

COUNTY OF LUNENBURG
PROVINCE OF NOVA SCOTIA
2000

NO: 952622, 952623, 952624
952629, 952630, 952631

IN THE PROVINCIAL COURT OF NOVA SCOTIA

[Cite as: R. v. Kaiser, 2002 NSPC 11]

HER MAJESTY THE QUEEN

versus

TERRY KAISER AND DAVID SILVER

DECISION

HEARD BEFORE: THE HONOURABLE JUDGE ANNE E. CRAWFORD, J.P.C.

PLACE HEARD: LUNENBURG, NS and
BRIDGEWATER, NS

DECISION DATE: JULY 11, 2001

CHARGES: UNLAWFULLY WHILE FISHING FOR SCALLOPS
UNDER THE AUTHORITY OF A RECREATIONAL SCALLOP
LICENCE FAIL TO COMPLY WITH ITEM 2 (a) OF THE
CONDITION OF THAT LICENCE BY FAILING TO RELEASE
SCALLOPS HAVING A SHELL HEIGHT LESS THAN 110 mm
CONTRARY TO SECTION 22 (7) OF THE FISHERY
(GENERAL) REGULATIONS ESTABLISHED BY P.C. 1993-186,
AS AMENDED, MADE PURSUANT TO SECTION 43 OF THE
FISHERIES ACT, BEING CHAPTER F-14 OF THE REVISED
STATUTES OF CANADA, 1985, AS AMENDED, AND
THEREFORE DID COMMIT AN OFFENCE UNDER SECTION
78 (a) OF THE FISHERIES ACT. - **2 CHARGES**

AND:

UNLAWFULLY WHILE FISHING FOR SCALLOPS UNDER

THE AUTHORITY OF A RECREATIONAL SCALLOP LICENCE FAIL TO COMPLY WITH ITEMS 2 (b) OF SCHEDULE 1 OF THE CONDITION OF THAT LICENCE BY FISHING FOR SCALLOPS IN A PORTION OF SCALLOP FISHING AREA 29 BETWEEN A POINT BEGINNING AT LATITUDE 44 20.7N., LONGITUDE 64 18.4W., THENCE RUNNING IN A STRAIGHT LINE TO A POINT AT LATITUDE 44 21.5N., LONGITUDE 64 19W., COMMONLY KNOWN AS BAYPORT, IN THE COUNTY OF LUNENBURG, THAT IS CLOSED TO FISHING CONTRARY TO SECTION 22(7) OF THE FISHERY (GENERAL) REGULATIONS ESTABLISHED BY P.C. 1993-186, AS AMENDED, MADE PURSUANT TO SECTION 43 OF THE FISHERIES ACT, BEING CHAPTER F-14 OF THE REVISED STATUTES OF CANADA, 1985, AS AMENDED, AND THEREFORE DID COMMIT AN OFFENCE UNDER SECTION 78 (a) OF THE FISHERIES ACT. - **2 CHARGES**

AND:

UNLAWFULLY WHILE FISHING FOR SCALLOPS UNDER THE AUTHORITY OF A RECREATIONAL SCALLOP LICENCE CATCH AND RETAIN MORE SCALLOPS THAN THE DAILY LIMIT PERMITTED CONTRARY TO SECTION 69 OF THE ATLANTIC FISHERY REGULATIONS ESTABLISHED BY P.C. 1985-3662, AS AMENDED, MADE PURSUANT TO SECTION 43 OF THE FISHERIES ACT, BEING CHAPTER F-14 OF THE REVISED STATUTES OF CANADA, 1985, AS AMENDED, AND THEREFORE DID COMMIT AN OFFENCE UNDER SECTION 78 (a) OF THE FISHERIES ACT. - **2 CHARGES**

COUNSEL:

PHILIP ROMNEY, CROWN ATTORNEY
MARK DEMPSEY, DEFENCE ATTORNEY

- [1] Terry Kaiser and David Silver are charged in separate informations with three counts under the *Fisheries Act* arising out of the same incident which occurred on January 8, 2000.

