

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Shatford , 2008 NSPC 18

Date: 20080430

Docket: 1832127 &1832128

Registry: Bridgewater

Between:

R.

v.

Daniel Shatford and Shatford's Lobster Pound Ltd

Judge: The Honourable Judge Anne E. Crawford, J.P.C.

Heard: March 18 & 20, 2008, in Bridgewater, Nova Scotia

Charge: s. 73 Nova Scotia Fisheries and Coastal Resources Act
s. 73 Nova Scotia Fisheries and Coastal Resources Act

Counsel: James Clark, for the Crown
Alan Ferrier, for the defence

By the Court:

[1] Daniel Barry Shatford (“Shatford”) and Shatford’s Lobster Pound Ltd.(“the pound”) are charged jointly under s. 73 of the Nova Scotia Fisheries and Coastal Resources Act with processing, buying, selling, packaging, possessing or marketing fish or fish products without a licence from the minister.

Facts

[2] This charge arose as the result of a complaint regarding unlabelled fish product being sold at Clearwater Lobster Shops at the Halifax International Airport.

[3] On May 30, 2006 Joan Marie David, an inspector with the Canadian Food Inspection Agency, attended at Clearwater’s premises at the airport and found unlabelled jars containing what appeared to be pickled mussels. She placed them under detention pursuant to the Fish Inspection Act (Canada) s. 7(1), and on June 1, 2006 she seized four jars at the airport and a total of 24 jars at Clearwater’s Bedford shop. She later forwarded 11 of the jars seized from Bedford for testing; the remaining 13 were produced before the court, with the four jars seized from the airport.

[4] Eric James Haley, who was at the time general manager of Clearwater’s retail stores, testified that Clearwater had an on-going commercial relationship with the pound. Clearwater bought mainly fresh fish from the pound, some of which Clearwater processed, and some of which, such as live or frozen canned lobster, was resold in the same condition in which it was purchased.

[5] Mr. Haley testified that sometime before April 28, 2006 he took his family for a meal at Shatford’s By The Sea (“the restaurant”), a restaurant owned by Daniel Shatford and his life and business partner, Joy Callahan, which operated out of premises adjoining the pound premises in Hubbards, Lunenburg County, Nova Scotia. While there he enjoyed pickled mussels as an appetizer, and, as he was leaving, saw that the mussels were offered for sale by the jar. He purchased a jar and consumed them on the way home.

[6] Mr. Haley said that he liked them so well that the next day, when placing his usual daily order with the pound, he asked “Bobby” (Robert Langille, retail manager

of the pound) if he could get another jar for himself, for which he would pay personally, and also whether he could buy some to sell in Clearwater's shops, as he thought they would be a good seller.

[7] An invoice from Shatford's Lobster Pound Ltd, and Clearwater Lobsters' purchase order and receiving report confirm that on April 28, 2006 thirty-six 500 ml. bottles of pickled mussels were sold by Shatford's Lobster Pound to Clearwater at \$8.50 per bottle and were received by Clearwater. Mr. Haley testified that, although he could not recall the price at which he offered the mussels for sale at Clearwater, he believed he had paid \$10 for the mussels he purchased personally at Shatford's and that the \$8.50 price appeared to him to be wholesale so that he could put a mark-up on them to make a profit.

[8] Testimony of Troy MacKay, inspector with Nova Scotia Department of Fisheries, establishes that computerized departmental records as shown in Exhibit 11 in this case show that Shatford's By The Sea paid for and was issued an Eating Establishment Permit for 2006 "for two facilities". Inspector MacKay also stated that under departmental policy, as exhibited in the Operations Manual Part I Chapter 4, section C. 6., the restaurant was permitted to cook and sell fish to the final consumer, i.e. to retail fish products, but not to wholesale to other businesses for retail sale on to an ultimate consumer.

[9] Robert Langille, retail manager of the Pound, testified that he sold the 36 bottles of mussels on April 28, 2006 as shown in the documentation, but stated that he told Haley that they were not for retail sale, but were for personal use only.

[10] Mr. Langille testified that it was his recipe that was used in pickling the mussels, and that he began doing it to use up extra product that would otherwise have been wasted. The pickled mussels were first used at a gala that the restaurant put on in 2005, and then were on the restaurant menu. They were also offered for sale to consumers at both the restaurant and the pound food shop at \$10.00 per bottle.

[11] Mr. Langille and Joy Callaghan each confirmed that the pound had no licence to process or sell fish or fish products, as required under s. 73 of the *Fisheries and Coastal Resources Act* but said that they thought the pound was exempt because of the eating establishment permit issued to the pound and restaurant jointly.

[12] John Peters, a food safety specialist with the Department of Fisheries, testified that as part of his employment he had been involved with both the restaurant and the pound, inspecting both premises in regard to food safety. He said that the pound and the restaurant shared one kitchen and an adjoining steam room. He said that under the guidelines the pound was a “food shop” and the restaurant was an “eating establishment” and that they did not require separate food service permits. The food service permit enables a restaurant or food shop to process food for consumption on the premises or for “take-out” to end users. It does not permit processing for sale to another retailer.

Legislation

[13] Section 73 of the Nova Scotia *Fisheries and Coastal Resources Act* states:

73 No person shall process, buy, sell, package, possess or market, within the Province, fish or fish products without a licence from the Minister unless the person is exempt pursuant to the regulations.

[14] Section 111 of the same Act codifies the due diligence defence in regard to all offences under the Act:

111 Unless otherwise provided in this Act, 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 conduct of that person innocent.

[15] Section 3(2) of the Fish Buyers’ Licencing and Enforcement Regulations states in part:

(2) For the purposes of Section 73 of the Act, the following persons are exempt from the requirement to hold a sellers licence:

...

