SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Everett*, 2024 NSSC 114

Date: 20240422
Docket: CRT No. 525665
Registry: Halifax

Between:

His Majesty the King
(as represented by the Public Prosecution Service of Canada)

Appellant

v.

Shawn Lawrence Everett

Respondent

DECISION ON APPEAL

Judge: The Honourable Justice Scott C. Norton

Heard: March 27, 2024, in Truro, Nova Scotia

Decision: April 22, 2024

Counsel: Marion Fortune-Stone, KC, for the Appellant
Stanley MacDonald, KC, for the Respondent

By the Court:

[1] This is a Summary Conviction Appeal from the decision of Judge Alan Bégin of the Provincial Court of Nova Scotia, given orally on June 23, 2023, at Truro Nova Scotia. The Crown appeals from the sentence passed on that date with respect to the Respondent.

Circumstances of the Offences

[2] On July 21, 2020, the Respondent captain, and his two crew members, were working aboard the *Fundy Storm* fishing vessel. They had been at sea for two to three days, harvesting lobster when they headed to Advocate Harbour. That same day, Department of Fisheries and Oceans Canada officers were nearby when the Fundy Storm approached the wharf. The officers subsequently boarded the vessel to conduct inspections.

[3] While on board, the officers observed 28 crates of lobster. Upon closer inspection, officers found the equivalent of seven complete crates of non-compliant lobsters interspersed among the 28 crates. The non-compliant lobsters were composed of two types of illegal catches.

[4] The first illegal catch was comprised of 792 undersized lobsters measuring under 82.5 millimeters. Reiterating testimony of a fishery officer, the Judge stated that many of the lobsters did not even have to be measured given their visible undersize. The second illegal catch component was the discovery of 28 female lobsters with eggs and 1 with egg cement attached. The entire illegal catch totaled 821 lobsters.

[5] The Judge noted that the entire illegal catch amounted to 34 percent of the total catch which weighed 2,200 lbs.

[6] While aboard, the Respondent was asked to produce his logbook and licence, neither of which he produced despite his obligation to do so under the *Fisheries Act*, R.S.C., 1985, c. F-14. He was fishing under the authority of two First Nation Licences and failed to produce either on request.

The Trial

[7] On June 16, 2022, the trial was held, and, by decision dated November 1, 2022, the Respondent and crew were found guilty of *Fisheries Act* offences for possession of the illegal catch of undersized lobster and female lobster bearing eggs and cement. The Respondent was also convicted of *Fisheries Act* offences related to license conditions and related regulations. The trial judge characterized the illegal catch as the product of intentional acts by all three carrying out a joint venture wherein none exercised any due diligence in the circumstances.

Sentencing

[8] On July 23, 2023, following the receipt of written submissions, the sentencing hearing was held at which time the Respondent was ordered to pay fines and was subject to a license suspension pursuant to the *Fisheries Act*.

[9] At the sentencing hearing the Crown had sought fines totalling $85,000 apportioned among the eight convictions as well as a period of suspension. The Respondent argued for fines within the range of $15,000 to $20,000.

[10] The sentencing judge levied fines totalling $32,504, apportioned as follows:

- Count 1 – 792 undersized lobsters - $15,000 fine.
- Count 2 – 28 female lobsters with eggs - $7,500 fine.
- Count 3 – 1 female lobster with cement or glue - $1 fine.
- Count 4 – Failing to produce a licence authorizing the use of the vessel on demand of a Fishery Officer - $5,000 fine.
- Count 5 - Failing to comply with a condition of a licence; namely, failing to keep and produce fishing records - $1 fine.
- Count 10 – Failing to comply with a condition of a licence; namely, failing to have a fishing logbook onboard the vessel - $5,000 fine.
- Count 12 – Failing to comply with a condition of a licence; namely, possessing of lobster smaller that 92.55 mm in size - $1 fine.
- Count 13 – Failing to comply with a condition of licence; namely, possession of female lobster with eggs attached to its swimmerets - $1 fine.

[11] The sentencing judge also imposed a license suspension for the first four weeks of the 2023 lobster season in one lobster fishing area, specific to Zone 35.

