NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Henneberry***, 2009 NSCA 112

Date: 20091113
Docket: CAC 310960
Registry: Halifax

Between:

Andrew William Henneberry, Clark Andrew Henneberry, Marcel Steven Henneberry, Wesley L. Henneberry, Paul Raymond Parnell, James Philip Ryan, Gregory Burton Smith, and Ivy Fisheries Limited

Appellants

v.

Her Majesty the Queen in right of Canada

Respondent

Judge: The Honourable Justice Jamie W.S. Saunders

Appeal Heard: September 23, 2009

Subject: Bluefin tuna. **Fisheries Act**, R.S.C. 1985, c. F-14 and **Regulations**. Strict liability offences. Standard and burden of proof. Admissibility. Consent. Sentencing. Section 79 "additional fine". Monetary benefits. Standard of review.

Summary: The individual and corporate appellants were convicted in the Provincial Court of catching 135 bluefin tuna in contravention of the **Fisheries Act**, R.S.C. 1985, c. F-14 and **Regulations**. The sale value of the illegal catch was $1.2M. The trial judge sentenced the appellants under s. 78 of the **Act** to fines and other penalties ranging from $500 to $25,000. Further, pursuant to s. 79, the judge imposed "an additional fine" in the amount of $643,000 (apportioned among the offenders) based on the evidence of a forensic accountant as representing the

amount of monetary benefits acquired from the sale of those particular tuna caught as a result of the most serious offences.

The appellants appealed to the Nova Scotia Supreme Court sitting as a summary conviction appeal court. The SCAC judge dismissed the appeals against conviction and sentence.

On appeal to this Court leave was granted but the appeals from conviction and sentence were dismissed.

First, the SCAC judge did not err in endorsing the trial judge's rulings concerning the admissibility of certain evidence, or the fact that consent was given by defence counsel during the trial.

Second, the SCAC judge did not err in endorsing the trial judge's analysis and application of the proper burden and standard of proof in strict liability offences.

Third, the SCAC judge did not err in refusing to disturb the trial judge's imposition of a s. 79 "additional fine", or in affirming the trial judge's approach to "monetary benefits" based on the evidence presented and accepted at trial.

Finally, the SCAC judge did not err in refusing to interfere with the other sentences imposed by the trial judge.

Held: Leave to appeal granted, appeals dismissed, suspension of fishing license reinstated.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.

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Appellants

v.

Her Majesty the Queen in right of Canada

Respondent

Judges: Saunders, Oland and Fichaud, JJ.A.

Appeal Heard: September 23, 2009, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Charles Ford and Ian Dunbar, for the appellants
Gerald Grant, for the respondent

Reasons for judgment:

[1] This is an appeal from the decision of Nova Scotia Supreme Court Justice Margaret J. Stewart sitting as a summary conviction appeal court (SCAC) dated March 30, 2009, and now reported at 2009 NSSC 95. Stewart, J. dismissed the appellants' appeals from their convictions and sentences imposed by Nova Scotia Provincial Court Judge Anne E. Crawford respectively on March 1, 2006 [reported at 2006 NSPC 5] and June 14, 2006 [reported at 2006 NSPC 26].

[2] For the reasons that follow I would dismiss the appeal.

Background

[3] The circumstances surrounding these offences and the various applications and proceedings which ensued are set out in considerable detail in the decisions of both the trial judge and the SCAC judge, as reported above. For the purposes of this decision I need only refer to the facts, summarily.

[4] Ivy Fisheries Limited (the company) is a Nova Scotia company owned by five members of the Henneberry family. Three of the appellants, Clark, Wesley and Marcel Henneberry are directors. During the period September 16 to December 16, 2000, Ivy Fisheries Limited utilized two company licenses, and three individual licenses, to fish for bluefin tuna. Five fishing vessels fished under these licenses and during this three month interval 176 bluefin tuna were recorded as being caught. Of those 176 bluefin tuna, 135 were found to have been caught in contravention of the **Fisheries Act**, R.S.C. 1985, c. F-14 (the **Act**) and **Regulations**. Ivy Fisheries Limited was found to have sold these 135 bluefin tuna for a total sales proceeds of $1,196,412.23.

[5] After a lengthy trial lasting more than 24 days with hearings conducted at various intervals spanning some two years, the eight appellants were convicted on March 1, 2006 on a host of charges under the **Act** and **Regulations**: failing to immediately enter confirmation numbers; failing to return incidental catch; the use of a tuna license concurrently with a shark license; failing to hail immediately; permitting an unauthorized person to fish a licence; fishing while a temporary replacement permit was in place; fishing without authorization; fishing without a fisher's registration card; and selling illegally caught fish. Judge Crawford's

lengthy decision on the merits reflects a very detailed analysis of the evidence, a clear expression of her findings of fact and a careful application of the law to the issues before her.

[6] On June 14, 2006, after a sentencing hearing where both the Crown and the defence called evidence, Judge Crawford sentenced the individual appellants under s. 78 of the **Act** to fines and other penalties ranging from $500.00 to $25,000.00. Further, acting pursuant to s. 79 of the **Act**, Judge Crawford imposed an "additional fine" in the amount of $643,234.00 which she apportioned against the company and the individual offenders based on the judge's assessment of the degree of responsibility for each offender. The additional fine of $643,234.00 was based on the evidence of a forensic accountant called by the Crown who calculated that sum as representing the amount of monetary benefits acquired by the appellants from the sale of those particular tuna caught as a result of the most serious offences. Finally Judge Crawford suspended the company's Canadian Offshore Tuna Fishing License #142645 for a period of one year.

