

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Fleet, 2008 NSSC 373

Date: 20081021

Docket: CrAt293210

Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Kerry Wyman Fleet

Respondent

DECISION

Judge: The Honourable Justice Douglas L. MacLellan

Heard: October 21, 2008, in Antigonish, Nova Scotia

Written Decision: December 11, 2008

Counsel: Ronda Vanderhoek, for the appellant
Thomas Hart, for the respondent

By the Court:

[1] This is a crown appeal from the acquittal of the respondent by Judge John Embree of the Provincial Court on a charge under section 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14.

[2] The respondent was tried by Judge Embree on 2 charges, namely.

[3] That on the 22nd day of June, 2007 at or near Marie Joseph, Guysborough County, Nova Scotia.

1. He did have on board a vessel a lobster trap without a valid tag issued by the minister securely attached to the frame of the trap contrary to section 62 (1) of the *Atlantic Fisheries Regulations*, thereby committing an offence under section 78 of the *Fisheries Act*.

2. He did while carrying out any activity under the authority of a license, contravene or fail to comply with any condition of the license by not removing all non-valid tags from the traps, contrary to subsection 22 (7) of the *Fishery (General) Regulations* SOR/93-186, thereby committing an offence under section 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14.

[4] He was acquitted on the first charge but convicted on the second charge. He was fined \$1,000.00 and \$10.00 costs.

[5] The crown has appealed the acquittal and alleges the following grounds of appeal.

1. That the learned trial judge erred in his interpretation and application of the defence of “due diligence”.

2. Such further and other grounds that may appear from a review of the record and which this honourable court may permit.

THE TRIAL EVIDENCE

[6] The trial consisted of evidence from two fisheries officers, the respondent and his wife Elizabeth Fleet.

[7] Jerome Felix Julain testified that he was working as a fisheries officer on June 22nd, 2007 and that he went to the wharf at Marie Joseph, Guysborough County and had contact with the respondent. He said it was the last day of the fishing season in that area and he was in the process of checking lobster traps for valid tags as the fishermen landed their traps at the wharf.

[8] He said that while he was there the respondent arrived at the wharf in his son’s boat “The Gracie and Kaleigh” and that he approached the boat and spoke to the

respondent. He told him he wanted to check the traps which he had on board the boat. He said the boat had about 90 traps on board.

[9] He said that as the traps were unloaded from the boat he checked each of them for valid tags to Mr. Fleet. He said that out of the 90 or so traps landed by Mr. Fleet that day he found that seven of the traps had no tags attached thereto; eight traps had tags which had previously been issued to the respondent earlier in the season but which had been cancelled when new tags were requested by him and issued by the fisheries department; and 13 traps had tags attached but they were not tags which had been issued to the respondent.

[10] Mr. Julian explained that normally when a fisherman lands a trap on the last day of the season he would put the buoy and rope from that trap inside the trap and close the door. He said six of the traps with no tags had no buoy attached to them. He said that was not a common situation.

[11] He said he told the respondent there was a problem with some of the traps and that he gave him his charter rights and a caution. He then took from him his lobster license. That license was introduced into evidence as Exhibit C-1.

[12] Officer Julian explained that the lobster license had as a condition the fact that all non valid tags must be removed from his lobster traps and that replacement tags must be attached to the traps.

[13] He said that when he confronted the respondent about the traps and the condition of the license that the respondent told him he that did not read the conditions on the license.

[14] The officer also explained the process where a fisherman comes to the office and explains that some of his traps have been lost and requests new tags to attach to replacement traps. He said that in that situation a complete set of new tags are issued for the fisherman and he is expected to attach the new tags to the replacement traps and also attach the new tags to his existing traps after removing the previously issued tags from these traps. That person's license is then amended to reflect the sequence of numbers for the new replacement tags issued to him.

[15] Officer Julian testified that he was aware that the respondent's wife had arranged for the issuing of replacement tags to the respondent earlier in the season.

[16] On cross-examination Officer Julian was asked about an incident involving the respondent on the first day of the season when his boat, which was full of traps for setting out, was nearly swamped by another fisherman. He indicated that he was aware of that incident and that the other fisherman had been charged criminally as a result.