(c) a person reselling fish or fish products, other than lobster, in a retail outlet owned by that person; or

[16] Nova Scotia Department of Fisheries departmental policy, as exhibited in the Operations Manual Part I Chapter 4, section C. 6 states:

Limited processing in a food establishment may be allowed in quantities that would seem reasonable for the operation of the facility and the focus of the business in retail sales, or as a means to prevent product loss when product loss is evident. **The term limited processing may not be used as a means to circumvent the Canadian Food Inspection Agency in relation to the requirements of a registered facility.** [Bold in original]

Elements of the offence

[17] The gravamen of the offence charged, despite the generality of the wording, is the resale of fish product to other than an end consumer without a sellers and/or processors licence.

[18] It is admitted that the sale in question took place and that the pound had no licences to process or sell, as required under s. 73.

[19] This is a regulatory offence and therefore one of strict liability. *R v. Sault Ste Marie (City)* [1978] S.C.J. No. 59; [1978] 2 S.C.R. 1299; 85 D.L.R. (3d) 161; 21 N.R. 295; 40 C.C.C. (2d) 353; 3 C.R. (3d) 30. The defendant is *prima facie* guilty of the offence if the Crown establishes all of the elements of the *actus reus*. The Crown is not required to prove a negative, such as an exemption. *R. v. D.M.H.* [1991] N.S.J. No. 417; 109 N.S.R. (2d) 322.

[20] I conclude that in regard to the pound the Crown has established all of the elements of this strict liability offence beyond a reasonable doubt.

[21] As to Shatford, there is no direct evidence before the court to implicate him personally in this transaction. He is therefore entitled to an acquittal.

Issues

[22] As to the pound, then, the issues before the court are:

1. Was the activity or the transaction exempt under the regulations or otherwise? and/or
2. Has the defence established a defence of due diligence?

1. Exemption under the regulations

[23] The burden of establishing that an exemption operates in his favour falls to the defendant.

[24] Under the Fish Buyers' Licencing and Enforcement Regulations the defendant was permitted in the words of s. 3(2)(c) to "resell fish or fish products . . . in a retail outlet owned by that person."

[25] Under the Eating Establishment Permit, which I am satisfied covered both the pound and the restaurant, the defendant was permitted to produce limited quantities of pickled mussels and to sell them to end consumers only. Although it is not clear to me whether or not either the restaurant or the pound was a registered facility under the Canadian Food Inspection Agency, this issue was not raised before me, and for purposes of this decision I assume that it is irrelevant.

[26] It is clear, then, that under either the pound's buyers' licence or under the eating establishment permit, although the defendant could sell limited quantities of pickled mussels on a retail basis to its customers, it was not permitted to sell them wholesale to any other business.

[27] The sale in question, as documented by the pound and Clearwater, is, on its face, a wholesale transaction. It is from one business to another at what appears to be a wholesale price. What one or both of the parties may or may not have understood the purpose of the sale to be is not relevant to a determination of whether or not a statutory exemption operated in favour of the defendant, although it may assist the defence in establishing a defence of due diligence.

[28] The defence has failed to establish on a balance of probabilities that this transaction was exempted from the requirement for a sellers and/or processors licence.

2. Due diligence

[29] The defendant may still escape liability if it establishes, on a balance of probabilities, that it or its agents “exercised all due diligence to prevent the commission of the offence”.

[30] The principal of the pound, Daniel Shatford, did not testify, and the only evidence before the court available to establish due diligence in regard to this transaction is that of Robert Langille.

[31] Mr. Langille testified that he acted for the pound in arranging the sale in question. He said that, despite the appearance of the transaction in the records of both the pound and Clearwater, he informed Mr. Haley at the time of the order that the sale was to him as a consumer and not for resale.

[32] Mr. Haley, however, has a different recollection of the conversation. He says that he told Mr. Langille that he wanted the pickled mussels because he thought they would be a “good seller” in his stores. The defence points out that Mr. Haley’s testimony for the Crown in this regard may be suspect, as his company, Clearwater, was also under investigation regarding this matter at the time that he gave his initial statement.

[33] The defence also suggested that the instruction in *R. v. W.(D.)* 1991 CarswellOnt 80, 3 C.R. (4th)302, 122 N.R. 277, 63 C.C.C. (3d) 397, 46 O.A.C. 352, [1991] 1 S.C.R. 742 should be applied to the conflict between the two accounts. However, this is not a “reasonable doubt” situation, but a situation in which the Crown has established beyond reasonable doubt the *actus reus* of the offence and the defendant can escape liability, as stated above, by showing due diligence. Although Mr. Haley’s testimony is not above suspicion, it is corroborated by the whole form of the transaction, and I cannot entirely discount it.

[34] But the question of due diligence does not really turn on which version of the conversation I accept. It is, rather, whether or not Mr. Langille’s warning to Mr. Haley, even if it occurred, would be sufficient to satisfy the due diligence requirement on a balance of probabilities. In my opinion, it is not.

[35] Mr. Langille, on behalf of the pound, in the words of the statute did not “exercise all due diligence” to prevent the commission of the offence. For example, if the sale really was for Mr. Haley’s personal use, why was it not invoiced to him, not his company, and paid for by him, not his company? A mere verbal warning is not sufficient to establish due diligence in these circumstances.

Conclusion

[36] As there is no doubt that Mr. Langille was acting on behalf of the pound in processing the mussels and arranging the sale in question, I find that the defendant Shatford’s Lobster Pound Ltd. is guilty of the offence charged.

[37] As previously stated, the charge against Daniel Shatford is dismissed.