

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

Citation: *Blagdon v. HMTQ*, 2010 NLTD 98

Date: 20100525

Docket: 200806T0110

BETWEEN:

WILLIAM BLAGDON

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Before: The Honourable Mr. Justice Garrett A. Handrigan

Place of hearing:

Grand Bank, Newfoundland and Labrador

Criminal Law – Fish and Wildlife – Offences – Illegal Fishing – Appeal from Conviction and Sentence – Standards of Appellate Review – Due Diligence Defence – Common Enterprise – Burden of Proof – Sentencing Discretion – Fines – Other Considerations.

William Blagdon appealed a conviction and the sentence he received in the Provincial Court for breaching section 91(3)(a) of the **Atlantic Fishery Regulations**, contrary to section 78(a) of the **Fisheries Act**. He claimed that the trial judge erred by finding he was engaged in a “common enterprise” with another fisher, ignored “irregularities” in the evidence and did not apply the “due diligence defence” or the “burden of proof” correctly. Mr. Blagdon claimed the sentence he received was “extreme”.

Summary: The court dismissed the appeal, both as to conviction and sentence. The trial judge understood the law which applied to the offence and applied it properly. He believed the Crown evidence. He did not believe Mr. Blagdon’s

evidence and after considering all the evidence he was satisfied that the Crown had proved the charge beyond a reasonable doubt. He also exercised his discretion appropriately when he sentenced Mr. Blagdon for the offence.

Appearances:

Mr. Blagdon	Appearing on his own behalf
Mark Stares	Appearing for Her Majesty the Queen

Authorities Cited:

CASES CONSIDERED: *R. v. Harper*, [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193, 133 D.L.R. (3d) 546, 40 N.R. 255 (SCC); *Furlong Estate v. Newfoundland Light & Power Co.*, 2005 NLCA 25 (NLCA); *Green v. Green*, 2005 NLCA 29 (NLCA); *R. v. Myles*, 2005 NLTD 138 (NLTD); *R. v. S. (A.T.)*, 2004 NLCA 1, 232 Nfld. & P.E.I.R. 283, 690 A.P.R. 283, 182 C.C.C. (3d) 47 (NLCA); *R. v. M. (C.A.)* (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500 (SCC); *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (SCC); *R. v. Cluett*, 2002 CarswellNfld 271, 217 Nfld. & P.E.I.R. 87, 651 A.P.R. 87 (NLTD).

STATUTES CONSIDERED: *Fisheries Act* R.S.C. 1985, c. F-14 – Section 78, 78(a); *Criminal Code of Canada*, R.S.C. 1985, c. C-46 – Section 21.

REGULATIONS CONSIDERED: *Atlantic Fishery Regulations, 1985* SOR/86-21 – Section 91(3)(a).

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] After a trial, a Provincial Court Judge convicted William Blagdon on September 4, 2008 of catching and retaining more codfish than the daily quota of groundfish he was permitted during the 2007 recreational cod fishery. He fined Mr. Blagdon \$1000 and prohibited him from fishing in this province's coastal waters for twelve months. The offence occurred on October 3, 2007 at Mortier Bank, which is just off Marystown, in Placentia Bay, NL.

[2] The Crown charged Mr. Blagdon under section 91(3)(a) of the **Atlantic Fishery Regulations, 1985**¹, which is punishable under section 78(a) of the **Fisheries Act**². Mr. Blagdon appealed to this court from both conviction and sentence.

THE ISSUES

[3] Mr. Blagdon's appeal raises two issues:

1. Did the trial judge err when he convicted Mr. Blagdon?
2. Did the trial judge impose a fit sentence on Mr. Blagdon?

THE LAW

Verdict Appeals

[4] In **R. v. Harper**³, Estey, J., said that an appellate court inquiring into the reasonableness of a trial verdict should only "intercede" if "...the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence..."⁴. Otherwise the appellate court has "...neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence"⁵.

[5] The Newfoundland Court of Appeal restated the standards of review recently that apply on appeal to questions of law, questions of fact, questions of mixed fact and law and inferences of fact when they are raised. The restatement appears in

¹ SOR/86-21.

² R.S.C. 1985, c. F-14.

³ [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193, 133 D.L.R. (3d) 546, 40 N.R. 255 (SCC).

⁴ *Ibid*, paragraph 5.

⁵ *Ibid*.

Furlong Estate v. Newfoundland Light & Power Co.⁶ and **Green v. Green**⁷. I also discussed the applicable standards of appellate review recently in **R. v. Myles**⁸. These are the standards which I will apply to Mr. Blagdon' appeal against his conviction:

- For questions of law, correctness.
- For questions of fact, "palpable and overriding error".
- For questions of mixed fact and law and inferences of fact, generally "palpable and overriding error", but this may vary, depending on the inferences or the mixture of fact and law.

[6] Some brief elaboration of these standards will assist in the following discussion. "Correctness" is the standard that applies to questions of law. It is a lower standard than "palpable and overriding error" and permits appellate judges to substitute their own findings for those of the trial judge if the latter is mistaken about the law.