FACTS

- [2] David Croft, the first Crown witness, testified that on that date between 8:30 and 9:00 a.m. he saw a black Chev truck towing an aluminum boat and black Mercury motor go by his home in Bayport, Lunenburg County, Nova Scotia. He was on his way to the Bayport wharf, where he kept his fishing boat and gear. As he passed Kenneth Silver's yard he saw the truck parked in his driveway and said he knew from where they were parked that they were going for scallops. He saw the boat going under the Indian Path bridge with two men in it. He recognized Terry Kaiser, who was wearing a heavy greenish grey coat; the other man had diving gear on, and he was not able to identify him, although he "surmised" who it was.
- [3] When Mr. Croft arrived at the Bayport wharf he saw the boat in question at a marker buoy which he identified as M66 on chart 4328 entered as Exhibit 4 in this case. He said that the boat was on the seaward side of the buoy. He said he saw the diver go over the side of the boat at that same buoy and then saw a white javex jug floating on the water toward Mosher's Beach. The boat was following the jug.
- [4] Mr. Croft was concerned that the two men were going to fish for scallops in the closed area, so he left Bayport and drove to Mosher's Beach through Feltzen South, a ten-minute drive away. Although he lost sight of the boat as he drove, he saw it again when he arrived at the Beach. It was right off the beach at that time, still inside the closed area. He watched the boat from Feltzen South for twenty minutes or so then drove back to the Bayport wharf and continued to watch from there until the boat began to steam back to Indian Path. At that point there were again two men in the boat. He did not see the diver come out of the water. He did not see anyone put anything in the boat.
- [5] In a previous decision, for reasons stated therein, I admitted the statement of the witness Leonard Mosher for the truth of its contents. In that statement Mr. Mosher said that on that same morning he saw an aluminum boat with a black motor in what he knew to be the closed area. There were two people in the boat, one wearing a divers suit and the other wearing a heavy, olive green hunting jacket. He said he saw the diver go into the water inside the closed area between red buoy EM56 and green buoy with a light EM55 on chart 4328 and come out in the same area. He saw a green bag taken out of the water and placed into the boat. He said that while the diver was in the water he saw the boat go along the shore on the outside of Mosher's Cove Beach, then out past the green buoy with the light and finally back to where he had dropped the diver off. The diver was picked up at the same location where he was dropped off. Mr. Mosher said that he did not see the boat, diver or white jug go outside the closed area at any time.
- [6] Both witnesses were asked on cross-examination where they understood the line marking the closed area to be. Mr. Croft said that he understood it to be as pencilled in on Exhibit 4 between 44°21.5'N 64°19'W and 44°20.7'N 64°18.4'W. When it was drawn to his attention that both of those points are in the water he said he assumed that by extending the line until it hit land on either end one could ascertain the closed area.
- [7] Mr. Mosher testified that the common understanding was that it ran from Mason Point to Mosher Head, but that many people, not familiar with the harbour, confused Mosher Head with Mosher Beach.

