

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Cottreau, 2010 NSSC 130

Date: 20100317

Docket: SY 304453

Registry: Yarmouth

Between:

William Vincent Cottreau

Appellant

v.

Her Majesty The Queen, In Right of Canada

Respondent

DECISION ON APPEAL

Judge: The Honourable Justice Charles E. Haliburton.

Heard: September 3, 2009, Yarmouth, Nova Scotia

Written Decision: March 17, 2010

Counsel: Andrew S. Nickerson, Q.C., for the Appellant
Gerald A. Grant, for the Respondent

By the Court:

[1] The Appellant was convicted after a brief trial of the offence

that on or about the 9th day of July, 2008 at or near Wedgeport, Nova Scotia being a person fishing under the authority of a license did fail to comply with a condition of such license, in that he did fail to accurately hail in the weight of scallops on board the vessel, and did thereby commit an offence contrary to Section 22(7) of the *Fishery General Regulations*, thereby committing an offence under section 78 of the *Fisheries Act*, R.S.C., c. F-14.

At the time of the trial Mr. Cottreau was not represented by counsel and conducted his own defence.

[2] The essence of the provision the Appellant was found to have contravened is one which requires a fishing vessel to contact an agency which is contracted to monitor the catch of various species of fish including scallops. The responsibility of the monitor is to receive from the fishing vessel a pre-landing estimate of the quantity of fish caught and which will be landed; and then to confirm when the fish is landed, that the landed weight actually matches that which was previously estimated.

[3] It is my understanding that there are a number of objectives to be achieved by the authorities in this arrangement. Each vessel or fisherman is licensed to catch a

certain quota of the species being caught, in this case scallops. Thus monitoring their landings will ensure that the quota is not exceeded and that each licensed fisherman will take only that share of the total catch allotted to them. A second objective is obviously a simple statistical record of the catch of various species, where it is taken, and in what season. Presumably the availability of fish to be caught in a certain region will provide support for an analysis of the health of any particular fish stocks. A third and perhaps more controversial objective would be the deliberate misreporting of the pounds caught. There could be an obvious motivation for “under reporting” catches where the stock is limited, and where the license holder is enticed to divert a portion of the catch to some sort of black market, thus, preserving for a future day some additional room in his/her quota.

[4] That third scenario could generate a profit for the license holder. One would expect then that the primary thrust of the officials in enforcing this regulation and catch monitoring would be to prevent the under reporting of the catch. In that sense, Mr. Cottreau’s offence is out of the ordinary because he in fact, “over reported” his catch. The evidence which the Judge accepted at the hearing was that Mr. Cottreau had “hailed” a catch of 7000 pounds of scallop meats. When he landed and his scallops were actually weighed for sale, they weighed only 5922

pounds. There was a discrepancy of 1078 pounds. This is a substantial deviation from an “accurate” estimate. An accurate estimate or hail is what the regulation requires.

[5] In his testimony on his own behalf Mr. Cottreau denied that he had provided the hailing figure recorded by the monitor. In support of his testimony he referred to the figures he had recorded in his fishing log where his estimate or recorded weight was 6355 pounds.

[6] The Appellant argues that this is a *strict liability* offence and that he should have been acquitted on the basis that he had an honest and reasonable belief in a set of circumstances which would have rendered him not guilty of the offence. That concept however did not enter into his defence at the time of trial. At trial his defence was that the monitoring agent hail wrongly recorded his “hail”. He concentrated on the fact that his records as reflected in his fishing log contained a reasonably accurate estimate of his catch and that when he had contacted the monitoring agency to record his hail the personnel there had misinterpreted and or mis-recorded the weights given. Counsel for the Appellant now refers to comments of the trial Judge, when, in the course of sentencing, he made the following

comment: “I am satisfied listening to you, that you likely made the mistake, but not in a way that you intentionally attempted to misreport”.

[7] It is correct law that an honest mistake on a reasonable foundation might constitute a defence in accordance with **Sault Ste. Marie** principles.

ISSUE:

[8] The issue as identified in the Appellant’s pre hearing brief is “Did the learned Trial Judge err in his application of the due diligence defence as set out in the **Sault Ste. Marie** case?”

[9] In advancing his argument counsel refers to the precedents relating to fisheries offences and the treatment of strict liability offences generally. Relying on a quotation from Justice Major of the Supreme Court counsel urges that in such cases where *mens rea* is not required the accused may “avoid liability by proving that he took all reasonable care” to avoid the breach of the law. A consideration of that issue will take into account “what a reasonable man would have done in the circumstances”. The defence will be available 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.

[10] On this appeal no issue is raised as to any misunderstanding between the Appellant and the monitoring agency about the number of pounds he had reported in his hail. What is advanced is that the Trial Judge imposed on Mr. Cottreau an obligation to “assess the number of bags” of scallops harvested, and that if he had done, it would have been readily apparent to him that he was misreporting. It is argued that by departing from a discussion of the total “pounds” of scallops and inserting a discussion of the number of “bags” of scallops the Trial Judge had misdirected his attention and imposed upon the accused a “standard” which was unfair.

