

Date: 20130626
Docket: 12/72
Citation: *R. v. Crane*, 2013 NLCA 44

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

APPELLANT

AND:

RICHARD BYRON CRANE

RESPONDENT

Coram: Green C.J.N.L., Rowe and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201004G0378

Appeal Heard: May 7, 2013

Judgment Rendered: June 26, 2013

Reasons for Judgment by Rowe J.A.

Concurred in by Green C.J.N.L. and Hoegg J.A.

Counsel for the Appellant: Mark A. Stares

Counsel for the Respondent: Self Represented (Video Conference)

Rowe J.A.:

[1] Richard Crane is a lobster fisherman. In June 2009, he was charged by Department of Fisheries and Oceans (DFO) officers with possession of:

- (a) “v” notched female lobsters;
- (b) lobsters less than 82.5 mm in length (under-sized lobsters);
- (c) fish caught in contravention of the *Fisheries Act*; and
- (d) setting fish gear that was not properly marked.

Mr. Crane pleaded not guilty.

[2] In June 2010, Mr. Crane was convicted of counts (a), (c) and (d). Those convictions have not been appealed.

[3] With respect to count (b) (under-sized lobsters), the Provincial Court judge held that Mr. Crane’s rights under section 7 and subsection 11(d) of the *Charter* were breached by DFO. As a result, she granted a stay of proceedings with respect to this charge.

[4] The Crown appealed the stay. In May 2012, a judge of the Trial Division (sitting as a Summary Conviction Appeal Court judge) dismissed the Crown’s appeal. The Crown now seeks to appeal to this Court.

FACTS

[5] On June 17, 2009, DFO officers observed Mr. Crane haul a lobster holding crate. In the crate were lobsters, 44 of which (according to the officers) were under-sized. The officers photographed the lobsters and took video. However, only one photo shows a lobster with a carapace gauge beside it. The officers then returned the lobsters to the water.

[6] Mr. Crane argues that by returning the lobsters to the water as the officers did, he was denied his right (under s. 7 of the *Charter*) to make full answer and defence to the charge of possession of under-sized lobsters.

[7] The Provincial Court judge agreed. She wrote:

56. In the case before me it is my conclusion that the return of the lobsters to the ocean by the Fisheries Officers caused prejudice to the accused with respect to the second charge before the court. By so doing the Officers deprived the accused

of the opportunity to make full answer and defence to the Crown's case against him that 44 of the lobsters which he had in his possession were undersized. If the alleged undersized lobsters had been itemized, photographed, videotaped and individually measured while being videotaped, with a clear demonstration of same provided to the viewer, the accused would have stood a much better chance of being able to mount a defence to the case against him. Instead the accused is left with a photograph of one alleged undersized lobster having been accused of catching some 44.

57. It is my view that the Fisheries Officers acted in haste in disposing of the lobsters. These are creatures which can survive out of the water for a period of time especially in cooler temperatures or if covered in kelp. Certainly the court accepts that the lobsters are returned in order to conserve them and to allow them to continue to reproduce. The court also accepts that the Fisheries Act provided the officers with the authority to return the lobsters to the sea. However the court believes that neither conservation nor preservation of evidence needed to be sacrificed. The lobsters could have been preserved long enough for their photographic images to be taken. The Officers could have also taken more detailed video of the lobsters which would have allowed the accused to scrutinize the evidence against him and the case which he was expected to meet. According to the evidence of the Officers there was no shortage of either digital or video cameras at the scene of the investigation. The videotaped evidence which was shown to the court contained footage of the Fisheries Officer removing the lobsters from the crate and measuring them as he removed them. There was no opportunity to clearly view the points on each lobster between which the Officer was measuring. The pace at which the Officer was moving also made it difficult to view the lobsters as each was inspected by him.

58. The court accepts that there was no deliberate attempt by the Fisheries Officers to frustrate or obstruct the judicial process or cause harm to the accused. The court does believe however that the Officers should have taken greater care to preserve the evidence of the alleged undersized lobsters. By not carrying out this obligation the court is of the view that the Officers were negligent in their duty to the accused. It is therefore the court's belief that the accused suffered actual prejudice when the alleged undersized lobsters were thrown back into the water without adequate video and photographic capturing of their individual images. To proceed to trial on the evidence which is available with respect to the alleged undersized lobsters would in the courts view only serve to aggravate the prejudice suffered by the accused.

59. The only reasonable remedy in removing the prejudice is to grant a stay of proceedings on the charge of possessing lobsters less than 82.5 mm. in length. The court is satisfied on a balance of probabilities that the accused has demonstrated a breach of his section 7 and 11(d) Charter rights with respect to charge number two and a stay of proceedings is hereby ordered.

