

Date: 20110316
Docket: 10/70
Citation: *R. v. Quinlan Brothers Ltd.*, 2011 NLCA 22

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

BETWEEN:

QUINLAN BROTHERS LIMITED

APPELLANT

AND:

HER MAJESTY THE QUEEN
As represented by the Attorney General
of Canada

RESPONDENT

Coram: Mercer, Harrington and Hoegg, JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General), 200701T2479

Appeal Heard: March 16, 2011
Judgment Rendered: March 16, 2011
Memorandum of Disposition Filed: March 17, 2011

Counsel for the Appellant: John Mate and Mandy Woodland
Counsel for the Respondent: Mark Stares

MEMORANDUM OF DISPOSITION

Mercer, J.A.:

[1] The appellant was convicted of a summary conviction offence and its conviction was upheld by the Summary Conviction Appeal Court. It sought leave to appeal to this Court. At the hearing, leave was denied. These are the reasons for that denial.

BACKGROUND

[2] The appellant was convicted in the Provincial Court of a breach of s. 63(1) of the **Fisheries Act**, R.S.C. 1985, c. F-14, by making a false or misleading statement in writing to an authority designated by a fishery officer, thereby committing an offence punishable under s. 78 of the **Fisheries Act**. The charges are related to the misreporting of the amount of snow crab purchased by the appellant from a fisher on May 16, 2002. Two employees involved in the misreporting were also charged and tried for the same offence as the appellant. One of the employees charged was acquitted in Provincial Court. A second employee convicted at Provincial Court was acquitted on appeal before the Summary Conviction Appeal Court.

[3] At trial, the appellant conceded that the *actus reus* of the offence had been established and that the focus of the defence was that it had acted with due diligence in the reporting of the amount of crab landed and ultimately purchased by the appellant.

GRANTING OF LEAVE

[4] Appeals to this Court of summary conviction proceedings are authorized by s. 839(1) of the **Criminal Code** but are limited to questions of law alone. **Newfoundland Recycling Limited v. Her Majesty the Queen**, 2009 NLCA 28 at paras. 3 and 4. While the Ontario Court of Appeal in **R. v. R.(R.)** (2008), 234 C.C.C. (3d) 463 held that leave to appeal under the section should be “granted sparingly” (at para. 37), Rowe J.A. writing for this Court in **Newfoundland Recycling** wrote at para. 7:

... I would say simply that the intended appellant must meet the appropriate test for leave to be granted. That test should not be unduly stringent.

[5] With regard to the grounds for the granting of leave, this Court elaborated at para. 9:

Thus, to obtain leave to appeal pursuant to s. 839(1):

- (a) the appeal must “be taken on a ground that involves a question of law alone”, and
- (b) the ground(s) of appeal must be such that:
 - (i) either the ground of appeal has a “reasonable possibility of success”, or
 - (ii) “the proposed question of law [has significance] to the administration of justice”.

ANALYSIS

[6] At the outset, it is noted that appellant’s counsel submitted that the issue of whether the *actus reus* – being the filing of a false or misleading statement – had been proved should be revisited in light of the submission that there was no error in the reporting of the amount of snow crab actually purchased by the appellant as opposed to the snow crab acquired but not paid for. Without setting out in detail the appellant’s theory, this Court was loathe to consider any attempt by an appellant to withdraw the concession made with respect to the physical component of the offence.

[7] Furthermore, the trial judge’s finding that the statement filed with the Department of Fisheries and Oceans contained false information was a factual finding that is not subject to appeal under s. 839(1) of the **Criminal Code**. We note that there was an ample evidentiary basis for that finding apart from the concession.

[8] The only issue subject to this appeal revolved around the defence of due diligence. The acts of due diligence must relate to the *actus reus* of the offence.

[9] In **R. v. Ralph**, 2008 NLCA 70 Mr. Ralph had appealed his conviction in Provincial Court for exceeding his licensed quota for the harvesting of snow crab. He submitted to the Summary Conviction Appeal Court that the trial judge had incorrectly stated the principles of due diligence. This Court found that the essence of the appeal was the assertion that “... the facts, which are essentially undisputed, established that Ralph

had met the legal standard of due diligence”. This Court held at para. 16 of the reasons that this was a question of mixed fact and law and not a question of law alone. In the result, the Court held that the appeal did not lie and leave to appeal to this Court was accordingly denied.

