IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Rideout, 2005 NSSC 4

Date: 20050107
Docket: 205333
Registry: Sydney

Between:

HER MAJESTY THE QUEEN

Appellant

v.

RICKY KENNETH RIDEOUT

Respondent

Judge:	The Honourable Justice Simon J. MacDonald
Written Decision:	January 7, 2005
Counsel:	Paul Adams for the Appellant Harvey M. McPhee for the Respondent

By the Court:

[1] ***Factual Background Summary****:*

On March 18, 2003 the respondent, Ricky Kenneth Rideout was found guilty in Provincial Court of contravening a condition of his license by fishing in a division or subdivision other than Area 23D contrary to S-S22(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.

[2] Mr. Rideout is an experienced commercial fisherman who has spent his entire adult life working in the East Coast Fishery and was the only Captain of the Fishing Vessel, Harbour Leta. He was often restricted by conditions of his license to fish in certain areas.

[3] As a result in the decline of the ground fishery certain fishers including the respondent were permitted to fish for snow crab. The Department of Fisheries and Oceans (DFO) divided the Atlantic Crab Fishery into various areas of zones for management purposes. They limited a certain number of fishers to each area. One of the fishing areas DFO divided was Area 23. It divided Area 23 into four sections. Although earlier on Mr. Rideout was permitted to fish for crab in two of these areas namely, Areas 23C and 23D he had been for several years including the year of the offence before the

court, authorized by way of his 2001 snow crab license condition to fish in Area 23D.

[4] On July 16, 2001, DFO surveillance aircraft observed the respondent's vessel fishing for snow crab. Evidence revealed the respondent had set and hauled snow crab gear outside of his licensed fishing Area 23D on several occasions between July 15 to 17, 2001.

[5] His catch was landed at the Port of Louisbourg on July 18, 2001 and was monitored by fishery officers. The land of snow crab catch was 20,200 pounds. The proceeds of the catch were seized by DFO and amounted to

[6] The evidence at trial revealed the respondent in charting out his fishing Area 23D prior to setting his traps on the dates involved, plotted a connection of three points which simply gave a straight line on his navigational chart. This the respondent assumed was the western boundary of Area 23D. He then proceeded to set his trap to the east of that line and the result was that he was actually fishing illegally in Area 24.

[7] The evidence at trial indicated Mr. Rideout did not know where the other boundaries of Area 23D were located. To do so would require a reference to or knowledge of the location of CFA 23 from which all of the subsections were derived.

[8] These coordinates were available to him upon his request. However, Mr. Rideout neither sought, nor received any advice from DFO Officers who were available to assist in that regard.

[9] The trial judge found there was no evidence in the case to suggest Mr. Rideout made any attempt to hide either the fact or the location of his fishing activity. Mr. Rideout argued a "due diligence" defence at trial. He argued that he honestly and reasonably, however mistakenly, believed he was fishing in compliance with the relevant condition in his license at the time of the offence. However, this was rejected by the trial judge.

[10] The trial judge upon conviction imposed a fine of $4000.00 on July 10, 2003. He further rejected forfeiture requested by the Crown. He stated the mandatory forfeiture provisions in s.72(2) of the *Fisheries Act* did not apply to the respondent's catch. He further declined to order forfeiture of any portion of the respondent's catch pursuant to the discretionary forfeiture provisions contained in s.72(1) of the *Fisheries Act*.

[11] ***Issues***: The Crown now bring this summary conviction appeal of the aforesaid sentence imposed by the trial Judge on the following grounds:

(1) That sentence imposed at trial was demonstrably unfit or clearly inadequate, given the nature and extent of the offence for which the Respondent was convicted.

(2) That the Trial Judge erred in his interpretation and application of the forfeiture provisions contained in s.72 of the *Fisheries Act.*

[12] ***Law and conclusions:***

The scope of appellate review in relation to sentence begins with s.687(1) of the *Criminal Code* (applicable to summary conviction sentence appeals by virtue of s.822(1) of the *Criminal Code)*, which states as follows;

687(1) Powers of court on appeal against sentence - Where an appeal is taken against sentence the court of appeal shall, unless a sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

[13] In *R. v. Shropshire* (1996), 102 C.C.C. (3d) 193 the Supreme Court of Canada adopted our Court of Appeal's position on sentencing appeals, as enunciated by Hallett J.A. in *R. V. Muise*, (1994), 94 C.C.C. (3d) 119 at p.124:

> "The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere.....My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive....."