- [8] F/O Darren Manderville testified that the intended Bayport Closure area line as agreed in discussions with local fishermen was to run from Moshers Head to Mason Point. Co-ordinates were adopted to implement that intention and were used in the relevant licence conditions. It was not until several months ago, in preparation for this case, that it was discovered that the co-ordinates used did not accurately reflect the intention and in fact ran from one watery location in Lunenburg Bay to another, as shown by the pencilled line on Exhibit 4.
- [9] F/O Manderville and F/O Brad Yeaton went to Bayport in response to a call received from David Croft, whom they met at the government wharf. It was decided that F/O Yeaton would wait in the woods near the Indian Path bridge not far from where the boat was expected to land. Within 10 minutes Yeaton heard and then saw the small aluminum boat with black motor come under the bridge and he watched it come in to where the truck was parked at the water's edge on Kenneth Silver's property.
- [10] F/O Yeaton went down to the boat. Mr. Kaiser said, "Here comes Fisheries." Then he said to Mr. Yeaton, "We might as well tell you, we didn't count the scallops and we didn't measure them." Both Kaiser and Silver admitted that they had been fishing scallops and handed over their licences.
- [11] By this time F/O Manderville had arrived. He and F/O Yeaton counted the scallops; there were 35 in one bag and 128 in the other. F/O Yeaton told the two men that they were being charged with fishing in a closed area, having more scallops than allowed and having undersized scallops. Each was separately read his Charter rights and given a warning. Mr. Kaiser then gave a statement to F/O Yeaton and Mr. Silver gave his statement to F/O Manderville. Those statements were admitted by consent, voir-dires being waived.
- [12] Both defendants testified.
- [13] Mr. Kaiser said that, although he took his diving gear along, he had no intention of diving that day. It was too dangerous to leave the boat untended, and it was his belief based on what others engaged in the same recreational fishery had told him that so long as he had his gear and licence with him, Mr. Silver could fish his quota for him.
- [14] He said that he understood that the Bayport Closure area line ran from Puffeycup Cove (or Mason Point) to Mosher Head and that the green lighted buoy where Mr. Silver entered the water, which he identified on Exhibit 4 as EM53, was just outside the Closure line.
- [15] He said that he tried to attach the white jug (Exhibit 10) to the dive bag, not to the diver. Attaching a line to the diver would be dangerous; it could get caught up by a passing boat and drag the diver; whereas attaching it to the dive bag would allow diver and boat to retrieve the bag after the diver was back aboard.
- [16] Mr. Kaiser said that it was very cold on the water that day. The water temperature was 31°C and he estimated the wind at 40 mph. He said that everything was freezing in the boat and that after he dropped Mr. Silver off he went to find shelter while he waited. Mr. Kaiser has a heart condition but said he did not realize how he would be affected by the cold. He motored into Mosher Cove around the beach, but was still in the wind; then he tried the other side but there were too many rocks. He went back out to the head until he saw Mr. Silver's head in the water and realized he had come up.
- [17] Mr. Kaiser "tore over" to Mr. Silver, who managed to get himself and the scallop bag into the boat without Mr. Kaiser's assistance. Mr. Kaiser said that he could not help because he had no feeling in his hands. He told Mr. Silver he could not measure the scallops and they headed

- for shore. On the way back in they retrieved the white jug, which had come loose from the scallop bag and was floating free.
- [18] Mr. Silver testified that he has been a scuba diver since 1982, with extensive qualifications up to and including rescue diving. He said that when he got his new scallop diving licence in December 1999 it contained no information regarding daily limit. He asked at the Bridgewater office and was told to go through Halifax. He followed up on this and was told that there was no variation order regarding the number of scallops. Since the daily limit prior to the imposition of variation orders several years previously had been 100, Mr. Silver testified that he believed he was allowed 100 scallops per day.
- [19] He said that he and Mr. Kaiser decided to go diving that day because the weather forecasts were calling for a high of 0°C with light winds until late afternoon. They went out to buoy EM53 and he said he dropped over the side just below it.
- [20] He said the white jug was supposed to be tied to his scallop bag, not to himself, due to the dangers of being caught by passing boat traffic. Instead he would use the bottle and rope as a reference point and dive along it. However on this day he could not find the rope. He did a grid search on the bottom and found his bag.
- [21] He said before he left the boat he took a compass bearing, then followed the tide out until he found the chain on the buoy. From there he knew that he had to keep a Northeast-Southwest course and the falling tide would take him outside the closed area. He zigzagged Northeast, then Southwest, picking up scallops.
- [22] He described the difficulties of measuring scallops while under water. His gloves are stiff, with air inside; he has to drop his buoyancy air control to pick up each scallop; and, although one can try to gauge size with the palm of the hand, everything looks 25% bigger and closer under water than on land. For all of these reasons it is normal to measure the scallops in the boat after the dive, rather than during the dive.
- [23] He said that he wanted 150 scallops that day – 100 for himself and 50 for Mr. Kaiser, who was still fishing on his 1999 licence, which had been extended by the Department. He said he usually plans on picking up 20 or 30 extra to make up for throwing small ones back. He ended up with the 163 scallops the Fisheries Officers counted; it is hard to keep an accurate count while diving.
- [24] Because he had no rope or buoy he had to lift the scallop bag up with him. He managed to get to the surface, but at first he could see neither the boat nor the shore. He took a compass bearing and started swimming toward Mosher Head. Finally he saw Mr. Kaiser and waved to him.
- [25] When Mr Kaiser brought the boat up to him, Mr. Silver said that he felt fear. He was very concerned about his friend's condition; there was water frozen on his cheeks and he was aware that he was very cold. He said that the fear he felt must have been what enabled him to heave the scallop bag into the boat and then climb in himself without assistance. Normally he would have needed help to do this.
- [26] In order to do so he had to take his own gloves off, which meant that from then on there was cold water running back into his diving suit. He said he kept talking to Mr. Kaiser as they ran back in with the boat wide open. The wind was coming out of the north or northwest at 30 or 40 mph, with a little sleet or wet snow.

