

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN, on the information  
and complaint of David Ralph Hiscox

Appellant

- and -

JOHN MENACHO

Respondent

**MEMORANDUM OF JUDGMENT**

[1] The Crown has appealed the Respondent's acquittal on charges of (i) leaving a gill net in the water for more than 72 hours, contrary to s. 9(b) of the *Northwest Territories Fishery Regulations* made pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14; (ii) leaving decayed fish in a net, contrary to s. 36(1)(c) of the *Fisheries Act* and (iii) wasting fish suitable for human consumption, contrary to s. 34(3) of the *Fishery (General) Regulations*.

[2] The trial judge found that the events at issue had occurred; that is, that the net had been left in the water for more than 72 hours, decaying fish were left in the net and the fish were wasted. There was evidence that the net belonged to the Respondent's father and that the father, a brother and the Respondent had set the net in January. The father had checked the net until "the weather got cold", and the Respondent had pulled it in February but not since then until May, when he was observed by the fisheries officer in the act of pulling it out with two other men. It was the officer's observation at that time that the Respondent appeared to be the leader of the group. The Respondent told the officer that he planned to give the fish to a dog team.

[3] The trial judge found that the Respondent was a participant in the fishing expedition. He made the following comments in acquitting him of the charges:

It has to be proven to this court that the accused had, in my view, a directing, operating, controlling role in this fishing expedition. It may very well be that he was working at the behest of his father, which might make him liable, or the behest of others that might make him liable, or it was a joint enterprise with others that might make him liable, but the only evidence I have is that he was participating.

...

At the end of the day, I'm just not satisfied beyond a reasonable doubt that whatever role the accused had, and he had a role, that it's one that brings him under the penalty clauses the [sic] relevant statutory regime.

[4] The Appellant Crown submits that the trial judge erred in law in requiring that the Crown prove that the Respondent had a directing, operating, controlling role in the fishing expedition. In my view, this submission has merit.

[5] As the trial judge recognized at the commencement of the trial, the offences with which the Respondent was charged are strict liability offences. As set out in *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.), for such offences the prosecution need only prove beyond a reasonable doubt that the defendant committed the prohibited act; the prosecution need not prove *mens rea*. The defendant has the burden of establishing on the balance of probabilities that he took reasonable care.

[6] There is no requirement for a conviction that the prosecution prove that the defendant's role in the doing of the prohibited act was a directing, operating or controlling one. It is not clear from the reasons given by the trial judge what he meant by the word "operating", but to the extent that he meant that the Crown had to show that the Respondent was in charge of the fishing venture or even that he was involved throughout the entire venture, I find that he erred.

[7] In the circumstances of this case, the question was whether the Respondent had committed the offences charged as a principal or as a party under s. 21(1) of the *Criminal Code*. Although the evidence of the Respondent's father, whom the Respondent called as a witness, was somewhat unclear as to who was responsible for checking the net for what period of time, there was evidence (in the form of admissions made by the Respondent to the fisheries officer) that the Respondent had pulled the net out in February to check it and had not done so again until May. The trial judge discounted some of this evidence because the Respondent was intoxicated when he made the admission, but there was evidence that he made the same admission on another date when he was not intoxicated.

[8] There was, accordingly, evidence that the Respondent left the net in the water for more than 72 hours. Therefore, the burden shifted to him to show on the balance of probabilities that he had taken reasonable care to ensure that the net was not left for the prohibited period of time. Whether the Respondent was the owner of the net or directed the fishing expedition does not change his participation in the doing of the act, although it may be relevant to the defence of due diligence.

[9] For the reasons given, I find the trial judge erred in law and the acquittals must be set aside. The Crown's position initially was that convictions should be entered based on the evidence at trial. It is apparent from the record, however, that because the trial judge was of the view that the Crown had not proved its case, he told the Respondent, who was not represented by counsel, that he did not need to hear from him. The Respondent, who had indicated that he wanted to testify, did not take the witness stand. In the circumstances, the relief granted must be a new trial.

[10] The appeal is allowed, the acquittals set aside and a new trial is ordered. As a result, I need not deal with the other ground of appeal concerning a ruling made by the trial judge on the *voir dire*.

Dated this 6th day of May, 2003.

V.A. Schuler,  
J.S.C.

Counsel for the Appellant Crown: Ari Slatkoff  
No one appearing for the Respondent.

S-1-CR-2002000103

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