[8] The Summary Conviction Appeal Court judge dismissed the Crown's appeal. Concerning the preservation of evidence, he wrote:

[19] In a case involving undersize lobsters --- where the live evidence is returned to the sea, where there can be less than a millimeter of difference separating a guilty verdict from a not guilty verdict, where the Officers have cameras readily available, where the Officers have the calibrated lobster gauge readily available, where due diligence is a good defence --- preserving an adequate photographic record illustrating the carapace size of the lobsters would be a reasonable step. From the various video and photographic images, there was only one lobster photographed in a way to display both ends of the gauge over the carapace. The trial judge found that the quality and quantity of the photographic and video images were not adequate preservation of the fruits of the investigation, that the failure to take better images was negligent, and that this negligence deprived the Respondent of the opportunity to make full answer and defence. The trial judge was satisfied that the Respondent had proven on a balance of probabilities that a *Charter* violation occurred. After consideration of the relevant legal principles, as discussed above, I find no error of law by the trial judge in coming to these conclusions.

[9] Concerning the stay of proceedings, he wrote:

[20] I do not interpret the trial judge's decision as requiring a complete photographic record of the 44 measured carapaces. The law requires only that Fishery Officers take reasonable steps in the circumstances to preserve the fruits of their investigation. What is reasonable will vary depending on the circumstances. A photograph showing measurement (with both ends of the gauge visible) of a single undersize lobster carapace from a total catch of 61 lobsters was not seen as reasonable in these circumstances.

...

[25] I emphasize in bold the word "only" because that was the word used by the trial judge. It conveys that she had considered and excluded alternate remedies. The Crown suggested that an alternate remedy is exclusion of the deficient video and photographic images and proceeding to trial on the basis of the single lobster which was photographed with both ends of the gauge visible. A problem with that remedy is that the "due diligence" defence is compromised without a more complete record of the fruits of the investigation.

[26] Another option raised by the Crown is proceeding to trial with a reserve ruling on the stay application until all of the evidence is heard. There was more evidence to come, including more testimony from Fishery Officers and possibly tendering of the Officers' notes. I find that the trial judge considered and rejected this option when she stated that to proceed to trial on the available evidence would only aggravate the prejudice.

[27] The trial judge was satisfied that the Respondent had met the onus of demonstrating that this was one of those clearest of cases where no other remedy is reasonably capable of removing the prejudice and salvaging a fair trial. This is even more obvious when one considers that the trial judge elected not to grant the stay on two other charges that were the subject of this same pre-trial application. The undersize lobster charge was count 2 on a four count Bill of Indictment. Two of the remaining charges, count 1 -- possession of female “v” notched lobsters and count 3 -- possession of fish caught in contravention of the *Fisheries Act*, were also impacted by the same *Charter* breach. For those other charges the trial judge did not order a stay, and allowed the trial to proceed on those charges. It was only for count 2 that the trial judge determined that no other remedy was reasonably capable of removing the prejudice and salvaging a fair trial.

ISSUES

[10] Were Mr. Crane’s rights under section 7 and subsection 11(d) of the *Charter* breached? If so, should the charge have been stayed?

ANALYSIS

[11] Mr. Crane represented himself in this appeal. He urged on this Court that the Summary Conviction Appeal Court judge and the Provincial Court judge did not err. The Crown submitted they had.

Leave to Appeal

[12] Appeal of a decision of a Summary Conviction Appeal Court judge requires leave of this Court: s. 839(1) of the *Criminal Code*. As well, appeals can involve only “a question of law alone”: s. 839(1). Leave should be granted if either there is “a reasonable possibility of success” or “the issue is one of importance”: *R. v. Croft and Russell*, 2006 NLCA 33, 256 Nfld. & P.E.I.R. 1, para. 11; *Newfoundland Recycling Limited v. R.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153, para. 3-4; *R. v. Quinlan Brothers Limited*, 2011 NLCA 22, 305 Nfld. & P.E.I.R. 184, para. 4-5.

[13] Are the two issues “questions of law alone”? Whether section 7 and subsection 11(d) of the *Charter* were breached is on its face a question of law. (I say nothing about the interaction between rights under section 7 and subsection 11(d) of the *Charter*, as it is not necessary for the proper disposition of this case.)

[14] Whether the charge should have been stayed involves the application of a legal test to the facts as found. This, too, is a question of law. As the

Supreme Court of Canada stated in *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, para. 20:

While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

[Emphasis added.]

[15] I would grant leave to appeal on the basis that dealing with perishable evidence is an issue of importance regarding fisheries prosecutions.

Were Mr. Crane's Charter Rights Breached?

[16] The Crown relies on the following passage from *R. v. Stinchcombe* (No. 2), [1995] 1 S.C.R. 754, para. 2:

The Crown can only produce what is in its possession or control. There is no absolute right to have originals produced. If the Crown has the originals of documents which ought to be produced, it should either produce them or allow them to be inspected. If, however, the originals are not available and if they had been in the Crown's possession, then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligation unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the Canadian Charter of Rights and Freedoms.

