffic and number of

buoys. He stated that his vessel became hooked a few times as well and emphasized the need to slow down in that area.

LAW AND SUBMISSIONS OF COUNSEL

(A) DEFINITION OF FISHING

[27] The term “fishing” is defined in s. 2 of the Fisheries Act, R.S.C. 1985. For the purposes of the Act and the attendant regulations, it means “fishing for, catching or attempting to catch fish by any method.”

[28] The seminal case on the meaning of fishing was decided by the Supreme Court of Canada more than 100 years ago in the case of the Ship Frederick Gerring Jr. v. R. (1897), 27 S.C.R. 271 where Sedgewick, J. speaking for the Court said at pages 280 - 281:

The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of 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.

[29] The definition of fishing is very broad in scope and the words used in both the statute and the case law are comprehensive of the activities associated with fishing.

[30] The Frederick Gerring Jr. case was relied upon in the case of R. v. Aylward (1990), 79 NFLD and P.E.I. Reports, (P.E.I.T.D.), where on appeal the accused fisher's appeal from his conviction on a charge of fishing snow crab outside his license area was upheld. In that case the accused was found to be "fishing" where his baited crab traps had been found in the water outside his licensed fishing zone and the accused's boat had been seen manoeuvring around the baited traps, although the accused was not seen placing or pulling the traps.

**(B) WHETHER CROWN HAS PROVEN ACCUSED WAS FISHING
OUTSIDE HIS LICENSED AREA**

[31] It is clear from the evidence that the fisheries officers never directly observed the accused, nor his crew, putting traps in the water, taking traps out of

the water or baiting the traps. The Crown concedes that the case presented against the accused fisher is a largely circumstantial one. However, the Crown has argued that in considering the totality of the evidence in this case that it has proven the guilt of the accused beyond a reasonable doubt.

CIRCUMSTANTIAL EVIDENCE

[32] This case requires consideration of circumstantial evidence and inferences flowing from this evidence.

[33] Circumstantial evidence provides the basis to support a conviction if the trier of fact is satisfied, not only that the accused committed the prohibited act, but that the facts are inconsistent with any other rational conclusion than the guilt of the accused. Hodge's case (1838) 168 E.R. 1136 and Comba [1938] S.C.R. 396.

[34] This principle was restated by Justice Ritchie of the Supreme Court of Canada in R. v. Cooper [1978], S.C.R. 860, 34 C.C.C. (2d) 18 that for a trier of fact to be satisfied of proof beyond a reasonable doubt, the court must also be satisfied that guilt is the "only reasonable inference to be drawn from the proven facts" in such cases.

[35] The law regarding the cumulative potential of circumstantial evidence to prove facts in issue was well summed up by the Supreme Court of Canada in Cote v. The Queen (1941) 77 C.C.C. 75 where Taschereau, J. stated at page 76:

It may be, and such is very often the case, that the facts proved by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered. Each one in relation to the whole, and it is all of them taken together which may constitute the proper basis for a conviction.

[36] The burden rests with the Crown to prove guilt beyond a reasonable doubt. There is no onus on the accused to give evidence or to establish anything. However, in this case the defence called evidence, including evidence of the accused, and I must weigh this evidence in the context of the evidence as whole.

[37] The defence maintains that the evidence of the accused along with the evidence of his crew supports a rational conclusion that conforms with innocence citing the decision of Deschenes, J.A. in R. v. Vallieres (1973) 15 C.C.C. (2d) 241 (Quebec Court of Appeal), where he stated at page 265:

After a careful consideration of the evidence, I cannot escape the conclusion that the interpretation which leads to compatibility with a rational conclusion other than the guilt of the accused, *ie.* his innocence, is not contrary to reason.

Therefore, since it is just as compatible with the innocence or the guilt of the accused, the evidence does not take on the characteristics of reasonable certitude attached to circumstantial evidence before the Judge should be satisfied that the evidence might, in law, open the way to a guilty verdict by the jury.

Consequently, after applying the principles that I tried to draw from the jurisprudence, we must conclude that the verdict rendered against the appellant cannot and must not be upheld.