[7] On appeal to the SCAC, several errors were alleged by the appellants including **Charter** violations and a variety of mistakes related to the admissibility of certain evidence, burden of proof, statutory interpretation, and fitness of sentence.

[8] After a painstaking review of the evidence, the issues and the law, Stewart, J. filed a lengthy and comprehensive decision where she carefully considered each of the appellants' submissions before dismissing the appeals and upholding the convictions and sentences imposed by Judge Crawford.

[9] Ivy Fisheries Limited made an application to this Court for an order staying the suspension of its Canadian Offshore Tuna Fishing License #142645 pending disposition of this appeal. With the consent of the Crown, that application was heard and granted on May 22, 2009, by order of MacDonald, C.J.N.S.

[10] The appellants now appeal to this Court from the decision of the SCAC judge. I will begin my analysis with a restatement of the issues that are before us.

Issues

[11] I would distill the various complaints and errors alleged by the appellants on appeal as four principal questions:

1. Whether the SCAC judge erred in law in affirming the trial judge's finding that documents tendered by the Crown were properly admitted into evidence as proof of the truth of their content?

2. Whether the SCAC judge erred in law in finding that the trial judge applied the appropriate evidentiary burden for these strict liability offences?

3. Whether the SCAC judge erred in law in affirming the trial judge's interpretation and application of s. 79 of the **Fisheries Act**?

4. Whether the SCAC judge erred in law in refusing to vary the sentences imposed by the trial judge?

Standard of Review

[12] The appeal is taken pursuant to s. 839(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Our leave must be obtained. Appeals are limited to questions of law. Our review is directed towards an assessment of the reasoning and disposition of the SCAC judge, not the court of first instance. See for example: **R. v. R.H.L.**, 2008 NSCA 100 at para. 20; **R. v. Travers**, 2001 NSCA 71 at para. 21; and **R. v. Shrubsall**, 2000 NSCA 18 at para. 7.

[13] Accordingly, for this appeal to succeed, a reversible error of law must be identified in the decision of Justice Stewart, sitting as the SCAC judge.

[14] Errors of law are reviewed on a standard of correctness. Failure to properly apply the correct legal standard to a set of facts constitutes an error of law necessitating appellate intervention. **Housen v. Nikolaisen**, 2002 SCC 33; **R. v. Araujo**, 2000 SCC 65; and **R. v. Morin**, [1992] 3 S.C.R. 286.

[15] With respect to appeals against sentence, our powers are as set out in s. 687(1) of the **Criminal Code**. Again, our leave is required. Unless the sentence is one fixed by law, we are to consider the fitness of the sentence and if we are persuaded that the sentence is unfit, we may vary the sentence within the limits prescribed by law. We must not disturb a sentence simply because we might have imposed a different one. Rather, we should only vary a sentence if we are satisfied that it is clearly excessive or inadequate.

[16] After applying these principles to the decision of the SCAC judge, I am not persuaded that there is any basis for us to intervene.

Analysis

#1 Whether the SCAC judge erred in law in affirming the trial judge's finding that documents tendered by the Crown were properly admitted into evidence as proof of the truth of their content?

[17] Here the appellants argue that the SCAC judge erred by failing to find that the trial judge had improperly admitted certain documentary evidence entered by the Crown at trial. The material included DFO documents, as well as other records seized during searches of the premises of Ivy Fisheries Limited and a dockside monitoring company. Essentially the appellants say the documents should never have been used for proof of the truth of their contents and that the SCAC judge erred in failing to rule that the impugned evidence was inadmissible.

[18] After thoroughly reviewing the appellants' complaint in this regard, the SCAC judge stated:

> **Conclusion**
>
> [67] The admission and use of documentary evidence was addressed during the trial and there is no substance to the rather vague objection raised by defence in closing submissions and argument before this court. There was no possible reason for the defence to believe that the Crown was proffering the documents for any other purpose than to establish the facts stated therein, as contemplated by the *Canada Evidence Act*. This was not a situation where the requirements of the *Canada Evidence Act* were neglected or insufficiently established. The appellants' counsel categorically stated the documents held at the various offices by consent were admissible. The Crown and the trial judge relied on that

> statement, and the trial proceeded accordingly. At the close of the Crown's case, defence raised specific objections to the relevancy of several individual exhibits, which the court addressed. There was no suggestion that there was any qualification or limit on the consent that had been given at the beginning of the trial. Nor was the issue raised on the motion for directed verdict.
>
> [68] The trial judge's observations of the defence seemed to misunderstand the principles of documentary evidence are well founded.
>
> [69] The documents tendered at trial and now forming part of the evidentiary record were properly admitted by the trial judge into evidence for the proof of the truth of the facts or matters stated therein. Having been admitted, the question of what "weight" or "purpose" should be attached to the documentary evidence is a matter for the trier of fact.
>
> [70] I would dismiss this ground of appeal.

[19] I am satisfied that the SCAC judge was correct in her assessment.

[20] The record is replete with defence counsels' stipulations that but for a few very limited pieces of paper, the admissibility of the documents proffered by the Crown was conceded. Defence counsels' consent was clear and unequivocal. The documents were relevant and plainly admissible for proof of the truth of the facts or matters contained therein. Ultimately, the six documents challenged by the defence formed the subject of a separate hearing before the trial judge where counsel were given the opportunity to make further written and oral submissions. Of these few documents the trial judge admitted some and excluded others.