[17] He also indicated that the respondent had complained to the fishery's office about someone tampering with and damaging his traps during the course of the season.

[18] Brian Joseph Gillis is also a fisheries officer and had contact with the respondent on June 22nd, 2007 at Maire Joseph, Guysborough County. He testified that he got a call from Officer Julain to go to the wharf at Maire Joseph. He did that and when he arrived he met with Officer Julain and the respondent. He said that there were a number of lobster traps put aside on the wharf and that he was asked to view them. He said that he found that seven of the traps had no tags attached to them; eight had tags that had been issued to the respondent earlier in the year but were no longer valid and 13 traps had tags which had not been issued to the respondent. When Officer Gillis attempted to explain to whom these 13 tags had been issued, the trial judge interjected and suggested that would not be admissible evidence from him. Based on that

interjection crown counsel indicated that it was not relying on that evidence as part of it's case.

[19] Officer Gillis said that he saw Officer Julain take the lobster license from the respondent and when he showed him the condition of the license requiring that old tags be removed from traps, the respondent said "I don't read the conditions".

[20] He said he then asked the respondent why there were no tags on the traps, his response was "I don't pay attention to the tags".

[21] Officer Gillis was asked about complaints which had been made by the respondent or his wife about incidents against him during the season. He indicated that the respondent had reported on the first day of the season another boat had come by his boat in a dangerous manner causing him to loose 25 traps overboard. As a result of that report he had issued a new set of tags to the respondent. He said that later in the season Mrs. Fleet had reported the lose of ten traps by the respondent and once again he issued a complete new set of tags to her for the respondent.

[22] The respondent testified. He explained that he was fishing a new lobster license which he had taken over from his son. That license was for a different fishing area from the area he usually fished. He said that prior to the start of the season he was approached by fisheries officers who indicated that they had heard rumours that there would be trouble because he was going into the new area.

[23] He said that the trouble started the first day of the season as he was going out to set his traps. He had a lot of traps on the boat and another boat came by in an attempt to swamp him. He lost 25 traps overboard. The person in that boat was Leonard Jewers from Marie Joseph.

[24] He said that he set 18 to 20 traps in a certain area of the fishing ground and that the next day when he came back to haul these traps they were all gone.

[25] He said it cost him about \$100.00 a trap to replace any lost traps.

[26] He said he got new tags issued for the replacement traps and when he set some of them again he lost 18 or 20 in the same location where he had originally lost the same number.

[27] The respondent was asked by his counsel on direct examination the procedure when new tags are issued. He said (transcript page 77):

“Q. And then what do you do with them?

A. Well, you tag your traps with them. I was supposed to cut the old ones off and ---

Q. Did you know that at the time?

A. I knew it at the first of the season and I just forgot about it after -- during the season.”

[28] The respondent also testified that during the season in addition to the lost traps some of his traps were damaged by having the netting cut on them, or having the buoy cut off the rope attached to the trap. He explained that the system he used involved having a buoy attached to each individual trap and that he marked the location of each trap on his G.P.S. which would enable him to go back to that location the next day by simply following the directions on the G.P.S. without having to actually see the buoy in the water.

[29] He said that during the season he also had the door to some of his traps opened so that the lobsters would escape and the bait box removed from the trap. He also said that sometimes he found knots put in the rope on a trap so that when it was hauled out of the water it would cause injury to the person doing the hauling.

[30] The respondent said that he became very frustrated with the situation and he felt that the fisheries officers were not doing enough to help him. He said he complained to the Provincial Minister of Fisheries.

[31] He said that on June 22nd, 2007 he was hauling his traps because it was the last day of the season. He said that when all the traps were landed he ended up with 203 traps. He said he started the season with 250 therefore he had lost 47 over the course of the season.

[32] He said that as he was hauling the traps to take ashore that day he went to a area where the G.P.S. indicated he should have a single trap and buoy. He said that in that area instead of buoy he found a floating rope. He hauled the rope and attached to it were maybe ten traps in a group. He said he was able to determine that they were his

traps but that they did not have tags attached to them. He loaded the traps on his boat and came back to the wharf where he was met by Officer Julian.

