

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Arbuckle, 2013 NSSC 2

Date: January 4, 2013
Docket: CR. Ant. 398079
Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Clarence W. Arbuckle; Alexander Edison Arbuckle; Bernard Joseph Chisholm;
John K. Chisholm and John Anthony Wallace

Respondents

Decision

Judge: The Honourable Justice N. M. Scaravelli

Heard: November 30, 2012, in Antigonish, Nova Scotia

Counsel: **Paul B. Adams, for the Appellant**
Public Prosecution Service of Canada

James MacIntosh, for the Respondents

By the Court:

[1] The crown appeals a decision of the Provincial Court rendered on May 22nd, 2012, wherein the court following trial, acquitted the respondents of the charge that:

They did fish for, buy, sell or have in their possession herring that was less than 23.5 cm in length contrary to S. 44 (1) of the *Atlantic Fishery Regulations*, thereby committing an offence under S. 78 of the *Fisheries Act* R.S.C. 1985 C.F-14

BACKGROUND

[2] Having met the Respondents' vessel, *Bounty Hunter*, at the wharf in Arisaig on June 23, 2011, Fishery Officer MacInnis took a total of seven samples from the 14 trays of herring onboard. The samples were taken randomly from different trays. With the exception of one sample wherein Officer MacInnis was unsure as to the total number, each of the samples contained 50 fish. The results of Officer MacInnis' sampling and measurement were as follows:

Sample No.	Over 26.5 cm	Under 26.5 cm
1	9	41
2	11	39
3	26	24
4	25	25
5	39	11
6	25	25
7	(unknown number)	34

[3] Officer MacInnis testified that with respect to the above noted samples only those fish that measured 22 cm or less in length were recorded as under 26.5 cm. The Trial Judge found that subsequent to the sampling and measurement, Officer MacInnis had placed the undersized herring into a single separate tray.

[4] The 14 trays of herring landed by the Respondents, together with the 15th tray into which Officer MacInnis placed the undersized herring, were subsequently seized and transported to the Antigionish DFO detachment, where they were stored overnight. The following day June 24, 2011, Fishery Officers became aware of a Variation Order which had varied the terms of S. 44 (1) and (2) of the *Atlantic Fishery Regulations* wherein the length of herring was changed to 23.5 cm as opposed to 26.5 cm with an allowable bi-catch of no more than 50 % of undersized herring.

[5] On June 24, 2011, Fishery Officers MacInnis and Jowett resampled the herring catch seized from the Respondents' vessel in light of the Variation Order. The Fishery Officers extracted and measured nine samples containing 50 herring each. The results were as follows:

Sample No.	Under 23.5 cm	23.5 - 26.5 cm	Over 26.5 cm
1	19	23	8
2	43	7	0
3	30	16	4
4	37	12	1
5	19	26	5
6	27	18	5
7	24	22	4
8	36	11	3
9	39	11	0

[6] Each of the above noted samples were taken from separate trays. There were 15 trays in total, one being the tray into which Officer MacInnis had placed the undersized fish during sampling the previous day.

[7] The Trial Judge found that the lack of proof that samples taken from the catch of herring were random samples, raised a reasonable doubt and acquitted the respondents.

ISSUE

[8] The appellant submits the acquittal should be set aside on the grounds that the Trial Judge erred in his interpretation and application of S. 44 of the *Atlantic Fishery Regulations*.

POWERS OF SUMMARY CONVICTION APPEAL COURT

1. *Section 822 (1) of the Criminal Code* provides:

Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683 (3) and 686 (5), apply, with such modifications as the circumstances require.

2. *Section 686 (4) of the Criminal Code* provides:

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.

STANDARD OF REVIEW

[9] The issue raised by the Crown on Appeal involves primarily a question of law. The standard of appellate review on a question of law is correctness, *R. vs. Henderson* 2012 NSCA 53.