[21] The appellants say the information set out in the impugned documents constitutes hearsay and ought to have been excluded either on the basis that it did not fall within any classical exception to the rule, or did not satisfy the pre-conditions under the principled approach to hearsay evidence.

[22] I am not persuaded that the SCAC judge erred in her analysis on the question of admissibility or the requirements for consent. Having applied those principles correctly, the issue of whether consent occurred is a question of fact. Contrary to the appellants' submissions before us, one does not need an agreement or contract to effect consent. Clearly, the giving of consent may be unilateral. I

see no basis for us to disturb the SCAC judge's endorsement of the trial judge's disposition of the matter.

[23] In my opinion neither the SCAC judge nor the trial judge erred in their consideration of this issue. I would dismiss this ground of appeal.

#2 Whether the SCAC judge erred in law in finding that the trial judge applied the appropriate evidentiary burden for these strict liability offences?

[24] Here the appellants say the SCAC judge erred in law by failing to find that the trial judge improperly imposed an evidentiary burden upon the appellants.

[25] Referencing certain extracts from the trial judge's reasons, the appellants say the judge, in effect, obliged them to lead evidence to establish their innocence. As an example, they point to para. 36 of her decision where Judge Crawford said:

> [36] As stated above, these are all strict liability offences; in regard to each of them once the Crown has established a *prima facie* case, the onus shifts to the defendant to establish a defence of due diligence or mistake of fact or law. As no such evidence was called by the defence on any of these charges, the issue in each charge will be simply whether or not the Crown has met its initial burden, which **in the absence of any defence evidence, will become proof beyond reasonable doubt**. Issues raised by the defence in regard to each charge will be considered within this over-all framework. (Emphasis added by the appellants)

[26] The SCAC judge rejected the appellants' complaints. Stewart, J. said:

> [74] Throughout her decision, when dealing with individual counts, the trial judge employed the Supreme Court of Canada words "*prima facie*". At paragraph 36, she provided the following context and demonstrated an understanding of the appropriate principles of strict liability.
>
> > "As stated above, these are all strict liability offences; in regard to each of them once the Crown has established a *prima facie* case, the issue shifts to the defendant to establish a defence of due diligence or mistake of fact or law. As no such evidence was called by the defence on any of these charges, the issue on each charge will be simply whether or not the Crown has met its initial burden, which is the absence of any defence evidence, will become

> proof beyond a reasonable doubt. Issues raised by the defence in regard to each charge will be considered within this over all framework."

[75] By using the words "*prima facie*" throughout her decision, as she addressed the charges overall and individually, the trial judge was not using the standard of proof applicable to a motion for directed verdict of "some evidence" rather than proof beyond reasonable doubt, as the appellants allege. Any such suggestion is simply wrong.

[76] The trial judge's reference to "*prima facie*" unequivocally refers to that stage of the trial proceedings where the Crown has proven beyond a reasonable doubt the essential factual elements of the regulatory offences charged, (i.e. the *actus reus*: the prohibited act of failing to comply with the licence conditions attributable to a person in position to exercise control over or have responsibilities for the activity, under the authority of the licence and to prevent the prohibited act from occurring; but, failing to do so) thereby leaving it open to the appellants to avoid liability by establishing a due diligence defence on the balance of probabilities. They offered no such evidence.

[77] At paragraph 30, addressing the lack of *mens rea* requirement and the responsibility of the licence holder and anyone fishing under the holder in a regulatory scheme, the trial judge correctly identified a fundamental error in the appellants' closing argument, where they stated,

> Most of the charges in this matter relate to licence conditions. It is submitted that the onus is on the Crown to establish what conditions apply, to whom they apply, what the fisher in question knows of the conditions and that the fisher in question saw the conditions and that the conditions in question were on board the vessel at the time of the alleged infraction.

[78] Once the Crown proved beyond a reasonable doubt that the appellants had failed to comply with a licence condition, a *prima facie* case was made out. Each of the trial judge's references to *prima facie* was in this context, as she was satisfied on the whole of the uncontradicted evidence, the factual elements of the offences had been proven beyond a reasonable doubt. She correctly addressed such in her analysis of the facts per offence. The Crown had no burden of proving either *mens rea* or negligence. As the Crown is relieved from the burden of proving *mens rea*, the Crown does not have to adduce evidence to prove intent or knowledge on the part of the appellants. The very nature of regulatory offences is such that the Crown is not able to establish intent to commit an offence. As the Crown is relieved from the burden of proving negligence,

> negligence is presumed from the bringing about of the prohibited act or omission that constitutes the *actus reas* of the offence and, as noted, the onus shifts to the defence to establish "due diligence" or "mistake of fact" on a balance of probabilities. No such defence evidence was called.
>
> [79] The fact that these offences were offences of strict liability meant that the Crown did not have to prove such matters as alleged by the appellants, i.e., that the appellants knew of the existence of the licence conditions; that they knew what the licence conditions meant; that they knew they were in fact committing an offence; that the licence conditions were on board the vessels at the time of the offence or actually attached to the licence and that actual permission was given to anyone to use a vessel.
>
> [80] No error was committed by the trial judge in her interpretation or application of strict liability principles.

[27] For reasons I will now develop, I am not persuaded that the SCAC judge erred in her analysis and disposition of this ground of appeal.