[33] He was asked by his counsel about his state of mind when he saw the fisheries officers on the wharf that day. He said

“A. Oh, as soon as he asked me for my papers and he wanted to check the traps I knew right then that it was set up.

Q. And why did you say that? Why did you conclude that?

A. Because I had seven -- ten traps on board that I knew I had no tags on. So I knew he had to know it. Somebody had to let him know that I had those traps on that boat.”

[34] He was also asked about the conditions on his license about replacement tags.

The transcript indicates as follows:

“Q. So how did it come about that you ended up with these multiple tags on some of your traps at the end of the season?

A. Because when I re-tagged, when I got another set of tags and re-tagged I forgot to cut the other old ones off. You never had to before.

Q. Okay. All right. And what about the traps that had no tags at all? I mean how did that -- how do you explain that one, Mr. Fleet?

A. Well, when I hauled them up they had none on. Somebody had to cut off the tags. And I gone ahead, Mr. Gillis, I told him that there I was getting upset, mad over it. And I had new traps with the tags cut off, new traps with two tags were -- just one tag on and the good one cut off and I had a bunch of old rickety traps there that wasn't worth bringing in.

But I had so much trouble I brought everything in and I told him, I said but I have new traps, not tagged and I have these old rickety things and bring in. He said I don't care what you're saying.

Q. Yeah. So what-- you're saying the new tags, if you were going to bring in---

A. If anybody was going to do crooked work you wouldn't tag old traps and your new traps you wouldn't tag. You wouldn't take the chance of losing a new trap over an old trap that's no good.

Q. Right. So you're saying it was some -- a lot of the new traps were missing tags?

A. Was -- had the tags cut off.

Q. Okay. And where did you -- do you know where those traps were hauled? Did you have any ideas which ones were hauled where on that day or did you keep track of it?

A. What do you mean?

Q. I'm just wondering, you said that a lot of the traps were -- had tags cut off. But do you know what---

A. Well, the only ones I knew of was the ones with none on at all. It was a shock to me that there was more traps with no tags, cut off.

Q. Right. So you don't know really where those were hauled?

A. No. No. Just -- because when you're bringing in 80 traps -- you're picking them you know different spots."

[35] Mrs. Elizabeth Fleet testified. She is the respondent's wife and was on the boat with him on June 22nd, 2007 while they were landing traps at the end of the season. She recounted the problems her husband had during the season and how she went and got new tags issued after he lost some traps and they had to buy replacement traps. She said she did that two times and on the third occasion when she asked for new tags she was told by the fishery's officers that they should note the numbers on the existing traps and that fisheries would then issue tags just to replace the last ones instead of reissuing a entire set of tags. She said that caused a major difficulty to them because of the conditions under which she would have to record the numbers after hauling the traps onto the boat. She said she decided not to try and do that and therefore did not put out any replacement traps for the last ones missing at that point in the season. She said that was why they only had 205 traps at the end of the season. She said she

complained to the Minister of Fisheries, Ronnie Chisholm about what was happening to them.

[36] Mrs. Fleet said that on June 22nd when her husband hauled the seven traps all tied together he was upset because the traps had no tags. She said

“A. My -- well, I was up front there and my husband said we lost so much he said that -- well, we had no phone and then he said we lost so many, he said I think I'll take them in and I'll call them when we get in there.

Q. Um-hmm. Okay. So you took the traps in even though you knew they had no tags?

A. Yeah.

Q. Okay. What -- did you have any other choice at that point as far as you knew?

A. Not as far as I knew.

[37] In his decision the trial judge recounted the problems the respondent had during the season and said:

“I accept from the evidence of both Defence witnesses that the fishing season for 2007 for both of them was a difficult one. And that they encountered numerous problems and had their fishing gear disappear and go missing and be tampered with.

And throughout a portion of that season when those difficulties were encountered and new tags were required those were sought and issued and it would seem through some hard work applied and utilized as they were supposed to be.