[12] The Crown's appeal is focused solely on the sentencing disposition for the Respondent. The Crown does not appeal from the ancillary order for suspension or with respect to the fines imposed as requested by the Crown for Count 4 and Count 10.

Issues

[13] In its Notice of Appeal and Factum the Crown set forth the issues for determination on this Appeal as follows:

1. Did the learned trial Judge impose a sentence that was demonstrably unfit or clearly inadequate given the nature of the offence and the circumstances of the offender?

2. Such further and other grounds that may be disclosed on the record and this Honourable Court may allow.

Standard of Review

[14] The standard of review on a sentence appeal was recently reiterated in *R. v. Chiasson*, 2024 NSCA 11, at para. 66:

> [66] The principles governing this Court's review of a lower court's sentencing decision are well established. These were recently set out in *R. v. Friesen*, 2020 SCC 9 as follows:
>
> > [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
> >
> > [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a

> failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[15] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (*R. v. Lacasse*, 2015 SCC 64, para. 43) .

[16] The Court in *Lacasse*, *supra*, addressed the very high burden on the Appellant to overturn a sentence as demonstrably unfit, at paras. 51-52:

> 51 Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.
>
> 52 It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure": *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (Ont. C.A.), at p. 720. <u>All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence</u>.
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> [Emphasis added]

[17] This appeal comes before the court pursuant to s. 813 of the *Criminal Code*, R.S.C., 1985, c. C-46, a provision governed by s. 822 (1):

> **822 (1)** 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 683(5), apply, with such modifications as the circumstances require.
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> **Powers of court on appeal against sentence**

> **687 (1)** Where an appeal is taken against sentence, the court of appeal shall, unless the 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,
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> > **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > **(b)** dismiss the appeal.
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> **Effect of judgment**
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> **(2)** A judgement of a court of appeal that varies the sentence of an accused person who was convicted has the same force and effect as if it were a sentence passed by the trial court.

The Appellant's Position

[18] The Appellant acknowledges that judges engage in a highly discretionary function when sentencing an offender to which deference is generally accorded on appeal. The principles of sentencing are well known and represent the cornerstone of sentencing decisions.

[19] The Appellant states that the sentencing judge imposed a demonstrably unfit sentence in all circumstances of the offences and the offender and when considering that the paramount purposes of the *Fisheries Act* and its Regulations are conservation and protection. More particularly, the Appellant says that the sentencing judge overemphasized the issue of parity to the detriment of the more important and primary consideration of proportionality.

[20] The Appellant also argues that the sentencing judge failed to engage in any sentencing exercise that identified and balanced the established principles of sentencing and the overarching sentencing goal of general and specific deterrence for Federal fisheries offences. His failure to address those principles within the context of all the evidence ultimately led to a clearly unfit sentence.

The Respondent's Position

[21] The Respondent says that the sentencing judge was well aware of the relevant sentencing principles. Extensive written submissions were provided by the Crown and counsel for all three defendants. In the course of the sentencing hearing, the judge referred to the fact that the Crown was seeking penalties without placing before the court any real authority for those penalties. Crown counsel at the sentencing hearing acknowledged that there was a distinct lack of caselaw regarding

sentencing for fisheries offences and that practically no authority had been provided for the total sentence sought by the Crown.

[22] The Respondent says that the sentencing judge imposed very significant fines and harsh suspensions on all three defendants, particularly the Respondent, and notes that no appeal was taken from the sentences imposed on the crew members.

[23] By any assessment, says the Respondent, the sentence imposed on him was fit and proper and by no means was it demonstrably unfit or clearly inadequate. The sentencing judge's decision is entitled to a very high degree of deference.

Analysis

[24] In the course of its argument, the Appellant asserts that:

- the sentencing decision provides no transparency or roadmap to explain and support the determination on fine amounts. There was no reference to the principles of sentencing, neither those in the *Criminal Code* or those in fisheries caselaw.
- the sentencing judge did not engage a balancing or weighing exercise relevant to the nature of the offences, the circumstances of the offences and the offender.
- the sentencing judge offered no substantive consideration of the aggravating and mitigating factors relevant to advancing a demonstrably fit sentence.
- the sentencing judge failed to self-instruct on the facts in the context of the law and did not engage in a totality analysis by looking back to ensure a fit and proper sentence was imposed.

