

1982

C. Y. No. 2540

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN, by
Her Attorney General for Canada

APPELLANT

- and -

AUBREY E. PENNEY

RESPONDENT

HEARD: At Yarmouth, Nova Scotia, the 8th of September,
A.D. 1982

BEFORE: His Honour Judge Peter Nicholson, J.C.C.

DECISION: The 25th day of October, A.D. 1982

COUNSEL: Hugh J. Fraser, Esq., for the Appellant
Gregory M. Warner, Esq., for the Respondent

NICHOLSON, J.C.C.

The Respondent was charged:

"that he, Aubrey E. Penney, of Clark's Harbour, in the County of Shelburne and Province of Nova Scotia, at or near Peases Island, in the County of Yarmouth, Nova Scotia, on or about the 20th day of March, 1982, did unlawfully, while fishing for lobster by means of a vessel in waters adjacent to the Province of Nova Scotia, have on board his vessel a lobster trap without a tag issued by a fishery officer to the owner of the vessel for the current year (1982), securely fastened to the sill of the trap, contrary to Section 13(1)(b) of the Lobster Fishery Regulations C.R.C. 1978, Chapter 817 made pursuant to the Fisheries Act, R.S.C. 1970, as amended."

The case was tried before His Honour P. R. Woolaver a Judge of the Provincial Magistrates Court at Yarmouth on 8 June, 1982, and after hearing evidence and submissions by counsel the Trial Judge dismissed the charge and found the accused not guilty.

The reason the Trial Judge gave for the Decision he made was that there was no proof as to where the alleged offence took place. It was admitted by Crown counsel that there was no viva voce evidence in relation to Peases Island either as to its location in the County of Yarmouth, or indeed in the Province of Nova Scotia. The Trial Judge found that proof of the location of the alleged offence was an essential

ingredient that had to be proved beyond a reasonable doubt and that the Crown's case failed to establish that essential fact.

In his Brief on the Appeal, counsel for the Respondent urged that the first issue was the question as to whether the Trial Judge erred in holding that the place of the offence was not proved at the trial and that there was no evidence proving beyond a reasonable doubt that the offence occurred within the jurisdiction of the Trial Judge.

There can be no doubt whatsoever but that Peases Island was not identified within the jurisdiction of the Court. The question is whether or not that was fatal to the Crown's case.

Counsel for the Appellant urged that a chart, Exhibit C-2, showed the location of "Pease Island" on it near a point where the witness Captain Corporon had marked the location of Mr. Penny's vessel, the "Ian & Darren", at the time it was boarded by the Fisheries Officers who found that there were lobster traps aboard the vessel without proper tags secured thereto in accordance with Section 13(1)(b) of the Lobster Fishery Regulations, and that the chart so marked constituted an identification of the place where the subject matter of the proceedings is alleged to have arisen. He quoted

from R. vs. Cote (1977) 73 D.L.R. (3d) where de Grandpre, J. held that so long as the accused was reasonably informed of the transaction against him, giving him the possibility of a full defence and a fair trial, it is impossible for the accused to be misled. Counsel went on to urge that the Respondent was acquitted in the Court below on a purely technical matter which the Cote case indicated that the Court should avoid, and that the Respondent was in no way misled.

However it is firmly established law that evidence of a place of an offence must be proved beyond a reasonable doubt. See R. vs. Guimond (1976) 20 N.B.R. (2d) 326, per Stevenson, J.:

"...an allocation placing the offence in proximity to the territorial division is an essential ingredient of an indictment or information charging such an offence."

In R. vs. Deal (1978) 24 N.S.R. (2d) 394, Macdonald, J. of the Nova Scotia Court of Appeal held that the place of an offence is an essential averment in an information, and further found:

"...that the prosecution is bound by the form and circumstance of the indictment or information it presents and must prove the charge contained therein."

Having agreed with the Trial Judge that there was no viva voce evidence regarding the location of Peases Island; I have to consider whether there was something further

in the case by way of linking the location of the alleged offence with the geographical identification in the Information.

Counsel for the Crown relied on the chart, Exhibit C-2, as being an exhibit proving that the offence took place within the jurisdiction of the Court.

It is clear law that:

"the Court will not take judicial notice of the precise extent or limits of the various counties or divisions; or whether particular places are, or are not, situated therein; nor of the local position of the particular places with respect to each other",

per Phipson on Evidence, 9th Edition, page 23.

The question now arises as to whether I am entitled to accept Exhibit C-2 as evidence that there is a Peases Island in the County of Yarmouth, and that it is near the point where Fisheries Officers apprehended the Respondent. The chart showed an island that was described as "Pease" Island but made no reference to the County of Yarmouth. There is no doubt about the admissibility of the chart but there is a limitation as to the purpose to which it can be used. See R. vs. Price Brothers (1926) S.C.R. 28, at page 44:

"Maps are from their nature very slight evidence...Maps, when they have no conventional or statutory significance, should be regarded merely as representing the opinions of the persons who constructed them, they furnish at best no adequate

proof, and none when it appears that they are founded upon misleading or unreliable information or upon reasons which do not go to establish the theory or opinion represented, and when they have not the qualifications requisite to found proof of reputation...These maps are prepared and issued, not for the purpose of establishing facts or admissions; they merely illustrate, and the proof must come from other sources outside the maps." (emphasis added)

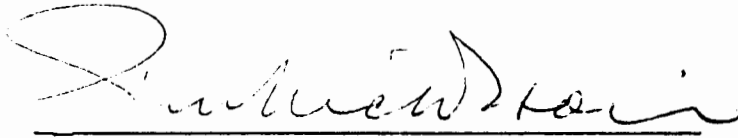
Counsel for the Appellant argued that the fact that there were three measurements made on the chart with regard to Gannet Rock, Spectacle Island and Ellenwood Island was sufficient to conform with the Information. However in order to accept that proposition I would have to take judicial notice of the fact that those places are within the province of Nova Scotia, or at least within its territorial jurisdiction, and that according to the authorities it is an assumption that I am not permitted to make.

In the result I find that the Appellant failed to prove an essential ingredient of the offence with which the Respondent was charged and that the learned Trial Judge was entitled on the evidence, or rather lack of it, to make the finding that he did and the acquittal of the Respondent is confirmed.

The appeal is dismissed with costs.

DATED at Annapolis Royal, Nova Scotia, this

25th day of October, A.D. 1982.



JUDGE OF THE COUNTY COURT OF
DISTRICT NUMBER THREE

TO: The Clerk of the Court,
The Court House,
P. O. Box 188,
Yarmouth, N.S.
B5A 4B2

Hugh J. Fraser, Esq.,
Barrister and Solicitor,
P. O. Box 580,
Yarmouth, N.S.
B5A 4B4

Gregory M. Warner, Esq.,
Barrister and Solicitor,
P. O. Box 398,
Yarmouth, N.S.
B5A 4B3