[17] The Crown further relies on the following passage from *R. v. La*, [1997] 2 S.C.R. 680:

18. The issue of the Crown's disclosure obligations where evidence has been lost arose during the new trial ordered by this Court in *Stinchcombe* (No. 1). The police had misplaced a tape recording of an interview with a witness. During the interview, the witness had expressed doubts about the accuracy of her earlier testimony. The officer who interviewed her had died of a brain tumour. However,

the Crown disclosed a transcript of the interview. In setting aside the stay of proceedings entered by the trial judge, the Alberta Court of Appeal noted that *it is information contained in witness statements that must be disclosed, not the original statement: Stinchcombe (No. 2), supra*. This Court agreed, [1995] 1 S.C.R. 754, at para. 2 [reproduced above]:

...

25. It is not necessary to elaborate a test to be used in such cases in order to deal with the case at bar. Suffice it to say that, where the Crown has met its disclosure obligations, *in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence*. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dubé in her reasons in *Carosella*, [1997] 1 S.C.R. 80; see paras. 76-80. [Emphasis added]

[18] As a preliminary point, the rules regarding disclosure do not require the creation or gathering of particular forms of evidence. In this case, there was no obligation on the Crown to take photos or video. It was open to DFO officers, for example, to measure the lobsters and simply record the measurements in their notes. Good investigative practice may well call for the creation of evidence (e.g. photos) that verifies what is recorded in the officers' notes, but the law does not require it.

[19] Where investigating officers do a poor job of making photographic or video records (as was the case here), that does not breach any *Charter* right the accused may have. Rather, it may merely make it harder for the Crown to prove its case, as courts tend to accord less weight to evidence arising from a poorly conducted investigation. That said, all evidence the Crown has (whatever quality) must be disclosed to the accused.

[20] While it is clear that the Crown must disclose evidence what it has, it is equally clear that it cannot disclose evidence that it does not have. Thus, it cannot be said that the Crown failed to make disclosure to Mr. Crane, as he was given copies of the photographs and video.

[21] The issue, therefore, is not whether the Crown failed to disclose evidence, but rather whether it was required to preserve evidence (the lobsters), such that the evidence would be available for disclosure. Generally speaking, the Crown should do so. As Sopinka J. wrote in *Stinchcombe (No. 2), supra*:

If, however, the originals [the evidence] are not available and they had been in the Crown's possession, then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligation unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the [*Charter*].

[22] Such questions are highly fact specific. Was there anything about DFO's release of the lobsters that in itself "warrants a remedy under the [*Charter*]"? I see none. The DFO officers released the lobsters to preserve them as part of the living resource. There is no suggestion they did so for any other purpose. Thus, the "explanation is satisfactory".

[23] But, that does not end the matter. A second question arises, as noted in *R. v. La*, whether an accused can "establish actual prejudice to his or her right to make full answer and defence" arising from the failure to preserve evidence for disclosure. The Provincial Court judge concluded there was such prejudice. The Summary Appeal Court judge agreed. I cannot agree, nor can I disagree, as, in the absence of hearing other evidence at trial, it is impossible to say, *a priori*, whether the accused suffered "actual prejudice".

[24] As an example, I would note that the Summary Conviction Court judge stated that because the officers failed to preserve the lobsters, the accused's "due diligence defence is compromised". How can we know that any such defence would have been raised by the accused? We cannot. Speculation is not a sound foundation for granting a stay.

[25] The proper approach was set out by the Ontario Court of Appeal in *R. v. Andrew* (1992), 60 O.A.C. 324, para. 4:

We do not accept the submissions of counsel for the [accused] that this issue of the alleged violation should be considered in isolation, without regard to the evidence adduced at trial. On an application of this nature alleging a *Charter* violation before trial, it is our view that unless the violation is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial.

[26] Thus, applications of this nature generally should be decided after evidence has been received. Only then, when the trial judge has a complete picture of the evidence, can the issue of "actual prejudice" properly be assessed. See *R. v. Buyck*, 2007 YKCA 11, 163 C.R.R. (2d) 140, para. 35 and *R. v. J.P.*, 2009 ONCA 850, 256 O.A.C. 242, para. 11-12.

[27] In this case, the Provincial Court judge erred by making a premature decision on the stay application. She should have heard other evidence before deciding whether Mr. Crane suffered “actual prejudice” (resulting in a breach of his *Charter* rights) arising from the DFO officers’ failure to preserve the lobsters.

[28] I leave for another day practical questions relating to preserving seafood as evidence, as well as the option to preserve samples rather than all the evidence. (In this case, one such practical problem was how, if at all, lobsters could be preserved so that they retain their exact length. Another such problem would be how to deal with several tonnes of fish alleged to be under-sized.) Practicality must go hand in hand with principle in the proper administration of justice.

CONCLUSION

[29] The appeal is allowed. The decision of the Summary Appeal Court judge is reversed. The stay granted by the Provincial Court judge is set aside. The Crown may proceed to re-try the charge, if it so wishes.

M. H. Rowe J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

L. R. Hoegg J.A.