[10] This application for leave was on a similar footing with that in **R. v. Ralph**. The appellant here submits that the trial evidence was sufficient to prove on a balance of probabilities that it had acted with due diligence in ensuring that a reasonable process existed for the proper reporting of snow crab landed and ultimately purchased. There was no contention, nor any basis for such contention, that either the trial judge or the Summary Conviction Appeal Court judge misstated the law pertaining to the defence of due diligence. The submissions centered on whether the appellant exercised reasonable care, i.e., due diligence – in the circumstances. That is a matter of mixed fact and law and leave to appeal should therefore be denied as explained in **R. v. Ralph**. See also **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

[11] It should further be noted that the availability of the defence to a corporation such as the appellant is properly determined having regard to the actions taken by those “who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself”. **R. v. Sault St. Marie**, [1978] 2 S.C.R. 1299 at p. 1331 per Dickson J. There was an ample evidentiary base for the decisions on this point in the courts below as explained by the Summary Conviction Appeal Court judge as follows:

[44] ... While counsel for Quinlan is correct in saying that Quinlan had hired two employees to act as weigh masters and arranged for Walsh to perform the same function on occasion when the two other weigh masters were unavailable and, as such, had done something to ensure that information was recorded on the Purchase Slip, that does not detract from the conclusion reached by the trial judge in this case. What the trial judge was stating, which I am in full agreement with, is that there was no evidence given that Quinlan had provided any instructions or training to the weigh masters so as to ensure the correct information was recorded on the Purchase Slip and that errors such as occurred in this case would not take place. While I am inclined to agree with counsel for Quinlan that Noonan’s use of his own tally sheet is something that goes to the benefit of Quinlan, the trial judge was not incorrect in finding that Quinlan did not direct that a specified separate tally form was to be kept for comparison and checking purposes. As well, clearly there is no sufficient evidence that Quinlan had directed its weigh masters concerning the need to check or compare the numbers obtained by the Dockside Monitor against their own recordings. There is no basis on the evidence

presented to conclude that the trial judge was incorrect in making these findings or that there was a reasonable [sic] basis for him to reach his conclusions in this regard.

[45] As well, as was pointed out by Crown counsel before me, there was no evidence presented at trial by Quinlan as to what occurred after the weigh master submitted the Purchase Slip to Quinlan's accounting office. As he stated, the evidence ended at the wharf. What system, if any, existed internally at the Quinlan operation to check the form? Here it is clear that Noonan's tally sheet as well as the Purchase Slip were provided to other Quinlan employees and had there been a system in place to compare these, the error could have been detected. The obligation to submit the Purchase Slip was on Quinlan and an adequate system to ensure the information that was placed on that form was correct was required in order to establish, at least in part, a due diligence defence. At the very least, Quinlan should have ensured that where two different weigh masters were involved in the offloading of the vessel, some form of cross-check between them was to occur.

(Underlining added)

[12] The appellant argued that the Summary Conviction Appeal Court judge erred in law by concluding that the role of other parties, such as dockside monitors, did not detract from the appellant's obligations. The impugned sentence stated:

[46] As to the point that any system had to be assessed in the context of the fishery being an industry that is highly regulated, I conclude that this does not detract from the need of those involved in the fishery to recognize their own obligations.

[13] There is no legal error in that statement. The activities of other parties during vessel off-loading were relevant in determining what steps should have been taken by the appellant to satisfy the test of due diligence. That was considered by the Summary Conviction Appeal Court judge who stated following the above-noted sentence:

[46] ... While DFO employed Dockside Monitors to record information related to fish landings, there remains an obvious obligation on the fish buyer to ensure that any reports required from them do not contain false information. Again, the purpose of the reporting must be borne in mind.

[47] In this case, it was not due diligence to rely on the Dockside Monitor's figures based upon the obligation on Quinlan. While in the normal course had Noonan completed the weigh in process the error would have been detected by him, this does not excuse what Walsh did on behalf of Quinlan. Without direction

or training provided by Quinlan to its weigh masters, Quinlan did not establish on a balance of probabilities that reasonable steps had been taken to avoid committing the offence charged. Furthermore, as earlier stated, there was no evidence of any internal processes to provide some confirmation of the numbers that had been obtained and used by the weigh master. Therefore, there is no basis for me to interfere with the decision of the trial judge based upon the standard of judicial review set out previously. In so concluding, I accept and recognize what was stated by Fitzpatrick, J. in **R. v. Courtaulds Fibres Canada** (1992), 76 C.C.C. (3d) 68 (Ont. Ct. J.), where at page 77 he stated:

Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.

[14] These matters were likewise referenced in paras. 31 and 36 of the trial decision. There was no legal error by either judge in the courts below respecting application of the legal principles of due diligence.

SUMMARY AND DISPOSITION

[15] This appeal involved a question of mixed fact and law for which an appeal does not lie to this Court. In reaching this conclusion, the Court also found that had the threshold requirement of the presence of a question of law alone been established, the appellant failed to establish either that the ground of appeal has a reasonable possibility of success or that the proposed question of law has significance to the administration of justice.

[16] Leave to appeal pursuant to s. 839(1) of the **Criminal Code** was therefore denied.

K.J. Mercer, J.A.