- [27] Once they got around Corkum's island Mr. Silver started to measure scallops, placing them in the other bag as he did so. But when they rounded the tip of the island they were in the wind again, so Mr. Silver went back to break the spray for Mr. Kaiser and keep him talking.
- [28] They ran the boat right up onto the waiting trailer and F/O Yeaton was there. He helped them winch the boat up onto the trailer, and get Mr. Kaiser into the truck for warmth. Mr. Silver gave a statement to F/O Manderville and showed him the copy of his licence that he had with him, but it had no conditions attached. F/O Manderville took Mr. Silver home where Mr. Silver provided him with the original licence, conditions and the map he had received from the Department when the Bayport closure began. Mr. Silver said that when he first received it he could not make much sense of it and spoke to F/O Barnes, supervisor of the Lunenburg and Queens County DFO offices, (since retired) about it. Mr. Barnes agreed with Mr. Silver that it did not make much sense and told him to use the buoys for references. He showed him the buoys marked EM 53 and EM 52 on Exhibit 4 and said that if he stayed outside those he would be ok.
- [29] Both men stated that their intention was to measure and count the scallops as soon as they were able to get warm, throwing the excess and/or undersize ones back before they froze. Normally they would put all of the scallops in the boat, go to a spot out of the wind, while still on the water, measure and return them to the water before coming ashore.

ISSUES

[30] There are four issues to be resolved in this case:

- (1) Has the Crown proven beyond reasonable doubt that the defendants were fishing in the closed area?
- (2) If so, do the defendants have a defence of officially induced error to that charge?
- (3) and (4) In regard to the other charges have the defendants established the defence of due diligence?

1. The closed area

[31] A comparison of Exhibit 13, the chart handed out to fishers for several years at the beginning of the Bayport closure, with Exhibit 12 and 11, two other charts of the same area produced by the Crown in evidence show a total of four different lines for the seaward boundary of the closed area. F/O Manderville testified that the inner line on Exhibit 11 is the line now cited in licence conditions and the outer line was the one cited in licence conditions at the time of these charges. He testified that the outer line, which runs between points in the waters of Lunenburg Bay, was produced by Departmental error. Apparently someone in the department used a topographical chart rather than a marine chart to establish the co-ordinates of Mosher Head and Mason Point, which was where the line was intended to run. A closed area bounded by a line which begins and ends in the water is a logical absurdity and physical impossibility. No one -- not the Department, not the local fishers -- intended that the line should be that far to the east; in fact, Fisheries Officers were not attempting to enforce that line and were not aware of its existence. In their opinion the line ran from Mason Point to Mosher Head; that was what they were telling fishers who asked and that was what they were enforcing. That

was also the line the defendants believed to be the closure line, based on Mr. Silver's conversation with F/O Barnes.

[32] I find that, despite the error in co-ordinates, the closure line ran, as intended, from Mason Point to Mosher Head.