There’s no factual dispute with, in fact, there’s concurrence on the fact that when the vessel that Mr. Fleet was using to bring his traps ashore on June 22nd came to the wharf, that there were lobster traps on board the vessel without valid tags. The officers observed that and Defendants acknowledge that.”

[38] He then went on to deal with the issue of due diligence he said:

“A Defendant can be convicted if the actus reus of the offence is established. It is not necessary for the Crown to prove mens rea or a mental intention to commit the offence. However, the Defendant can be acquitted if he establishes on the balance of probabilities the defence of due diligence. That he took all reasonable care and attention, for example, is one of them to avoid the commission of that offence but nevertheless it still happened.

I accept that defence in relation to count 1. I’m satisfied here that there was no apparent interference with tags directly on Mr. Fleet’s traps during the course of this season. That he did have to replace numerous tags on traps as a result of the trap going missing. And it would seem that he took steps to do that and exerted a fair amount of effort in attempting to ensure compliance with that.

And ultimately when he didn’t have tags or the process of applying them got too difficult as it would seem may have been the case towards the end of the year then he just didn’t fish the traps that didn’t have tags on them and ended up with some possibly 47 traps or less than he would have been entitled to if he was validly fishing them.

But ultimately when these traps were pulled on this day that didn't have tags on them I think anytime a trap is pulled and has got no tag on it then you have to take it out of use right away. And the only thing you can do is try and go and get a new one.

And there's bound to be some lag time in that process. Now maybe the first thing you do it as soon as you discover it even when you're out at sea you call in to shore and say that. And explain it. On this particular occasion that wasn't apparently possible. And it was the last day of the season it any event.

But I don't consider that there was much that Mr. Fleet could do on that 22nd of June in these circumstances. There's nothing to suggest that he fished those traps without tags prior to that day. There's nothing to suggest that. And that he had that on board on any other occasion or was aware that the tags were off on any other occasion.

And so I would say that he's demonstrated that in those circumstances I'm not aware of anything else he could do. Now maybe there's other policy that I haven't heard about or other suggestions for lobster fishermen to follow in that course of events that weren't put to me in evidence.

But it seems to me that based on what I did hear that this wasn't something anticipated, this was something encountered for the first time despite all of the things that had happened to Mr. Fleet's traps this year, that was the first time that he actually pulled the traps that he had put tags on and the traps were there but the tags were gone.

So I'm prepared to accept that the due diligence offence -- defence should apply in relation to count 1 and acquit him."

[39] Crown counsel in her factum and submissions before me submits that the trial judge erred in interpreting and applying the defence of due diligence.

[40] Counsel for the respondent submits that the finding of due diligence by the trial judge was a finding of fact that should not be disturbed unless it is found that it was “clearly unreasonable and unsupported by the evidence”. *R. v. Belliveau* (1986), 76 N.S.R. (2d) 234 (N.S.C.A.); *R. v. Harris* (1997) 165 N.S.R. (2d) 73.

THE LAW

[41] Section 62 of the *Atlantic Fisheries Regulations* provides us as follows:

“62. (1) Subject to subsection (3), no person shall fish with or have on board a vessel a lobster trap unless a valid tag issued by the Minister is securely attached to the frame of the trap in the manner for which the tag was designed and in such a manner that the tag is readily visible when the trap is not in the water.

(2) For the purposes of subsection (1), a tag is valid only for the period specified in the licence authorizing the use of a vessel in fishing for lobster and is valid only if it bears a tag number set out in that licence.

(3) Subsection (1) does not apply in Lobster Fishing Areas 1 to 11.

(4) No person shall fish with a lobster trap that has attached to it a tag where the tag has been tampered with or where the tag number is illegible.

(5) No person shall have on board a vessel a lobster trap that has attached to it a tag referred to in subsection (1) where the tag has been tampered with or where the tag number is illegible.”

[42] Section 78.6 of the *Fisheries Act* provides us as follows:

“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;”

[43] The test I must apply in dealing with this appeal is set out in *R. v. Nickerson* (2002), 178 N.S.R. 189 (page 191).