[14] In the recent case of *R. v. MacDonald*, (2003) N.S.C.A. 36 (N.S.C.A.) confirmed and elaborated upon the above where Bateman, J.A. speaking on behalf of the court stated at para. 15 and 16 as follows:

"More recently, in *R. V. Shropshire*, [1995] 4 S.C.R. 227; [1995] S.C.J. No. 52 (Quicklaw) (S.C.C.) Iacobuicci J., for a unanimous Court, said:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of

> having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.
>
> Similarly, in *R. V. M.*(C.A.), [1996] 1 S.C.R. 500; [1996] S.C.J. No. 28 (Quicklaw) (S.C.C.), Lamer, C.J.C. said, for a unanimous Court, at pp.565-566: "Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code...
>
> ...The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly."

[15] In sentencing cases such as the matter before the Court, a Judge must also bear in mind regulation offences such as those provided under the Fisheries Act are designed to protect and preserve a valuable resource and any

contravention of them must be taken seriously. The Fisheries are a natural resource and are in danger of being depleted or destroyed and this would have wide ramifications for not only fishers but society in general. Deterrence must be a primary consideration and penalties have to be imposed to reflect the seriousness of the offences and to force offenders to understand the ramifications for violation of these regulations to both themselves and society.

[16] In *R. v. Ulyvel Enterprises Ltd.*,[2001] 2 S.C.R. 87 the Supreme Court of Canada addressed the background of the Fisheries Act and the new amendments made in 1991. Iacobucci, J., speaking on behalf of the court at para. 24 described the principle objects of the Fisheries Act to be that as stated in *R. v. Savory* (1992) 105 N.S.R. (2d) 245 (C.A.):

"The *Act* and the *Regulations* have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the *Act* and the *Regulations* is to properly manage and control the commercial fishery."

[17] At para. 26 the court stated:

> "One of the ways that Parliament has seen fit to support the proper management and control of the commercial

> fishery is to provide the courts with the power to impose significant penalties upon conviction of offences under the *Fisheries Act*. The most recent amendments to the *Fisheries Act*, enacted in 1991, were primarily concerned with increasing the severity of penalties to deter the abuse of the fishery resource and make it uneconomical for rogue fishermen to flout the *Fisheries Act* and the Regulations. For instance, Parliament increased the fines for those who violate the Regulations in the Convention Area to a maximum of $500,000."

[18] And at para. 33 Justice Iacobucci, concluded at follows:

> "However, it is clear that as a whole, the 1991 amendments to the *Fisheries Act* were intended to modernize the legislation, and to increase the flexibility and severity of penalties for *Fisheries Act* offences."

[19] The Crown besides arguing the amount of the fine strongly urged the Court to order forfeiture of the proceeds of the Defendant's catch under s.72 of the *Fisheries Act*. The amount at stake is $35,362.25.

[20] Section 72 of the *Fisheries Act* reads as follows:

"72(1) Forfeiture of things

(1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

72(2) Forfeiture of fish

(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(a), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty."

[21] Section 51 of the *Fisheries Act* is also relevant in this particular matter and it reads as follows:

> Section 51:
>
> A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds
>
> (a) was caught, killed, processed, transported, purchased, sold or possessed in

> contravention of this Act or the regulations;
>
> or
>
> (b) has been intermixed with fish referred to
>
> in paragraph (a).”

[22] I propose first to deal with the mandatory forfeiture argument by the Appellant under s.72(2). The leading case on s.72(2) is *R. V. Mood*, (1999) 174 N.S.R. (2d) 292 (C.A.). There the appellant fisherman plead guilty to permitting another person to use his vessel for lobster fishing. He had permitted his crew to go to sea while he remained ashore ill. Fishery Officers seized lobsters from the boat and the trial judge refused to order forfeiture. On appeal the Summary Conviction Appeal Court allowed the appeal and ordered the lobsters forfeited. The appellant then appealed the forfeiture order to the Court of Appeal.