[33] From all of the evidence before the court I find that the defendants went to the area of buoys EM52 and EM53 and that Mr. Silver entered the water at that location. Neither of them could be sure whether they were just inside or just outside the buoys at that time. Mr. Silver says that, beneath the water, he could ascertain his location and that because of tide and wind conditions he could be sure that he was not within the closed area. But even if we accept that uncorroborated evidence it is clear from the evidence of the Crown witnesses that the fishing operation began and ended inside the closed area.

[34] In *Ship "Frederick Gerring Jr." v. R.*, 1897 CarswellNat 36, 27 S.C.R. 271 "fishing" is defined as follows:

The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what "fishing," according to the ordinary acceptance of the word, means. . .

[35] This definition has been followed in a number of Nova Scotia decisions dealing with fishing in closed areas, including *R. v. Denton* 1991 CarswellNS 243, 105 N.S.R. (2d) 357, 284 A.P.R. 357, where Freeman, J.A. stated for the court:

4 . . . After the gear was off the bottom, that is, after the catching operation had been completed, the vessel drifted across the boundary into the closed area. It was observed by a fisheries officer patrolling in a helicopter 7.3 miles from shore, or .7 miles inside the boundary, bringing aboard drags which appeared to contain scallops.

5 The vessel was well equipped with navigation aids. The appellant, the captain, knew where he was. The defence was that he was not fishing inside the boundary because the scallops had been caught outside of it.

. . .

8 . . . He was, however, fishing as fishing is defined in the *Gerring* and *Saunders* cases. That was an error of law that does not give rise to a defence of due diligence.

[36] In the present case, the fishing operation began, at latest, when Mr. Silver entered the water to begin his dive and ended, at earliest, when he got back in the boat with the scallops, in which case the defendants cannot claim a due diligence defence. At best, they did not know for sure whether they were or were not inside the closed area when they began and ended the

fishing operation; to claim that they were duly diligent they would have to be able to say that they were definitely outside the closed area with a margin for safety.

[37] I find that the Crown has established beyond reasonable doubt that the defendants were fishing within the closed area.

2. Officially induced error

[38] The defendants say that they relied on what Mr. Barnes had told Mr. Silver some years before: that if they stayed outside buoy EM53 and EM52 they would be all right. I have found that that information was accurate; that the line ran approximately where Mr. Barnes said it did. There was an error in the co-ordinates on the licence condition, but that had no effect on anyone, because no one was aware of it at the time.

[39] Thus there was no officially induced error here; the defendants were not misled by Mr. Barnes or anyone else from the Department.

3. Undersized scallops

[40] The defendants admit that they breached condition 2(a) of their licence conditions by having on board their vessel at least some undersized scallops. In their defence they say (a) that it is very difficult to measure scallops underwater, so the practice is to measure them after they are brought aboard and (b) on this day once the scallops were brought on board they were both so cold that they felt they had no choice but to seek shelter before attempting to measure. They say that their intention was to measure and return any undersized scallops to the water as soon as they got back to shore, but they were prevented from doing so by the arrival of the Fisheries Officers. They claim the defence of due diligence.

[41] Like the great majority of regulatory offences this is a strict liability offence as defined in *R. v. Sault Ste. Marie* 1978 CarswellOnt 24, 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299, 21 N.R. 295, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161:

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

[42] The *Fisheries Act*, s. 78.6 codifies the common law defence of due diligence as follows:

78.6 No person shall be convicted of an offence under this Act if the person establishes that the person

(a) exercised all due diligence to prevent the commission of the offence;