“The scope of review of the trial court’s findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see ss. 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), per Jones, J.A., at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns (R.H.)*, [1994] 1 S.C.R. 656; 165N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge’s conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge’s conclusions nor a new trial on the transcript.

[44] The main issue on this appeal is whether the trial judge’s finding that the respondent had exercised due diligence was reasonable and supported by the evidence.

[45] Both counsel have provided me with many cases where a court dealt with the issue of due diligence.

[46] Crown counsel points to **R. vs. Hackett** (unreported - April 6, 2001) Nfld. Prov. Ct. a decision of Gorman, P.C., J. of the Newfoundland Provincial Court in which he dealt with a charge under the **Fisheries Act**, he said:

“[32] The defence of due diligence therefore requires that the acts of diligence relate to the *actus reus* of the offence. The accused must establish that he or she took reasonable steps to avoid committing the statutorily barred activity. It is not sufficient to simply be reasonable or to have taken care in a general sense. In **R. v. Cancoil Thermal Corp.** (1988), 1 C.O.H.S.C. 169 (Ont. Prov. Off. Ct.), Megginson J. points out that “it is not ‘reasonable care’ or ‘non-negligence’ at large in the overall prevailing situation that exonerates, but rather ‘reasonable care’ or ‘non-negligence’ specifically relational to the statutorily defined *actus reus* of the particular offence charged” (at pp. 186-187).

[33] In **R. v. Kurtzman** (1991), 7 O.R. (3d) 41, the Ontario Court of Appeal points out that “the due Diligence must relate to the commission of prohibited act, not some broader notion of acting reasonably” (at p. 429).”

[47] In **R. v. McIntyre** [1999] N.B.R. (2d) (Supp.) No. 15 (N.B.Q.B) Riordon J. of the New Brunswick Court of Queen Branch said when dealing with the issue of due diligence and the **Fisheries Act** (page 8):

“29 These offences under the *Fisheries Act* are what are described as regulatory or public welfare offences of strict liability in which doing the prohibited act prima facie “imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care”. That is, that he did what a reasonable man would have done in the circumstances.”

[48] In *R. v. Bell*, [2007] N.S.J. 418 (N.S.C.A.) our Court of Appeal dealt with an appeal from a conviction under the Fisheries Act. Which had been upheld by the Summary Conviction Court.

[49] The Court of Appeal confirmed the Summary Conviction Court’s dismissal of the appeal based on the finding of that the appellant had offered no evidence of what would suggest that he had exercised due diligence.

[50] In *R. v. Alexander* [1999], N.J. No. 19 (Nfld. S.C-C.A.) the Newfoundland Court - Court of Appeal commented on the issue of due diligence when dealing with an appeal from a conviction under *Newfoundland Waste Material Disposal Act*.

[51] Green J.J.A. spoke for the court and said (paragraph 18, page 5):

“The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense. In *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (Ont. C.A.), Tarnopolsky, J.A. observed at p. 429 that “The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably.” In this case, the trial judge did not find, nor was there evidence from which he could find, that the appellant took all reasonable care to dispose of the waste in a receptacle or container for the purposes of subsequent collection. He, as well as the summary conviction appeal court judge, were therefore correct to reject the due diligence defence.”

[52] In this case the trial judge dealt with the circumstances in which the respondent found himself when he hauled seven traps and found that they had no tags. He basically held that there was nothing the respondent could do but to take the traps aboard his boat and come to shore, he said (page 12):

“And so I would say that he’s demonstrated that in those circumstances I’m not aware of anything else he could do. Now maybe there’s other policy that I haven’t heard about or other suggestions for lobster fishermen to follow in that course of events that weren’t put to me in evidence.”

[53] The difficulty I have in reviewing the evidence at trial is the fact that nowhere in his decision did the trial judge deal with the other 21 traps on board the respondent’s boat which had no valid tags.

[54] The fisheries officers found eight traps with tags issued to the respondent which were not valid because tags were later issued to replace them. There was no evidence as to why these tags were still attached to the traps if in fact the respondent had applied new tags as he and his wife indicated had been done.