[38] The Supreme Court of Canada in **R. v. W.(D)** (1991), 3 C.R. (4th) 302, [1991] S.C.R. 742 (S.C.C.) has given guidance to trial judges and juries regarding the principles to be followed when an accused offers testimony:

1. If the evidence of the accused is believed, the accused must be acquitted.
2. If the testimony of the accused is not believed but the Judge is left in a reasonable doubt by it, the accused must be acquitted.
3. Even if the Judge is not left in doubt by the evidence of the accused, the Judge must still consider on the basis of the evidence that is accepted whether the guilt of the accused has been proven beyond a reasonable doubt.

[39] In **R. v. Lifchus** [1997] 216 N.R. 215(S.C.C.) the Supreme Court of Canada offered model instructions on the concept of what represents proof beyond a reasonable doubt at page 233 where Justice Cory stated:

The accused entered these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression “beyond a reasonable doubt” mean?

The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so.. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[40] Later in the decision in *R. v. Starr* [2000] 2 S.C.R. 144 (S.C.C.) the Supreme Court of Canada held that the burden of proof placed upon the Crown lies “much closer to absolute certainty than to a balance of probabilities.” (Paragraph 242)

[41] It is these principles and guidelines that I apply in the case before me.

[42] I have carefully considered the evidence of all the witnesses along with the exhibits tendered.

[43] There is no question that some of the fishing gear retrieved from the waters in crab fishing zone 23B on September 5, 2002, in the vicinity of the co-ordinates taken by the fisheries surveillance aircraft on August 24, 2002, when the vessel, Patches III, was seen, belonged to the accused.

[44] As well it was established that the Patches III showed a pattern of slowing down and slightly diverting its course as it went through that area on its outbound and inbound trips from it's designated fishing area of 23D.

[45] It is obvious that markings on the buoys belonging to the accused were altered. The attempts to alter the name Patches III and the telephone number of the accused were not sophisticated and one might say were even done in a "amateurish" way. The accused and his crew members testified that they had not put the newer markings on the buoys. Even with those changes made, it is quite easy to connect the buoys back to the accused. The defence suggests that it would

be ludicrous for a person illegally fishing to use equipment with any markings that could be traced back to the fisher.

[46] Fishery Officer Maillet's testimony established that there was some kind of activity taking place on the Patches III in area 23 B the night of August 24, 2002. Before dropping to 200 feet and taking pictures with flash, the fisheries officer testified that he observed the Patches III through the infrared FLIR system for an hour and twenty minutes from an altitude of 3000 feet. He testified that he observed the vessel alter course, change speed, and stop and also saw a couple of bodies going to the stern of the boat three or four times. The accused and his crew testified that the Patches III never came to a stop although it did slow down and alter course to try to disentangle a buoy and line which had become hooked in its propeller.

[47] Credibility of witnesses is an important consideration in this case, as it is in most trials. It is important to remember that this trial is not a credibility contest and is not a matter of deciding which version of facts is more plausible, nor which witnesses are to be preferred.

[48] The role of a trial judge is to decide whether the crown has proven the accusation beyond a reasonable doubt.

[49] The case for the prosecution was well investigated, prepared and presented.

[50] I have given careful consideration to the photographic evidence, documentary evidence, expert evidence and witness testimony. Indeed, the observations presented to the court in this case raise the highest level of suspicion of illegal fishing.

[51] The evidence in this case clearly met the threshold required for the laying of charges.

[52] However, the test for conviction is much higher. No amount of suspicion replaces proof beyond a reasonable doubt.

[53] I have considered the evidence of the accused and his denial that he was fishing in the prohibited area where he was not licensed to fish. I carefully observed his demeanor and his assertions in his sworn testimony.

[54] After considering the evidence of the accused and the defence witnesses in this case in the context of the evidence presented by the crown witnesses and applying the principles in W.D. this court is left in a state of reasonable doubt as to the guilt of the accused.

[55] On the evidence, I am unable to conclude that the prosecution has discharged the onus of proving its case to the exclusion of any reasonable doubt that the accused was illegally fishing and accordingly I find the accused not guilty.

B. WILLISTON, J.P.C.