[23] Freeman, J.A. speaking on behalf of the Court remarked at para. 14 that the decision in *R. v. Morash* (1994) 129 N.S.R. (2d) 34, (C.A.):

> “...makes it clear that the vague "connection" between the fish and the offence urged by the Crown is not sufficient to justify a seizure under s. 51.”

He stated there was no reasonable grounds to seize the fish under s.51(a) because the offence alleged did not relate to the catching of fish but to the

granting and permission to use the vessel in fishing as again can be seen in para. 14 of *Mood.*

[24] Freeman, J.A. went further and emphasized the distinction between the broad "powers of seizure" on reasonable grounds under s.51 and the requirement of forfeiture under s.72(2) when he said at paras. 15 to 17 as follows:

> "Even if the seizure could be justified under s. 51, however, the broad powers of seizure in that provision should not be confused with a corresponding requirement for forfeiture under s. 72(2). When belief exists on reasonable grounds that fish can be seized because it was taken in the commission of an offence or needed for evidence, reasonable belief is only the test for a seizure under s. 51(a), not for forfeiture under s. 72(2). The test for mandatory forfeiture is whether a person is convicted of an offence under the Fisheries Act that 'relates to fish seized.' That is, were the fish a necessary element of the offence? In this case they were not.
>
> The requirement for mandatory forfeiture is not made out because the fish were caught in relation to the offence as the Crown submitted, that is, merely in connection with it. This turns the language of s. 72(2) on its ear. The requirement is only made out when the commission of the offence relates to the fish. It is not a reversible equation. Here the commission of the offence could not have related to the fish seized because it related to permission to use the boat and whether fish were caught was irrelevant. In my view the interpretation is clear: forfeiture is mandatory under s. 72(2) only when the offence was in relation to the fish that were seized, and they were an essential element of it.

> The correct interpretation does not detract from enforcement efforts. If fish are caught in circumstances of flagrancy that makes it just they should be forfeited, even though they are not a necessary element of the offence under the Fisheries Act for which a person is convicted, the court has discretion to order them seized as a 'thing' under s. 72(1). Both Sections 72(1) and 72(2) can result in the forfeiture of fish. Forfeiture is mandatory under s 72(2) if the offence relates to the fish, if it is an offence that could not be committed without catching them. However if the fish seized under s. 51 are merely incidental to, or connected with the offence, the court is not bound by statute to order them forfeited, but it has discretion to order forfeiture under s. 72(1) if the circumstances warrant it."

[25] In Justice Freeman's review of the structure of s.51 and s.72(1) and (2) he stated in para. 20 of *Mood*:

> Section 72(1) emphasizes what a court may order to be forfeited when a person is convicted of any offence under the Act. Section 72(2) defines the kind of offence--one that relates to fish seized under s. 51--that makes forfeiture mandatory. It appears to be intended to apply most obviously to "catching" offences, such as taking or keeping fish of the wrong species or the wrong quantity or in the wrong place at the wrong time with the wrong gear, rather than licensing offences such as the present one which govern who can own and operate fishing boats.

[26] He concluded in *Mood* the fish did not enter the picture until after all the elements of the offence were completed. I find the matter before the court is similar.

[27] Mr. Adams, on behalf of the Crown, pointed to examples of “fishing offences” referred to in paragraph 20 by Freeman, J.A. in *Mood* supra. The example referred to therein was fishing “in the wrong place” thus suggesting that the mandatory forfeiture should apply in this case. I agree that the passage contained therein supports Mr. Adams argument. However when one reviews the formulation of the test for Section 72(2) that Freeman, J.A. had already provided in paragraph 15 to 17:

> (15) “Even if the seizure could be justified under s. 51, however, the broad powers of seizure in that provision should not be confused with a corresponding requirement for forfeiture under s. 72(2). When belief exists on reasonable grounds that fish can be seized because it was taken in the commission of an offence or needed for evidence, reasonable belief is only the test for a seizure under s. 51(a), not for forfeiture under s. 72(2). The test for mandatory forfeiture is whether a person is convicted of an offence under the Fisheries Act that "relates to fish seized." That is, were the fish a necessary element of the offence? In this case they were not.