[28] There is no dispute that the offences under the **Fisheries Act** and the **Regulations** for which the appellants were convicted are all strict liability offences. Any consideration of this category of offence begins with **R. v. Sault Ste. Marie (City)**, [1978] 2 S.C.R. 1299. There, Dickson, J. (as he then was) reviewed the three categories of offences as: offences requiring proof of *mens rea*; offences of absolute liability; and offences characterized as strict liability offences. Dickson, J. described strict liability offences as:

> 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. Mr. Justice Estey so referred to them in *Hickey*'s case. (p. 1326)

[29] To better understand the positions taken by both the Crown and the defence in the courts below, we asked counsel at the hearing to file with the Court copies of the written briefs which had been submitted to both the trial judge and the SCAC

judge. The thrust of the appellants' complaint on this issue is captured in their post-appeal supplementary factum where they state at para. 12:

> 12. This is not a case of a trivial error. The Learned Trial Judge was substantially in the wrong. She incorrectly found that the Crown's *prima facie* case would become proof beyond a reasonable doubt in the absence of defence evidence. This is a significant error of law, and one which calls into question each of her verdicts. For each verdict, it cannot be said whether the Learned Trial Judge was correctly satisfied beyond a reasonable doubt that the *actus reus* of the offence was committed, or whether the Learned Trial Judge was only satisfied that a *prima facie* case was made out, uncontradicted by defence evidence. This error goes to the very basis on which the Learned Trial Judge entered convictions against the Appellants. The Learned Summary Conviction Appeal Court Judge erred in law by failing to recognize and correct this substantial error.

[30] In the context of strict liability offences the concept of "*prima facie* offence" has a particular meaning. The language in **Sault Ste. Marie** does not specifically use the term "*prima facie* case"; it says "*prima facie* imports the offence". In my view, these terms have distinct meanings and confusion may result if they are used interchangeably.

[31] As was made clear by Justice Dickson in **Sault Ste. Marie**, in cases involving strict liability, once the Crown has proved beyond a reasonable doubt the essential elements of the offence (which, in strict liability offences, is the *actus reus*), the offence is *prima facie* imported. At this point - to borrow the language from the Supreme Court's subsequent decisions - liability is "conditionally" imposed. Ultimate liability may be avoided if the accused satisfies the burden to prove, on a balance of probabilities, that he or she was duly diligent or acted under a reasonable but mistaken belief. Such a defence will be assessed on a reasonable person's standard. Failure to establish this defence will result in criminal liability and conviction for the offence.

[32] **Strasser v. Roberge**, [1979] 2 S.C.R. 953, was decided shortly after **Sault Ste. Marie**, and provides further elaboration of strict liability offences. In that case, the appellant was charged with participating in an unlawful strike, pursuant to the Labour Code of Quebec. The Labour Court treated this offence as a strict liability offence, while the Superior Court held that an intentional element had to be proved. The Supreme Court of Canada found that the judgment of the Labour Court was correct on this point, and that the offence was a strict liability offence as

that category of offence had been defined in **Sault Ste. Marie** (although **Sault Ste. Marie** had not been decided at the time the Labour Court had rendered its judgment). In reviewing the decision of the Labour Court, Beetz, J., for the majority, made the following remarks about strict liability offences that are instructive at p. 977:

> Additionally, the Labour Court used more than once in its final judgment a very characteristic expression, when it said, for example, at p. 448:
>
> > [TRANSLATION] ... the fact of not providing his services when an unlawful strike was in progress at his employer's place of business constitutes prima facie participation in that strike ...
>
> The expression "*prima facie*" in this context can mean only one thing: proof of the material element of the offence has the effect of discharging the burden of proof on the accused. The latter is accordingly required to prove, for example, that he had a reasonable belief in facts which, if true, would have rendered the act innocent. (Per Dickson J., speaking for this Court in **Sault Ste. Marie**, at p. 1316)
>
> Thus, if respondent had a reasonable basis for believing that there was no strike, he would not have committed the offence by refraining from working. However, without proof of that circumstance, the burden of which lay upon him, he **had** to be found guilty.
>
> Finally, commenting on respondent's silence, the Labour Court took care to emphasize at p. 448 that it considered the commission of the offence as already proven beyond reasonable doubt, quite apart from respondent's silence:
>
> > [TRANSLATION] The case for the prosecution is not "strengthened" by the fact that respondent refrained from testifying, but as the essential elements of the offence have been established beyond reasonable doubt, the Court cannot give respondent the benefit of a reasonable doubt which was never raised.
>
> There seems to be only one way of interpreting this passage: the Labour Court did not proceed from respondent's silence to a conclusion of guilt; this had already been done, **conditionally**, provided the defence did not submit any evidence; but respondent could have presented a defence leading to acquittal, which he did not do. (Underlining and emphasis mine)

[33] While the Supreme Court's decision in **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154 mainly concerned the constitutionality of certain regulatory provisions in the federal **Competition Act**, R.S.C. 1970, c. C-23, the judgment offers guidance in properly understanding the components of strict liability. For example, Cory, J., who is in the majority for the purposes of the s. 11(d) analysis, paraphrases at p. 218, Justice Dickson's language in **Sault Ste. Marie** as follows:

> The Sault Ste. Marie case recognized strict liability as a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence. (Underlining mine)

[34] To like effect I refer to the comments of Chief Justice Lamer at pp. 205-06 of his reasons where in reference to the Court's decision in **Sault Ste. Marie**, the Chief Justice states:

> ... the Court held that the standard of fault was that of "strict liability". This meant that conviction would follow proof (by the Crown) of the actus reus, unless the accused proved, on a balance of probabilities, that he or she took all reasonable care and was duly diligent. (Underlining mine)

[35] In **CanadianOxy Chemicals Ltd. v. Canada (Attorney General)**, [1999] 1 S.C.R. 743, the appeal centred around the question of whether search warrants issued under s. 487 of the **Criminal Code** authorized investigators to search for and seize evidence of negligence in strict liability offences. Major, J., writing for the Court, answered this question in the affirmative, and allowed the appeal. Though the issue in the case differs from the point of contention in the present appeal, Justice Major's description of strict liability offences and his use of the term 'prima facie case', is instructive.