[11] Scallops are shell fish. Once the shell stock is landed on the vessel they are shucked by the crew and the product, on this coast, is limited to the “muscle” portion of the species. They are generally referred to as “scallop meats”. This fishing boat is one which is at sea for several days. Once the scallops are shucked the meats are stored in ice in the hold of the vessel in standard sized scallop bags.

In this trial there was evidence of Mr. Cottreau about how many pounds of scallops each bag is expected to contain. In cross examination he was asked

Q. . . .It would be a fairly simple procedure to check what the weights are because they are generally in the range of 50 pound bags, is that right?

A. Not necessarily. We come in sometimes and they average 48 pounds . . . and we come in sometimes and they average 57, 55. We don't have always the same men bagging them up.

Q. O.K. but you'd be able to tell the difference if you looked at them?

A. No.

[12] There was other evidence about the weight of scallops to be found in one of these bags in the testimony of Bruce Beveridge a "dockside observer" who had actually weighed the scallops from this trip. He was called by the prosecution. He was asked at page 24:

Q. Approximately how much do each of these bags weigh?

A. He had the big bologna bags and they weigh approximately 50 pounds give or take 2 pounds either way usually . . . depending on other factors but usually 50 pounds.

Q. And so in your experience as a weigh master did the figures seem to be fine (on this occasion)?

A. Based on past experience, yes they were around 48, 49 pounds which was perfect . . . It was within the norm.

[13] Mr. Beveridge was cross examined by Mr. Cottreau at that time who after mentioning the 48 pounds asked

Q. And sometime is averages 56, 57 pounds?

A. It depends on the trip.

[14] The Trial Judge was apparently interested in the method by which Mr. Cottreau calculated the quantity of scallops on board. While the following exchange is not evidence but rather takes place during the summation by Mr. Cottreau it does throw some light on the reasoning of the Judge and the inability of Mr. Cottreau to satisfy the Trial Judge that he had a reliable system in place for calculating his catch. The exchange is as follows.

A. Mr. Cottreau: It is hard to guess. That's why we weigh them at the wharf when we come in, to get the accurate weight.

Q. The Court: But don't you count the bags?

- A. Mr. Cottreau: What's that?
- Q. The Court: Isn't it a function of counting the bags as they're.
- A. Mr. Cottreau: that's all.
- Q. The Court: O.K., so if you.
- A. Mr. Cottreau: Sometimes I got men aboard there and we don't always have the same men aboard. We're not making all that much so . . . (he had earlier said that different workers may put more or less scallops in each bag).
- Q. The Court: But if the number that you say you're over I guess is correct, that would be quite a few bags, wouldn't it?
- A. Mr. Cottreau: It would, it would.
- Q. The Court: So you'd for sure count them wouldn't you?
- A. Mr. Cottreau: I wouldn't hail that many bags over.
- Q. The Court: O.K. so how do you think it happened?
- A. Mr. Cottreau: I don't have a clue.

[15] In delivering his decision Judge Prince specifically referred to the strict liability defence. Having concluded that he was satisfied that the crown had established beyond a reasonable doubt the *actus reus* he continued:

“The burden then shifts to the Defendant to demonstrate either due diligence or a reasonable but mistaken belief in a set of facts which if true would render their conduct innocent.

I’ve considered whether or not the evidence supports that and I am persuaded by the submission of Crown that in this case if there is a mistake it was a mistake of the magnitude that would not constitute due diligence, and there is no basis in my view that would establish the second branch of the defence set out in **Sault Ste. Marie**. In other words he could not have established that he’d honest, reasonable but mistaken belief in a set of facts which are true and would render his conduct innocent. There would have been a duty in the circumstances to assess the number of bags and it would have been readily apparent it would seem to me in the circumstances, that the number of bags that would have been in question, would have been significant enough that any system should have picked that up.”

[16] In using the word “system” Judge Prince would have been referring to the second branch of **Sault Ste. Marie** that requires some reliable basis for forming the belief in compliance inherent in the concept of “taking all reasonable steps”.

[17] I conclude that a discussion of the number of pounds per bag in this case is a complete red herring. Mr. Cottreau landed 123 bags of scallops with a total weight of 5922 pounds. Based on normal weight of 50 pounds per bag that would be 6150 pounds as opposed to his actual landings of 5922 pounds. That would not be an unreasonable discrepancy.

[18] The existence of due diligence on the part of the accused is a finding of fact. The number of pounds hailed and the number of pounds weighed out upon landing are findings of fact. Both these conclusions are for the Trial Judge and are not easily overturned on appeal. I find no error in the conclusions reached by the Provincial Court Judge either in reaching his conclusion as to the facts or his application of the law. Accordingly the appeal is dismissed.

[19] There will be no costs.

Haliburton J.