[25] In short, the Appellant says that the sentencing decision was bereft of reasoning. The sentencing judge did not explain what he decided and why he did so. The Appellant states that his bottom-line decision does not permit meaningful appellate review.

[26] I note that the sufficiency of reasons was not raised in the Notice of Appeal. The issue of sufficiency of reasons was recently commented on by the Nova Scotia Court of Appeal in *R. v. Kitch*, 2023 NSCA 33. At para 12, Justice Beaton, writing for the court, observed:

> [12] I am also mindful of the caveat regarding **an argument of sufficiency of reasons; it is not a free-standing ground of appeal:** *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2021 NSCA 34 at para. 48; *R. v. G.F.*, 2021 SCC 20 at para. 70. As stated in *McPhee v. Canadian Union of Public Employees*, 2008 NSCA 104 (leave to appeal to SCC refused, [2008] SCCA No. 546):
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> > [74] … In other words, one cannot infer simply from the absence of stated reasons that the judge made an error. The appellate court is entitled to intervene only where effective appellate review is precluded because the basis of the judge's decision is not apparent when considered in light of the record, the issues and the submissions at trial: see, e.g., **R. v. Sheppard**, [2002] 1 S.C.R. 869 at para. 28 and **R. v. R.E.M.,** 2008 SCC 51 at para. 37, the principles of which have also been applied in civil cases as in ***F.H. v. McDougall***, supra.
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> [Emphasis added; Underlining in the original]

[27] At para. 26 Justice Beaton enumerated the assumptions engaged when assessing sufficiency of reasons as stated by *Sheppard*:

- Judges are presumed to know the law.
- Judges do not need to discuss all of the evidence put before them in providing the decision.
- Judges do not need to identify each and every conclusion reached nor resolve each and every inconsistency in the evidence.
- Judges do not need to take a formalistic approach to giving reasons.
- Judges are not held to a standard of perfection in giving reasons.

[28] At para. 27 Justice Beaton cited the Supreme Court of Canada decision in *R. v. Braich*, 2002 SCC 27, observing that this decision:

> … continued the Court's progressive perspective on a judge's task of providing reasons, echoed again the following year in *R.E.M.*, when appellate courts were reminded that: ". . . [t]he object is not to show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show *why* the judge made that decision" (para. 17). What the judge concluded must be linked to why it was concluded, and the connection between the two must be identifiable and understandable …
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> [Underlining added]

[29] The sentencing judge's decision was given shortly after the oral submissions were made to him and having received substantial written briefs. I am satisfied that considering the sentencing decision in light of the entire record, the issues and the

submissions at trial, the reasons are sufficient for appellate review. Specifically, I am able to discern why the judge concluded as he did.

[30] In its brief to the sentencing judge, the Appellant provided the judge with particulars of the legislation and submissions regarding culpability, the prior records of the Respondent, acceptance of responsibility, and damage/harm to the sustainability of the fishery. Extensive reference was also made to the principles of sentencing in fisheries matters, including the paramount consideration of general and specific deterrence. The Appellant reviewed the aggravating and mitigating factors and made a specific submission pertaining to parity/proportionality.

[31] Counsel for the Respondent also provided a thorough sentencing brief addressing the purpose and principles of sentencing. Sentencing precedents were provided and submissions were made with respect to the applicability of the *Kienapple* principle and totality.

[32] Counsel for another crew member offender provided the sentencing judge with a written brief including summaries of convictions and sentences for Atlantic Canada lobster fishery matters, that had been provided to him by the Department of Fisheries and Oceans. Counsel for the other crew member submitted that there were 29 cases referred to in the summaries, resulting in fines ranging from $300 to $20,000 with the most common fine being $1,000. Only one of those cases involved a suspension of fishing privileges, for a period of three days.

