

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Paul - 2003 NSSC164

Date: 20030813

Docket: S.H. No. 194330

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

-and-

Jerome Paul

Respondent

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Judge: The Honourable Justice Robert W. Wright

Heard: June 4, 2003 in Halifax, Nova Scotia

Written

Decision: August 13, 2003

Subject: Summary conviction appeal on sentence for *Fisheries Act* offences - fitness of sentence - interpretation of s. 72 forfeiture provisions.

Summary: In 2000, the Respondent, an aboriginal fisher, entered into discussions with the Department of Fisheries and Oceans ("DFO") seeking a license to fish for snow crab. DFO policy, in the aftermath of the Supreme Court of Canada decision in *Marshall*, was that under its Aboriginal Fishing Strategy, such licenses would only be issued communally to a band Council which then had the authority to decide who would fish under them. One such license was prepared and signed authorizing the Indian Brook First Nation to engage in snow crab fishing under certain conditions. The Indian Brook First Nation refused the license and maintained its treaty right to fish and regulate its own fishery. It purported to issue its own license to the Respondent to fish for snow crab, which contained essentially the same conditions and restrictions as the one available (but not accepted) from DFO.

The Respondent then openly engaged in fishing activity in August, 2000 and landed a significant crab catch which was entirely within the conditions which would have applied under the DFO license. He was then charged with fishing for crab without being licensed to do so, contrary to the Atlantic Fishery Regulations. In mounting his defence, the Respondent challenged, on a test case approach, the authority of the Minister to impose regulations to control licensing activity in the aboriginal fishery in light of the recent *Marshall* decision, specifically in relation to the snow crab fishery. The trial judge rejected the argument that an aboriginal fisher could not be charged under

the Atlantic Fishery Regulations, dismissed the Respondent's assertion of a treaty right to fish for snow crab on the evidence before him and entered convictions on two licensing offences with which the Respondent was charged.

At the sentencing hearing, the trial judge imposed a conditional discharge with supervised probation for one year and a community service requirement. The trial judge also made an order of forfeiture in respect of all the fishing gear used in the commission of the offences and further made a partial forfeiture order in respect of the seized proceeds of sale of the illegal snow crab catch. The Crown appealed the sentence imposed, requesting that the discharge be set aside, convictions be entered, an appropriate fine imposed, and that a replacement forfeiture order be granted directing that the entirety of the seized proceeds of sale be forfeited to the Crown.

Issues:

- (1) Whether the sentence imposed was demonstrably unfit or clearly inadequate ;
- (2) Whether the trial judge erred in his interpretation and application of the mandatory forfeiture provisions contained in s. 72(2) of the *Fisheries Act*.

Result: Bearing in mind the deferential standard of review enunciated in *Shropshire* and other cases, and considering the uniqueness and test case nature of the present case, the court was not satisfied that the sentence imposed by the trial judge was demonstrably unfit or clearly unreasonable. The first ground of appeal was therefore dismissed.

The second ground of appeal was allowed in part but only to the extent that the trial judge purported to make an order of partial forfeiture of the seized proceeds of the illegal catch under s. 72(2) of the *Fisheries Act*. That section was found not to apply to the facts of this case, in keeping with the judicial interpretation of that section by the Nova Scotia Court of Appeal in *R. v. Mood* (1999) 174 N.S.R. (2d) 292. The making of an order of partial forfeiture was an available option, however, under s. 72(1) of the Act and the trial judge's order of partial forfeiture should therefore be allowed to stand in the final outcome.

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DECISION. QUOTES MUST BE FROM THE DECISION, NOT THE COVER SHEET.**