or

(b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

- [43] The question then is whether or not the defendants “exercised all due diligence” or “took all reasonable steps to avoid the particular event”. All the witnesses agreed that it was a cold day and that the wind was blowing from the north or northwest. The Crown witnesses, none of whom were on the water that day, tended to downplay how cold it actually was, except F/O Yeaton, who spent several hours outside. He also admitted on cross-examination that both defendants told him they were cold.
- [44] In his written statement Mr. Kaiser said that he couldn’t stop to count or measure the scallops because his hands were “froze”, that they were so cold that he could not get his gloves off or hold the measure. Mr. Silver said in his statement that due to the sea conditions – “white caps and rough” – they decided to come in to measure the scallops and throw back the small ones.
- [45] On the witness stand they elaborated. Mr. Kaiser had had heart problems since he had last been out scalloping and said he had not realized how much the cold would affect him. He described trying to get out of the wind while he waited for Mr. Silver. Mr. Silver described how worried he was when he came up and saw his friend’s condition. He said that Mr. Kaiser was not able to help him back into the boat. They both said that as soon as he was aboard they headed for shore as fast as possible. Mr. Silver did start to measure and sort the scallops when they were in the lee of Corkum’s Island for a few moments, but said he was unable to continue after they left that shelter, as he felt he had to protect Mr. Kaiser from the blowing spray.
- [46] The Crown argues that if the conditions were that bad, they should not have gone fishing in the first place, but it seems clear that neither of them realized how bad it was going to be until after Mr. Silver was in the water. At that point Mr. Kaizer had no choice but to wait it out as best he could for Mr. Silver’s return; by that time the scallops had been caught and I find that, given the conditions they describe, their decision to wait until reaching shore to measure the scallops and return the small ones to the water (which is what the Fisheries Officers later did) was reasonable in the circumstances. I find that they have established on a balance of probabilities that they exercised all due diligence to avoid the commission of the offence of failing to release undersized scallops.

4. The daily limit

- [47] The situation in regard to having more than the legal daily limit is a little more complicated. The Crown established that the daily limit at this time was 50 scallops, as set by Maritimes Region Fishing Quota Variation Order, 1999-003. The defendants had 163 scallops in their possession. The Crown argues that, as only Mr. Silver was diving, the maximum allowable catch was 50 scallops and that Mr. Silver is guilty as principal in this offence with Mr. Kaiser guilty as a party.
- [48] On the other hand both defendants say that they believed that, as long as they each had a licence and diving gear aboard, one diver could collect scallops for both. And Mr. Silver says that he thought the limit was 100 for him and 50 for Mr. Kaiser and that, because it is so difficult to measure or even estimate size accurately while diving, he always took extra scallops so that he could throw the undersized ones back and still have a full quota.
- [49] As to the belief that one diver could collect for two licenced fishers, Mr. Kaiser said that he had formed this belief as a result of conversation with other divers who informed him that they had been told so by Fisheries Officers. Neither he nor Mr. Silver made any direct inquiries themselves to verify the accuracy of this information. I find that they cannot rely on such unverified information to establish a defence of due diligence. Each licence clearly states that it is to be operated only by the named licence holder.
- [50] Mr. Silver's belief that he was entitled to 100 scallops was based on a misinterpretation of the legal effect of information he received from the Department. He said that when he got his 2000 licence late in 1999 it had no conditions attached. After calling various DFO offices, the Yarmouth office finally faxed him the conditions on December 31, 1999. He read them, but they did not contain any reference to daily limit. He knew that on prior licences, such as Mr. Kaiser's for 1999, a notice of variation order had been attached, varying the fishing quota for this area to 50 scallops. So he called the Yarmouth office and asked about variation orders. He says he was told that there was no variation order. He therefore concluded that for 2000 the limit would revert to 100 scallops per day, as it had been prior to the imposition of the variation orders – a not unreasonable conclusion, given section 5 of the Order:
5. This order shall come into force on January 8, 1999 and remain in force unless otherwise revoked, at which time the quota shall revert to that set out in said Regulations.

[51] However, whether or not that conclusion could found a defence of due diligence in this case is moot as Mr. Silver brought on board not just 100 scallops, nor even 150, but 163. He cannot claim that he did everything reasonably possible to avoid the commission of the offence when he intentionally took more than a full quota, whatever his reason may have been. He and Mr. Kaiser were over the allowable limit by at least 63 scallops and probably by 113.

CONCLUSION

[52] The defendants are not guilty on the first count and guilty in regard to counts 2 and 3.

Anne E. Crawford, J.P.C.