(16) The requirement for mandatory forfeiture is not made out because the fish were caught in relation to the offence as the Crown submitted, that is, merely in connection with it. This turns the language of s. 72(2) on its ear. The requirement is only made out when the commission of the offence relates to the fish. It is not a reversible equation. Here the commission of the offence could not have related to the fish seized because it related to permission to use the boat and whether fish were caught was irrelevant. In my view the interpretation is clear: forfeiture is mandatory under s. 72(2) only when the offence was in relation to the fish that were seized, and they were an essential element of it.

(17) The correct interpretation does not detract from enforcement efforts. If fish are caught in circumstances of flagrancy that makes it just they should be forfeited, even though they are not a necessary element of the offence under the Fisheries Act for which a person is

> convicted, the court has discretion to order them seized as a "thing" under s. 72(1). Both Sections 72(1) and 72(2) can result in the forfeiture of fish. Forfeiture is mandatory under s 72(2) if the offence relates to the fish, if it is an offence that could not be committed without catching them. However if the fish seized under s. 51 are merely incidental to, or connected with the offence, the court is not bound by statute to order them forfeited, but it has discretion to order forfeiture under s. 72(1) if the circumstances warrant it."

The proposition that mandatory forfeiture is only available where the offence could not be committed without catching the fish appears to be inconsistent with the comments at paragraph 20 insofar as they relate to fishing "in the wrong place", "with the wrong gear" or "at the wrong time". None of these require that fish be caught; each would be complete at the moment a fisherman set gear, given the accepted definitions of "fishing". These examples can be contrasted with others from paragraph 20: 'taking or keeping fish of the wrong species or the wrong quantity', such as undersized

lobsters. Plainly, the latter are offences that could not be committed without the presence of the fish. Similarly, in the present case, the offence was complete when the crab traps went into the water outside the authorized zone. There was no need for any crabs to be caught for the offence to be complete.

[28] I conclude the most coherent test of Freeman, J.A. would be if the offence could not be committed without the fish being caught, the offence "relates to the fish" and forfeiture is mandatory. If the fish are "merely incidental to, or connected with", the offence, the discretionary forfeiture provision of Section 72(1) is available.

[29] In *R. v. Paul*, [2003] N.S.J. 295 (N.S.S.C.) Wright J. came to a similar finding when he concluded at para. 36 he was imposing a sentence for fishing without a license. He stated that the offence did not relate to the fish, but rather the fish were caught in relation to the offence. The fish were not a necessary element of the offence and the offence was complete before any fish came onboard the vessel.

[30] I find the matter before the court to be similar. The snow crab were not a necessary element of the offence. All the elements of the offence were complete before the snow crab were brought aboard the vessel.

[31] Judge Ross considered in his decision on sentence the arguments of both counsel and concluded at para. 12 as follows:

> "It thus appears from case authority that it is not enough merely that fish were caught while an offence was being committed for the mandatory forfeiture provision to apply. Rather, it is necessary to give strict application to the requirement that the offence "could not be committed without catching them." In the present case, as in *Morash*, *Mood* and many other cases, it is clear that the actual catching of fish is not an essential element of the offence. Under the definition in the Frederick Gerring Jr. Case, Mr. Rideout would have been convicted of this offence had he been charged the moment he deployed his traps at the location, without a single crustacean in them."

[32] I am satisfied the distinction was made between "catching offences" and "licensing offences" as stated by Judge Ross at para. 13 in his decision. That distinction having been made by our courts I also note that Mr. Rideout was charged with violating a license condition. I am satisfied the catching of fish was not an essential element of the charge before the Court. I conclude

therefore Judge Ross made no error in finding the mandatory forfeiture provisions of s.72(2) do not apply in the present case.

[33] The learned Provincial Judge in dealing with the possible discretionary forfeiture under Section 72(1) considered the remarks of Freeman, J.A. in *Mood* supra where the Court of Appeal said the discretionary power under subsection 1 would apply where fish are caught in circumstances of flagrancy that makes it just they should be forfeited, even though they are not a necessary element of the offence.

