IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Murphy, 2004 NSPC30

Date: 2004-05-12
Docket: 1347575
Registry: Bridgewater

Between:

R.

v.

Ausman William Murphy

Defendant

Judge:	The Honourable Judge Crawford
Heard:	March 29, 2004, in Lunenburg, Nova Scotia
Written Decision:	May 12, 2004, in Bridgewater, Nova Scotia
Counsel:	Lloyd Tancock, for the Crown Joel Pink, Q.C., for the Defence

By the Court:

[1] Ausman William Murphy faces a charge under s. 13(1)(a) of the Nova Scotia Occupational Health and Safety Act that, as an employer, he failed to take reasonable precautions to ensure the health and safety of persons at a workplace.

[2] The charge arises out of a tragic incident aboard the fishing vessel "Big Guy M.S.K.K.F." on August 19, 2003, in which a fisher, Chadwick Zinck, lost his life.

Facts

[3] The parties submitted a joint statement of facts as follows:

> On Tuesday, August 19, 2003 Ausman Murphy along with Chadwick Zinck, Richard Heisler and Barry Cook set out to check a tuna pen in the waters of the Atlantic Ocean off Horse Island near Northwest Cove, Lunenburg County, Nova Scotia.
>
> The defendant Murphy was operating the Motor Vessel "Big Guy MSKKF" which was owned by and registered to Larry Harnish. Zinck and Heisler were crew members for this trip and Cook was an invited guest. [N.B.: Richard Heisler testified in contradiction to this that it was he who operated the vessel that day, not the defendant.]
>
> In the belief that there were dead tuna fish in the tuna pen it was decided that somebody should go into the tuna pen to conduct a search. Chadwick Zinck, despite having never done so before and having no experience diving with scuba diving equipment, was anxious to perform this task. He did so using diving equipment borrowed from Cook and another individual who was not present.
>
> Zinck ultimately did not return to the surface and was subsequently located near the bottom of the tuna pen by a diver who was summonsed for that purpose. It was determined by medical autopsy that Zinck died of "drowning (salt water) due to inexperienced scuba diving."

[4] In addition, based on the evidence before me, I make the following findings of fact:

> • Zinck and Heisler had been recruited by Harnish to fish with him and the defendant in the 2003 tuna fishery.

• All four thought of themselves as self-employed fishermen.

• Harnish owned the boat and one tuna pen.

• The defendant owned another tuna pen.

• Tuna could only be killed when Brian Coolen was aboard, as he owned the tuna licence under which all four were fishing.

• Harnish, Murphy, Heisler and Zinck had a profit-sharing agreement, pursuant to which 10% of the gross was paid to Brian Coolen for the use of his tuna licence, 10% to Larry Harnish as boat share, 26% to Murphy or Harnish, depending on whose nets the fish in question came from, and after expenses were deducted, the net profits would be divided equally among the four.

• Larry Harnish, the owner of the boat, gave the orders when he was aboard; when he was not, no orders were given, as each of the three knew his duties and was able to work without direction.

• Zinck was dependent, in varying degrees, on Harnish, Murphy and Coolen, as he had no gear, boat or licence of his own; in particular, Harnish, as owner of the boat, could deny any of the other three the right to use his boat.

• All four were paid directly by the fish buyer, L.R. McCrae Fisheries Ltd., which did the accounting in accordance with their profit-sharing agreement and issued cheques and T4F certificates for each fisherman accordingly.

• Zinck was insistent on making the dive; he “tortured” Barry Cook and would not take no for an answer until Cook reluctantly lent him his equipment.

• Cook, a licenced diver, was on board, advised Zinck in the use of the equipment and told him to stay within 10 to 12 feet below the surface.

Issue

[5] The defendant conceded at the outset of the trial that the issue to be determined was whether or not he was an “employer” within the meaning of the Occupational Health and Safety Act. And the Crown agreed that it was the Crown’s burden to

establish this beyond a reasonable doubt. In other words, if I find that the defendant was an employer, there is no doubt that, as such, he failed to take reasonable precautions for Mr. Zinck's safety.

Legislation

[6] The relevant portions of the Occupational Health and Safety Act include the following:

> 3 In this Act,
>
> (j) "dependent contractor" means a person, whether or not employed under a contract of employment and whether or not furnishing the person's own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another on such terms and conditions that the person is
>
> (i) in a position of economic dependence upon the other,
>
> (ii) under an obligation to perform duties mainly for the other, and
>
> (iii) in a relationship with the other more closely resembling that of an employee than an independent contractor;
>
> (o) "employee" means a person who is employed to do work and includes a dependent contractor;
>
> (p) "employer" means a person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor;
>
> (ae) "self-employed person" means a person who is engaged in an occupation on that person's own behalf but does not include a dependent contractor;
>
> 13 (1) Every employer shall take every precaution that is reasonable in the circumstances to
>
> (a) ensure the health and safety of persons at or near the workplace;

Was the defendant Chad Zinck's "employer" for the purposes of the Occupational Health and Safety Act?