> 13 At issue is whether search warrants issued pursuant to s. 487(1) of the Criminal Code are limited only to evidence relevant to an element of the offence which is part of the Crown's prima facie case, or whether such warrants encompass evidence that may relate to potential defences, such as due diligence, which may or may not be raised at the trial. ...

In conducting his analysis, he concluded at para. 17:

> 17 We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's prima facie case.

Further on, he continues with this conclusion on the issue:

> 26 The majority of the British Columbia Court of Appeal found that the word "commission" in s. 487(1) restricted its application to evidence that the accused had done those acts, or allowed those omissions, which constitute the elements of the offence. The criminal justice system is not solely concerned with whether a *prima facie* case can be made out against an accused, but whether he or she is **ultimately guilty**. ... (Underlining and emphasis mine)

[36] Most recently in **Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.**, 2006 SCC 12, LeBel, J., writing for the Court emphasized once again the shifting burden upon the accused in strict liability offences. At para. 15, he states:

> 15 Faced with the difficulties and injustices caused by this dichotomy between *mens rea* offences and absolute liability offences, this Court in *Sault Ste. Marie* recognized the need for and existence of an intermediate category of strict liability offences. Some commentators at that time suggested that such offences be identified with negligence offences. Accused persons would be allowed to exculpate themselves by proving affirmatively that they were not negligent, although the prosecution would be under no obligation to prove *mens rea* or a lack of due diligence (*Sault Ste. Marie*, at pp. 1313 and 1325). Under the approach adopted by the Court, the accused in fact has both the opportunity to prove due diligence and the burden of doing so. An objective standard is applied under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances. (Underlining mine)

[37] Similar explanations of the requirements for proof in strict liability offences have found expression in decisions of this Court. See for example, **R. v. Smith & Whiteway Fisheries Ltd.**, (1994), 133 N.S.R. (2d) 50 and **R. v. Stone** (1996) 148 N.S.R. (2d) 46.

[38] Having provided a brief reference to the analytical framework applicable to strict liability offences, let me turn now to the specific complaints advanced by the appellants here. In my respectful view, the appellants appear to misunderstand the

nature of strict liability offences, causing them to rely upon case law that is not applicable to the charges for which they were convicted.

[39] At the heart of the appellants' submissions lies their complaint that the trial judge erred in law by imposing upon them an evidentiary burden to establish their innocence. To illustrate the point the appellants place great reliance upon para. 36 of Judge Crawford's decision which I will here again repeat for ease of reference:

> [36] As stated above, these are all strict liability offences; in regard to each of them once the Crown has established a *prima facie* case, the onus shifts to the defendant to establish a defence of due diligence or mistake of fact or law. As no such evidence was called by the defence on any of these charges, the issue in each charge will be simply whether or not the Crown has met its initial burden, which in the absence of any defence evidence, will become proof beyond reasonable doubt. Issues raised by the defence in regard to each charge will be considered within this over-all framework.

[40] These words – in the submission of the appellants – constitute reversible error as suggesting that proof to a *prima facie* level will inevitably become proof beyond a reasonable doubt, if the offender fails to affirmatively establish his or her innocence. In support of their submission the appellants rely upon **Sunbeam Corp. (Canada) Ltd. v. R.**, [1969] S.C.R. 221 at p. 228:

> I do not think that any authority is needed for the proposition that, when the Crown has proved a *prima facie* case and no evidence is given on behalf of the accused, the jury may convict, but I know of no authority to the effect that the trier of fact is *required* to convict under such circumstances. ....
> (Emphasis added by the appellants)

[41] With respect, I think the appellants have mischaracterized the trial judge's reasons by parsing a few words, here and there, and taking them out of context. While it would have been preferable had the trial judge not used the words "will become proof beyond reasonable doubt", I am not prepared to say that she misconstrued the criminal standard or burden of proof.

[42] I do not interpret the trial judge's words at para. 36 of her decision as imposing an evidentiary burden upon these appellants to prove their innocence. Neither do I consider her remarks to mean that she convicted the appellants on a measure less than the criminal standard of proof beyond a reasonable doubt.

Rather, throughout her decision, she has correctly expressed the proposition that because these were strict liability offences, any failure on the part of the appellants to establish on a balance of probabilities a defence of due diligence or mistaken belief would, in the circumstances of this case, result in the Crown's proof of the *actus reus* beyond a reasonable doubt being sufficient to establish ultimate liability for the offence.

[43] When this impugned phrase and other passages from the trial judge's reasons are read as a whole and seen in the context of her entire decision, I am satisfied that she understood the required analytical framework and correctly applied the proper standard and burden of proof.

[44] The appellants' reliance upon **Sunbeam Corp.**, **supra** is ill-founded. First, **Sunbeam Corp.** is a 1969 case, which pre-dates **Sault Ste. Marie** where strict liability offences were first characterized and defined. Thus, **Sunbeam** is not a strict liability case as that category of offence has come to be described. While the passage cited by the appellants from **Sunbeam** [see [40] **supra**] is a correct statement of the law for full *mens rea* offences, it is not applicable here where the term "*prima facie* case" has a specific meaning in strict liability offences.