[34] As well the sentencing Judge in the present case made comment about the concern for conservation and of the significant amount of crab that was involved in the offence.

[35] In arriving at his conclusion not to order forfeiture under S. 72(1) he also considered there was a low degree of “flagrancy” and the “significant pecuniary loss” that the Respondent occurred as a result of the charge. Mr. MacPhee argued that the Sentencing Judge considered the frailty of the D.F.O. description of Area 23D in mitigation.

[36] In considering the “significant pecuniary loss” the Respondent occurred as a result of the charge the Sentencing Judge concluded at para 19 of his decision that Mr. Rideout suffered a such loss by one kind or another in that

amount of $50,000 on the remarks of defence counsel when addressing the Court in sentence. There was no evidence before the Court to indicate what the crew and fuel costs were nor what observer costs would be or what real costs could amount to the sum of $50,000.

[37] As Bateman, J.A. said in *R. v Smith and Whiteway Fisheries Ltd.*(1994) 129 NSR 2d, 152 NSSC at para 20:

> "Every case in which a forfeiture is imposed occasions hardship to the crew. I am satisfied, however, on the authorities before me, that the usual sanction is forfeiture."

And at paragraph 23 she said as follows:

> "I am mindful that this matter has occasioned some expense to the company in that there has been a trial, an appeal, a re-trial and another appeal."

[38] In *R. v Paul* (supra) dealing with the matter of discretional forfeiture, Wright J. Said at para. 39:

> "There remains to address the validity of the order of partial forfeiture which the trial judge made in the amount of $28,599.60. The trial judge considered a number of factors (summarized at paras. 19-20 of this decision) in settling on that amount. Although it was a questionable decision, in my view, not to order forfeiture of the entire amount of the seized proceeds of the illegal catch, I am mindful of the deference which ought to be accorded by an appellate court to a sentencing judge,

> particularly in the exercise of discretionary powers. In my view, the discretion exercised by the trial judge here in making a partial forfeiture order does not warrant intervention by this court where that option was otherwise available under s. 72(1). That order should therefore be permitted to stand in the final outcome."

[39] There was no forfeiture ordered against Mr. Rideout in this case by the sentencing Judge.

[40] The Court is aware that it ought not to simply tinker with the sentence imposed. Appeal courts are reluctant to tamper with the sentences given by trial courts. This is because they have a unique opportunity to observe the witnesses and to assess the offences against the background of local customs and prevailing attitudes. In this case, the learned trial judge clearly expressed his view that deterrence was an important factor to be considered. General deterrence to Mr. Rideout and others who would be so inclined to fish in an area where they are not permitted ought to be bring stiff penalities to avoid the depletion of our fishery.

[41] The seriousness of violations of the Fisheries Legislation must be borne in mind. The number of people permitted to fish in each designated area was drafted to conserve the fishery. As O'Regan, J. said in R. v Croft [2004] NLSC TD 46 at para 1:

> "...Conservation of the species is the overriding consideration of these Regulations."

[42] The difficulty with the sentence imposed is that surely the Respondent should not be entitled to the benefits derived from his illegal catch in the amount of $35,362.25 as the principal of general deterrence would not be properly addressed.

[43] I am not satisfied on the facts of this case that the Learned Trial Judge gave adequate effect to the requirement of general deterrence. One could conclude here by the imposition of a fine only that it might be worth the while to mistakenly fish in another area when the fine of $4,000 is compared to a $35,362.25 fish catch.

[44] I do consider the Sentencing Judge's comments in paragraph 20 that if he had ordered forfeiture he would impose a lesser fine based on the factors he used in reaching his conclusion as to sentence.

[45] In the circumstances and facts of this case for the reasons above, I would allow the Crown Appeal on Sentence. I would vary the sentence and the Order of the Learned Trial Judge to provide for a fine in the amount of $2,000 and would order forfeiture of the catch seized, such forfeiture to be in the amount of $35,362.25. The fine is to be payable on or before February

28th, 2005. In default of payment of the fine, the Respondent will serve three months in jail.

[46] Each party shall bear it's own costs of the Appeal.

J.