[7] In order to decide this question, it will be necessary to look at the obverse question: was Chad Zinck an employee of the defendant? If so, it follows that the defendant was his employer and, as such, owed him the duty set out in s. 13(1)(a) above.

[8] The fact that fishermen have traditionally seen themselves as being self-employed is an important factor in deciding this issue, but is not, in and of itself, conclusive. However, it does make it clear that fishers are not simply "employees" in the normal use of that term.

[9] The argument of the Crown is that fishers should be classified for the purposes of this Act as "dependent contractors" under s. 3(j) above.

[10] The Crown took the position that both the defendant and Larry Harnish were employers for the purposes of the Act, but as Harnish was not present on the day of the accident, only the defendant was charged.

[11] This might have been an easier argument for the Crown to make if it was apparent that the defendant was acting as skipper or captain in Harnish's absence. But the evidence simply did not establish that the defendant was in any sense acting as Mr. Harnish's lieutenant or second in command. It was Richard Heisler who was operating the vessel, not the defendant; and neither Heisler nor Harnish testified that the defendant had any kind of authority over the other fishers.

[12] If the Crown is to make its case under s. 3(j) it will have to establish beyond reasonable doubt that Chad Zinck was economically dependent on the defendant, was required to perform duties mainly for him and was in a relationship with him that more closely resembled an employee relationship than that of independent contractor.

[13] As a fisherman without boat, gear or licence, Chad Zinck would obviously be economically dependent on someone else for his livelihood. In this case, he was dependent on Harnish for the boat and part of the gear, on Coolen for the licence and on the defendant for the balance of the gear. The Crown's argument that he was dependent on Harnish and Murphy jointly does not accord with the profit-sharing agreement. Apart from the differing percentages allotted to Harnish and Murphy for the boat and gear (out of which they had to pay expenses for what they owned), they were entitled only to an equal share with Zinck and Heisler. It is noteworthy that there

was no differential due them as captain or mate. Nor does the Crown argue that Coolen should be considered an employer although all four fishers were dependent on him for the licence.

[14] Although Chad Zinck was required to work "mainly for" Harnish and the defendant in the sense that this was full-time or nearly full-time work during the season and that if he did not show up or provide a replacement he would not share in the profit, this cannot be determinative; the same would be the case whether he was a "dependent" or "independent" contractor.

[15] In analyzing this relationship it appears to me to be closer to that of independent contractor than that of employer-employee.

[16] To sum up, I do not believe that the Crown has established on the facts of this case that Chad Zinck was a "dependent contractor" within s. 3(j).

[17] I am fortified in this conclusion by comparison to the definition of "dependent contractor" in the *Canada Labour Code,* R.S.C. 1985, c. L-2 which found it necessary to provide a specific reference to fishers to bring them within the definition, as well as by the Trade Union Act, R.S.N.S. 1989, c. 475, s. 2(1)(k), which also specifically refers to fishers in order to bring them within the definition of "employee".

[18] I also note that relevant case law has concluded as Laskin, C.J.C. stated in *B.C. Packers* v. *Canada (Labour Relations Board)* [1978] 2 S.C.R. 97 at para 13, in regard to the decision in *Re Lunenburg Sea Products Ltd.; Re Zwicker*, [1947] 3 D.L.R. 195:

> The court then concluded that in the absence of a particular definition of "employee" and "employer," the "general law" applied, and under that law it must be held that the fishermen were engaged in a joint venture with the owners of the vessels, a species of partnership, and that there was no employer-employee relationship. . .

[19] By contrast, the cases to which the Crown referred me by way of analogy were all decided in the context of labour relations, not worker health and safety, and none of them involved fishers. I do not find them persuasive.

[20] As anyone who has lived in Nova Scotia for any period of time is aware, fishers are a unique type of worker. Traditionally they have been fiercely independent,

jealously guarding their freedom from government interference in their workplace. They have their own code of conduct and regard themselves as the best and final guarantors of their own safety.

[21] Chad Zinck was obviously an example of that type of rugged individualism. No one ordered him to make that dive; he wanted to do it; and he insisted on doing it against the advice of others more knowledgeable and experienced.

[22] This was a classic case of someone being the author of his own misfortune, and to hold the defendant or any other of his co-fishers responsible for his health and safety would be to arrogate to them a degree of control they simply did not possess.

[23] If the legislature means to include fishers as employers or employees under this Act, it should do so specifically and inform the industry in advance of that change in policy.

Conclusion

[24] I find the defendant not guilty of the offence charged.