[45] In a similar vein, the appellants refer to earlier decisions of this Court in such cases as **R. v. Pye** (1984), 62 N.S.R. (2d) 10 (N.S.S.C.A.D.) and **R. v. Strang; R. v. Lunn** (1992), 108 N.S.R. (2d) 238 (N.S.S.C.A.D.) as supporting their assertion that the trial judge erred by effectively compelling them to affirmatively establish their innocence. With respect, these cases do not assist the appellants and are clearly distinguishable.

[46] **Strang** is not a strict liability offence case and so the comments of Hart, J.A. regarding the burden of proof under s. 193 of the **Motor Vehicle Act** are not relevant here. Secondly, reading beyond the portion of the judgment cited by the appellants, one sees that Justice Hart clearly distinguishes the burden imposed by s. 193 of the **Motor Vehicle Act** from the burden in strict liability cases. He says:

> **[24]** Surely the burden cast upon the accused to raise a reasonable doubt is not as great as the burden of an accused in a strict liability offence to establish due diligence by a balance of probabilities as was held to be constitutionally valid by a majority recently by the Supreme Court of Canada in **R. v. Wholesale Travel Group Inc. and Chedore** (1991), 130 N.R. 1; 49 O.A.C. 161 (S.C.C.).

[47] **Pye, supra** was a stated case challenging the constitutional validity of a "*prima facie* evidence" provision under the Nova Scotia **Lands and Forests Act**, R.S.N.S. 1967, c. 163. Macdonald, J.A.'s reasons in that case are not relevant to the proper analysis of a strict liability offence as arises here.

[48] Let me conclude my consideration of this ground of appeal by referring to two other portions of the trial judge's decision, both of which were challenged by the appellants in their submissions as further illustrations of the errors they attribute to her analysis. At para. 61 of her decision Judge Crawford said:

> [61] In summary, I find that the Crown has established a *prima facie* case on each of these charges; and, the defence having called no evidence to establish a defence to these strict liability offences, I find the defendant guilty on both counts.

Further, at para. 112 of the trial judge's reasons she says:

> [112] Once again, ... I refer to my treatment of that issue ... and state that documents signed by the defendant ... are admissible against the defendant for the truth of their contents, in other words, as direct evidence. In this case they establish the Crown's case against the defendant beyond reasonable doubt in the absence of any evidence from the defence ...

[49] In my view, contrary to the submissions made by the appellants, these conclusions by the trial judge are correct statements of the law and are consistent with the language used in the leading jurisprudence to which I have referred.

[50] In summary, I am not persuaded that the trial judge misunderstood the burden of proof to be applied in strict liability offences or that the SCAC judge erred in affirming the trial judge's decision.

[51] In my opinion the trial judge understood that once she was satisfied the Crown had proven the *actus reus* of the offence(s) beyond a reasonable doubt, liability was conditionally imposed upon the appellants. At that point it fell to the appellants to establish on a balance of probabilities a defence of due diligence or a reasonable belief in a mistaken set of facts which, if true, would have rendered their acts or omissions innocent. Failure by the appellants to establish either defence necessarily resulted in their conviction.

[52] For these reasons, I would dismiss this ground of appeal.

#3 Whether the SCAC judge erred in law in affirming the trial judge's interpretation and application of s. 79 of the Fisheries Act?

[53] Section 79 of the **Fisheries Act** provides:

> 79. Where a person is convicted of an offence under this Act and the court is satisfied that as a result of committing the offence the person acquired monetary benefits or monetary benefits accrued to the person, the court may, notwithstanding the maximum amount of any fine that may otherwise be imposed under this Act, order the person to pay an additional fine in an amount equal to the court's finding of the amount of those monetary benefits.

[54] Clearly the imposition of a s. 79 fine is discretionary. If an offender is found to have acquired "monetary benefits" as a result of an offence under the **Act**, the court *may* order the offender to pay an additional fine. Such an "additional fine" under s. 79 must be equal to the amount of the "monetary benefits".

[55] In this case, the trial judge accepted the Crown's submission and ordered the appellants to pay a substantial additional fine totalling $643,234.00. This figure was calculated by the Crown's expert as being the gross sale value of that portion of the illegal catch (limited to 70 bluefin tuna) acquired as a result of the most serious offences. The s. 79 fine was apportioned among certain individual appellants in amounts ranging between $1,000.00 and $6,000.00, while the greatest apportionment was levied against the company in the amount of approximately $626,000.00.

[56] At this Court, and in the courts below, the appellants objected to the imposition of a s. 79 fine. In the alternative, the appellants argued that if such a penalty were to be imposed, the term "monetary benefits" ought to have been interpreted to mean the <u>net</u> sales proceeds of the illegally caught fish, and not the gross proceeds.