ANALYSIS

[10] Prior to the minimum length variation order the relevant portion of S. 44 of the *Atlantic Fishery Regulations* provided:

44. (1) Subject to subsections (2) and (4), no person shall fish for, buy, sell or have in his possession any herring that is less than 26.5 cm in length.
- (2) Subsection (1) does not apply with respect to herring that are less than 26.5 cm in length where:
- (a) the catching of the herring was incidental to the catching of longer herring; and
 - (b) the number of herring less than 26.5 cm in length retained during any one fishing trip does not exceed 10% of the number of longer herring that were caught and retained during that fishing trip.
- (3) For the purposes of subsection (2), the percentage shall be determined on the basis of four or more samples taken from the catch, with each sample containing 50 or more herring.

[11] The variation order changed the minimum length of herring set out in S. 44 (1) to 23.5 cm. Section 44 (2) was varied to prohibit incidental catch of herring of

less than 23.5 cm in length of an amount greater than 50% of the longer herring caught.

[12] The Trial Judge found the second sampling contained an amount of herring that were less than 23.5 cm in length. However, in his decision, the Trial Judge focused on the provisions of S. 44 (2) (3) of the regulations dealing with the sampling of the catch for the purposes of determining whether the undersized herring exceeded 50% of the larger herring. He concluded that random sampling was required and the lack of reliable randomness associated with the second sampling of the catch raised a reasonable doubt as to guilt. He stated:

[22] I find that to give a common sense understanding to the word “sample” under S. 44 of the *Atlantic Fishery Regulations*, and the processes it encompasses, Officers are obliged to take samples that are random throughout each catch. To not require otherwise would allow Officers to single out four samples of 50 or more of the smallest fish irrespective of whether they are fair representations of the whole.

[23] Given that the Officers, when sampling the second time at the DFO compound, stood a very real possibility of having sampled the tray of undersized fish hand picked by Officer MacInnis. They strayed from the randomness and sampling that any common sense understanding of the Regulations would require. This clearly raises a reasonable doubt in relation to the fairness and accuracy of the sampling process the Officers engaged in. That, in turn, raises a reasonable doubt as to the guilt of the accused.

[13] The appellant submits the Trial Judge erred in treating S. 44 (2) as an element of the offence charged by finding the Crown failed to prove the undersized herring exceeded 50% of the larger herring sampled in accordance with S. 44 (3).

[14] The Respondent submits the Trial Judge did not err by finding the Crown failed to prove by appropriate sampling that the undersized herring exceeded 50% of the longer herring.

[15] In *R. vs. Neary* 2010 NSSC 466, Rosinski, J. of this court interpreted S. 48 (2) of the *Atlantic Fishery Regulations* dealing with the possession of undersized mackerel. That section is virtually identical to S. 44 (2). Justice Rosinski concluded that S. 48 (2) is a statutory due diligence defence and not an element of the offence of possessing undersized mackerel.

[16] Section 44 (1) is a strict liability offence in that the offence occurs when a fisherperson is in possession of “any” undersized herring. I concur that S. 44 (2) is not an essential element of an offence under S. 44 (1). Section 78.6 of the *Fisheries Act* creates the statutory defences of due diligence and reasonable and honest mistake of fact. Section 44 (2) of the regulations is a due diligence defence

to the charge of possessing undersized herring by establishing a way for fisherpersons to prove they were caught incidental to catching longer herring and that the number of undersized herring did not exceed 50% of the number of longer herring.

[17] In summary, S. 44 (1) of the Regulations creates a strict liability offence. It prohibits the possession of “any” herring that is less than 23.5 cm in length. Proof of possession of any undersized herring is proof of the actus reus of the offence. The Crown is not required to prove beyond a reasonable doubt that undersized herring exceeded more than 50% of longer herring properly sampled in accordance with S. 44 (2) and S. 44 (3). The provisions are a due diligence defence to the possession of undersized herring.

[18] The Trial Judge treated proof that S. 44 (2) did not apply, as an essential element of the offence under S. 44 (1). By doing so, he misinterpreted and misapplied the provisions of S. 44 of the Regulations. This constitutes an error in law.

[19] The Crown proved the essential element of the offence charged by proving the respondents were in possession of herring that were less than 23.5 cm in size. There was no evidence before the court relating to the statutory defences.

[20] As a result, I allow the appeal, set aside the acquittal and enter a verdict of guilty to the offence charged.

[21] I remit the matter to the Provincial Court for submissions and imposition of sentence.