[33] At the sentencing hearing, the sentencing judge made reference to the fact that he had just re-read his decision on the verdict. Counsel for the Crown, after making submissions on an issue regarding "violation reports" included in his brief (which were ruled inadmissible), then turned to the sentencing itself and stated:

> With respect to the submissions on sentencing itself, I think they're clearly outlined in the brief, and I really don't have much else to add to that. I think we are asking Your Honour to consider this as one of the more egregious offences that the Court has likely seen.
>
> There is some difficulty, I will admit, with respect to the case authorities for sentences in the range that the Crown is seeking.

[34] The sentencing judge and Crown counsel then had a discussion about the lack of relevant sentencing precedents. This led the sentencing judge to comment:

> So, when you come before me and you're looking for a very severe fine, excuse me, penalty, there's some backing for it.

[35] The comments made by the sentencing judge throughout the sentencing hearing make it abundantly clear that he understood and agreed that the circumstances were "very serious", the conduct of the Respondent was "egregious", but the Crown was offering no precedential support for the severity of penalty it was seeking.

[36] Counsel for the Respondent and the other crew members acknowledged they were dealing with "bad facts" and that the court had to emphasize deterrence. Counsel reminded the court that all sentencing principles were to be applied in a rational and reasonable way, and with regard to the issue of parity:

> And of course parity is a big challenge here, especially when we take into account the discussion that's already been had here that there really are – there's just no precedent for what the Crown is seeking.

[37] The Crown brief had provided a breakdown of the penalties by offence; the Respondent had not. After discussion about whether a global fine could be imposed, and agreement that it had to be broken down, the sentencing judge asked counsel for the Respondent for his submissions on the applicable fine for each offence.

[38] It is clear that the sentencing judge recognized that he was going to impose a suspension as part of the sentence and that the imposition of a suspension at the beginning of the next season would have a particularly deterrent effect.

[39] The Crown then made rebuttal submissions regarding the potential suspensions but made no further submissions regarding the fines or the breakdown of the fines among the offences, even after being invited by the sentencing judge to offer any other comments.

[40] After taking a recess of 25 minutes, the sentencing judge gave an oral decision. At the outset he highlighted parts of his verdict and then stated:

> Mr. MacDonald in his submissions this morning more than once referred to conservation, and clearly that's what these Regulations are all about and that's exactly what these individuals, these three men, were in contravention of, shooting themselves in the foot, short term gain at the longer term pain for the industry, plain and simple.

[41] Contrary to the argument advanced by the Appellant, it is clear that the sentencing judge was keenly aware that the paramount purposes of the *Fisheries Act*

and its Regulations are conservation and protection, and that his sentence was intended to address deterrence as a primary consideration.

[42] Although the Appellant asserts that the sentence imposed is demonstrably unfit, it was unable to provide the sentencing judge or this court with anything "demonstrating" the unfitness. The Appellant's counsel, at the sentencing, admitted that the number of penalties being sought could not be backed up by precedential authority. The Appellant cited no reported case in its Factum that would support a finding that the sentencing judge's penalties imposed were demonstrably unfit in the circumstances.

[43] As to the offences for which the sentencing judge imposed fines of $1, it is clear that, while the possibility exists to commit one and not the other, the significant overlap between the offences is such that additional culpable conduct is minimal. It is apparent to me that the sentencing judge was applying this consideration as well as a concurrency and totality analysis in formulating these penalties.

[44] The assessment of the fitness of the sentence must take account of the entire sentence and not just those aspects of the sentence about which the Appellant complains. The Appellant takes no issue with the imposition of the four-week suspension imposed on the Respondent or the $5,000 fines imposed as requested by the Crown. As the Respondent asserts, this is not surprising having regard to the particularly harsh impact of the suspension penalty.

[45] Here, there was simply no range of sentence established by the Appellant for the offences before the court. Counsel for the Appellant at the sentencing hearing agreed he had no precedential authority for the sentences he recommended. In this context, having regard to the wide latitude to be given to sentencing judges (*Lacasse*, para. 11), and the Appellant being unable to identify a specific error of law or principle impacting the sentence, I am unable to find that the Appellant has met the high threshold of establishing that the sentence imposed was demonstrably unfit.

[46] The Appeal is dismissed.

Norton, J.