[57] At trial Judge Crawford rejected such an interpretation. On this point she said in part:

> [24] The defence argued further that, should a penalty under s. 79 be imposed, it should be in the amount, not of the gross sales but only of the net profit after deduction of legitimate business expenses. In so arguing they rely on two recent cases from the Newfoundland and Labrador Court of Appeal, *R. v. Oates,* [2004] N.J. No. 29, 233 Nfld.&P.E.I.R. 138 and *R. v. Meade* [2004] N.J. No. 49, 234 Nfld.&P.E.I.R. 1. In *Meade* the Court of Appeal reduced the fine imposed at trial under s. 79 to allow deduction of expenses; in *Oates* the decision of the Summary Conviction Appeal Court to do the same was upheld on further appeal.
>
> . . .
>
> [26] With the greatest respect, on the evidence before me in this case, I must beg to differ with the learned Chief Justice. When questioned on this point by defence, Brian Crockatt, – an accounting expert – clearly stated that gross income is a monetary benefit to any enterprise, whether or not there is a profit after all expenses have been deducted. As he stated, there is a monetary benefit to any enterprise in being able to pay its expenses; without gross income from which to pay expenses no enterprise can stay in business long.
>
> [27] In addition, to narrow the meaning of "monetary benefit" in this context to "net profit" is to overlook the paramount purpose of sentencing in a regulatory context: to deter both the offender and others in his/her position from engaging in the illegal activity. If offenders know that, if caught, they will be deprived of the entire benefit of their illegal catch, and that they will therefore have to pay for the costs associated with their illegal fishing from other sources, the cost-benefit analysis will make illegal fishing much less attractive and they may be less likely to "take a chance" than if they know that even if caught their expenses will be covered.
>
> . . .
>
> [29] Therefore, both on the meaning of the term "monetary benefit" in accounting terms, and on a purposive interpretation of the legislation, I must respectfully decline to follow the decisions in *Meade* and *Oates*, which are not binding upon me and have not been followed in any other province so far as I am able to determine. I conclude that the term "monetary benefits" in s. 79, at least in the case before me, should be equated with the sale price of the tuna.

[58] In the alternative, Judge Crawford said that if she were wrong in the meaning she ascribed to the term "monetary benefits", she would hold (as did Wells, C.J.N.L. in **Oates, supra**) that the burden lay with the appellants to establish their expenses on a balance of probabilities, and that the evidence offered

by the appellants at trial fell far short of the mark. After explaining the deficiencies in the appellants' evidence, the trial judge went on to say:

> [32] I conclude that the defence has not met the burden of establishing on a balance of probabilities the expenses that ought to be deducted from product value. The best evidence before the Court as to the monetary benefit to the offenders of those 70 tuna is therefore the sale price established by the Crown.
>
> [33] I find that the fine sought by the Crown under s. 79 in the total amount of $643,234.82 is justified. Apportioned as recommended by the Crown expert, Brian Crockatt, it will deprive the offenders of the monetary benefit they acquired as a result of their most serious offences, but leave them with the monetary benefit accruing from the tuna involved in the less serious infractions of the regulations. It is thus an important and necessary first step in achieving the sentencing purpose of general and specific deterrence. To paraphrase Freeman, J., the thieves will have been deprived of their loot.

[59] I am not persuaded that the trial judge erred in her interpretation and application of s. 79, nor that the SCAC judge erred in refusing to set aside the additional fine. I have come to that conclusion for several reasons.

[60] First, it was entirely within the trial judge's discretion to decide whether a s. 79 fine was warranted. She said, at para. 23:

> In my opinion a fine in the amount of the benefit that would otherwise accrue to the offenders as a result of their illegal acts is warranted here.

On the appropriate standard of review, I see no basis for disturbing the SCAC judge's endorsement of that disposition.

[61] More fundamentally, I do not see this issue as raising a question of law entitling us to intervene. The **Fisheries Act** allows the Court to apply various penalties – including forfeiture, fines and additional fines – so as to fashion a sentence that will adequately address the overriding principle of deterrence. In my opinion, s. 79 is part of a package of penal provisions intended to deter offenders, in part, by prohibiting the retention of an illegal catch or the monetary benefits acquired from its sale. Like the forfeiture of fish or proceeds under ss. 72(1) and (2), an "additional fine" under s. 79, may be considered as a necessary and appropriate sanction when simple forfeiture is not enough. As Freeman, J. (as he

then was) so wisely put it in **R. v. Ross** (1990), 96 N.S.R. (2d) 444 (Co. Ct.) at para. 18:

> [18] ... Forfeiture of an illegal catch is not a strong deterrent and may be compared with depriving a thief of his loot. ...

Judge Crawford was not so much engaged in statutory interpretation which might otherwise invoke a standard of correctness, as she was fashioning an appropriate sentence based on the evidence presented.

[62] I agree with the SCAC judge's conclusion that the trial judge made very clear findings of guilt buttressed by careful assessments of the gravity of the offences and the responsibility of each offender. For example, at para. 37 of her sentencing decision, Judge Crawford said:

> [37] These are serious charges each involving multiple breaches of licence conditions in a lucrative, but seriously threatened fishery. Taken together they establish a pattern of behaviour which can only be described as a deliberate, concerted effort to catch the maximum number of tuna, regardless of the rules. The offenders here seem to have treated the quota as a target to be met, rather than an upper limit to their fishing activity. It is important that they learn that their fishing licences represent a privilege, not a right, and that in exercising that privilege they are exploiting a resource that belongs to the people of Canada.

[63] The appellants are unable to point to any error in principle in the trial judge's reasons or the SCAC judge's refusal to intervene.

[64] I do not accept that the judges in the courts below erred in their application of the phrase "monetary benefits" in s. 79. It was entirely open to the trial judge to reject the approach taken in the two Newfoundland decisions to which she was referred (and as she observed do not appear to have been followed outside Newfoundland and Labrador) and to instead adopt an approach which would apply the gross sale value of the 70 bluefin tuna acquired as a result of the most serious offences. This was particularly so given the expert evidence offered by the Crown's forensic accountant and which was accepted by the trial judge.