[55] The most difficult issue for this court is how the trial judge could find that the respondent had exercised due diligence in relation to the 13 traps with no tags attached which at any time had been issued to the respondent.

[56] There was no evidence from the respondent as to how that came to be. The burden was on the respondent to establish due diligence. The crown were entitled to have a conviction entered under Section 62 (1) of the *Atlantic Fisheries Regulations* once it was established that the respondent had traps on board his boat with no tags issued to him unless he could show due diligence.

[57] These 13 traps were single traps attached to a buoy and not traps that appeared to be interfered with as the seven found by the respondent on the last day of the season.

[58] The trial judge in his decision did not address the due diligence issue in relation to these traps.

[59] He did convict the respondent on the charge of failing to remove his old tags from the eight traps that had non valid tags attached.

[60] I conclude that the crown here were entitled to have the trial judge convict the accused based on any of the traps found on his boat that day. The crown were also entitled to have the trial judge apply the due diligence test to all the traps found on his boat.

[61] The trial judge erred when he did not do so.

[62] I have reviewed the trial evidence and I accept the findings of fact made by the trial judge that the respondent found the seven traps tied together in a group without a buoy and that he had no cell phone to call anyone at that point. I am also prepared to accept the trial judge's finding that what the respondent did, that is, taking the traps on board his boat and going to the shore could amount to due diligence in relation to

the seven traps. However, that does not excuse the respondent in relation to the other 21 traps.

[63] The charges laid by the crown in this case overlap to some extent in light of the evidence offered by the crown witnesses.

[64] The charge of having on board a vessel traps without valid tags could be based on any of the 28 traps seized by the fisheries officers. None of these traps had valid tags issued to the respondent. Eight traps had tags issued to him but were not valid on June 22nd, 2007. The other 21 traps did not have attached to them any tags issued to the respondent.

[65] Once the crown established that the respondent had on board his boat any of these 28 traps the offence under Section 78 of the *Fisheries Act* based on regulation 62 (1) is committed unless the respondent establishes due diligence as set out in Section 78.6 of the *Fisheries Act*.

[66] The trial judge must apply that law to all 28 traps seized from the respondent's boat.

[67] The second charge here under Subsection 22 (7) of the Regulations is a much less serious offence. It I suggest implies that a fisherman who is found fishing with a trap that has a valid tag in his name and in addition another tag either issued to him earlier or to some other person, in that circumstance the regulation would apply.

[68] There was no evidence presented in this trial that appears to establish that situation here. None of the traps seized from the respondent had two different tags attached despite the fact that defence counsel suggested that to the respondent in his direct examination and argued it in summation at the trial.

[69] In this case the respondent had issued to him three different sets of tags. The original tags issued at the start of the season and two sets of replacement tags requested by him as a result of losing traps during the early part of the season. It was therefore important that this regulation be followed by the respondent to insure that the fisheries officers would know what were valid tags and what tags had been in effect cancelled by the issuance of replacement tags.

[70] The trial judge here convicted the respondent of this offence based on the eight traps that had tags issued to the respondent but which were not valid because replacements tags had been issued. I conclude that these eight traps could be the basis of a conviction either under Subsection 22 (7) of the regulations or form the basis of a conviction under Section 62 (1) of the regulations if as here the non valid tags were not removed but also the traps contained no valid tags. In any given situation where that is the result the court would have to deal with the *Kienapple* issue in deciding which conviction should be entered or what sentence should be imposed.

[71] Section 686 (4) of the *Criminal Code* provides:

“(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in

law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.”

[74] Crown counsel asks that I enter a conviction against the respondent.

[75] In the circumstances of this case I conclude that it is appropriate that I allow the appeal against the acquittal of the respondent and enter a conviction against him on this charge.

[76] I would direct that the respondent appear before the court on January 21, 2009 at 9:30 a.m. at which time I will deal with submissions on the issue of sentence. I do so because I find it is appropriate that I impose sentence instead of remitting the matter back to the trial judge to impose sentence.

MacLellan, J.