[65] I prefer to leave the determination as to whether – on the facts of any given case – monetary benefits will equate to the gross value of the product, or whether that figure ought to be reduced after discounting expenses to the enterprise or

individual, to the discretion of the judge hearing the case. It seems to me that trial judges are in the best position to make that assessment based on the particular circumstances of the case and the evidence presented. Future cases will offer further guidance on the application of that discretion. It is enough for me to observe that in certain situations, at the moment of the *actus reus*, there may be few expenses left that are neither spent nor committed. In that case, any gross revenue from the criminal act would benefit the perpetrator's bottom line. Section 79 does not direct the performance of a profit and loss analysis of the fishing enterprise, as for an income tax calculation. Rather, the sentencing judge is to assess, in the particular circumstances of the case and on the evidence presented, whether the convicted person in fact obtained a monetary benefit from his commission of the criminal act.

[66] As to the trial judge's conclusion that the appellants had failed to present any persuasive evidence which might go to reduce their monetary benefits, it was entirely within Judge Crawford's jurisdiction to assess the evidence and attach to it whatever weight she thought appropriate. The SCAC judge was right to conclude that she had no authority to interfere with the trial judge's assessment.

[67] I would dismiss this ground of appeal.

#4 Whether the SCAC judge erred in law in refusing to vary the sentences imposed by the trial judge?

[68] Again, I see no reason to intervene. In the present case the SCAC judge concluded that the trial judge thoroughly considered the matrix of sentencing options available to her and correctly applied proper sentencing principles in her assessment of these offences and these offenders. I agree.

[69] The reasons of the SCAC judge also recognize the considerable deference owed to the trial judge's sentencing decision as well as affirm the conclusion that the penalties imposed fell within an established and appropriate sentencing range.

[70] As the SCAC judge observed in her reasons, the appellants failed to point to any error in principle which would justify her interference with the sentences imposed. She said:

> [177] Finally, the appellants say the "massive fines in this case, given that the fish were tagged, hailed, and within quota, is grossly disproportional and overly harsh." The appellants have not offered any principled basis for their claim that

the sentencing judge erred. Their position appears to be that the fines are excessive because they are higher than fines that have been imposed in other fishery cases. In their "sampling of fines in fishery cases", if indeed the point is to reflect fines attributable to less serious offences, they failed to reference the fairly recent Nova Scotia Court of Appeal affirmation of a $5,000.00 fine imposed for a conviction of possessing six short lobsters. (*R. v. Croft*, 2003 NSCA 109). Of the cases listed by the appellants, virtually none have facts that resemble the facts here. It should also be noted that s. 78 contemplates fines up to $100,000.00 for first offences prosecuted on summary conviction. Fines cannot be considered to be inappropriately high simply because the appellants would have preferred lower ones.

[178] I agree with the Crown's submission that the trial judge considered the established sentencing range together with the circumstances of the offences. The trial judge properly emphasized deterrence in the context of conservation related commercial fishing violations and imposed penalties sufficient to strongly encourage statutory compliance. The trial judge's decision is entitled to difference. The penalties fall within the established sentencing range and were not excessive or unreasonable in the circumstances. The Crown illustrates this with the following points;

1. Ivy Fisheries reported gross fishing income of $5,027,178.13 in 2000.

2. During September 16th to December 16th, 2000 time period for all species of fish recorded as being caught under licences utilized by Ivy Fisheries, the total sales value was $1,854,182.40. During the same time period, 176 Bluefin Tuna were recorded as being caught under licences utilized by Ivy Fisheries Ltd. The total sales value of those 176 Bluefin Tuna is $1,550,212.04.

3. 135 of the 176 Bluefin Tuna were found by the trial judge to have been caught in contravention of the *Fisheries Act* or its regulations and are involved in the charges before the court. The total sales value of 135 illegally caught Bluefin Tuna is $1,196,412.53. The total sale values of the 70 Bluefin Tuna related to the most serious offences is $643,234.82.

4. The trial apportioned only the sale proceeds of $643,234.82 amongst those convicted for counts 3, 6, 8, 9, 10, 17, 18 and 20 and not the sale proceeds for all 135 illegally caught Bluefin Tuna.

[179] The appellants point to no error in principle that would justify interference with the sentences. Determining s.78 fines, the sentencing judge considered the ranges suggested by the Defence and the Crown; while the fines were typically higher than those suggested by the Defence, this does not render them unfit. The trial judge took note of the circumstances of the offenders, including each

> individual's family and income status, and their status as a principal or employee of Ivy Fishery Limited. She recognized the primacy of deterrence in regulatory sentencing, particularly in the fishery, where a scarce and declined resource is put at risk by overfishing.

[71] Having carefully considered the sentence imposed by Judge Crawford, together with the detailed reasons filed by Justice Stewart, I see no reason for us to intervene.

[72] Accordingly, I would dismiss this ground of appeal.

Disposition

[73] I am not persuaded that the SCAC judge erred in dismissing the appeals after trial. While I would grant leave to appeal, I would dismiss the present appeals from conviction and sentence. I would also direct that the Order suspending Canadian Offshore Tuna Fishing License #142645 be reinstated effective Monday, December 14, 2009 so that the Suspension Order continues to run for the remainder of its term.

Saunders, J.A.

Concurred in:
Oland, J.A.
Fichaud, J.A.