[7] The search for "palpable and overriding error" in a trial judge's reasoning raises the bar considerably. Appeal courts invariably show great deference to trial judges on the findings of fact, including the inferences to be drawn from the facts they find. The reasons for this deference are so obvious they need not be stated.

[8] Mr. Blagdon's main argument is that the trial judge convicted him because he made mistakes of fact. Mr. Blagdon sets out two grounds of appeal against conviction, in his notice of appeal:

1. The trial judge was biased and "made assumptions without facts".
2. "Evidence was altered and did not support conviction".

[9] I will apply "palpable and overriding error" as the standard of review to my analysis of these grounds and similar questions which Mr. Blagdon raised and give the trial judge's findings of fact the deference they deserve.

⁶ 2005 NLCA 25 (NLCA).

⁷ 2005 NLCA 29 (NLCA).

⁸ 2005 NLTD 138 (NLTD).

Sentence Appeals

[10] The Newfoundland Court of Appeal has repeatedly said that an appellate court reviewing sentence must ask itself "...whether or not the sentence imposed by the trial judge, in the exercise of his/her discretion, is 'clearly unreasonable/demonstrably unfit'"⁹. The Court of Appeal has said just as often that it is immaterial if the appellate court would have imposed a different sentence if the trial judge's sentence meets that standard.

[11] Appellate courts defer to trial judges on sentence because, as Lamer, C.J.C. stated in **R. v. M. (C.A.)**¹⁰, "Parliament explicitly vested sentencing judges with discretion to determine the appropriate degree and punishment under the Criminal Code...."¹¹. Elsewhere, in the same judgment, after explaining the "profound functional justifications" for the deference which must be shown to sentences imposed at trial, Lamer, C.J.C. concludes that "The discretion of a sentencing judge should...not be interfered with lightly"¹².

[12] I attend now to my analysis of the substantive issues in this case, with the preceding principles of law in mind; starting with the background.

ANALYSIS

Background

[13] William Blagdon was born October 12, 1938 and is seventy-one years old. He lives alone in Marysvale, NL and is retired, although he has recently worked as a skipper with a tour boat operator during the tourist season. Mr. Blagdon said he is quite familiar with the fishery and has "...been around with the fishery...been fishing for years...So, I have a very good knowledge of catching a few fish, how to catch a few fish"¹³. Mr. Blagdon also worked for the Department of Fisheries and Oceans (Canada) for approximately twenty years and for eleven of those years was an "offshore inspector".

⁹ I took this from Rowe, J.A.'s reasons for allowing the Crown's appeal from sentence in **R. v. S. (A.T.)**, 2004 NLCA 1, 232 Nfld. & P.E.I.R. 283, 690 A.P.R. 283, 182 C.C.C. (3d) 47 (NLCA).

¹⁰ (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500 (SCC).

¹¹ Ibid, paragraph 90.

¹² Ibid, paragraph 91.

¹³ Page 69, lines 5-8 of the transcript of the evidence at trial.

[14] Mr. Blagdon came to visit his sister in Burin, NL on October 2, 2007. His brother-in-law arranged for Mr. Blagdon to accompany Keith Adams, also of Burin, in Mr. Adams' boat for the recreational groundfish fishery which was open at the time. Mr. Blagdon said that he and Mr. Adams left Burin around 5:00 am on October 3, 2007 and steamed to an area of shallow water on Mortier Bank, in Placentia Bay. He said that Mr. Adams had handlines on his boat and they used the gear to direct for cod fish, the most coveted of the groundfish.

[15] Mr. Blagdon said he modified his handline so that two of the three hooks, the smaller ones, were "blinded", by which he meant they were no longer capable of catching fish, leaving him with a single larger hook, called a "Norwegian jigger" at the end of his line. Mr. Blagdon said he did not want to "jig" small cod fish with the smaller hooks on the upper part of his handline but wanted to catch some "nice big fish"¹⁴ because the daily quota for the recreational fishery limited him to five groundfish. Mr. Blagdon caught his daily quota, apparently quite easily, and then turned his attention to mackerel which he believed to be in the area.

[16] Mackerel is a pelagic fish and was not included in the recreational ground fishery quota. To catch mackerel, Mr. Blagdon reversed the modifications he had made to his handline to catch only big groundfish, by disabling the Norwegian jigger and activating the two smaller hooks, on the upper part of his handline. He caught two mackerel for this effort and put them in a plastic pail in the bottom of the boat. He intermingled the five cod fish he caught with those Mr. Adams caught by putting them together with Mr. Adams' in a plastic pan, rectangular in shape, which was also stored in the bottom of the boat.

[17] Meanwhile, Fishery Officers Jason Bateman and Tracy Drover left Marystown the same day at approximately 6:00 am aboard a Fast Rescue Craft to patrol in the Mortier Bank area. They focused on that area because they saw eight or nine fishing boats lying about, apparently engaged in the recreational fishery. The officers approached Mr. Adams' boat at approximately 7:15 am and noted that Mr. Adams was up forward of the boat where the operational controls were found and Mr. Blagdon was to the aft. Neither Mr. Adams nor Mr. Blagdon was known to the officers at this time.

¹⁴ Ibid, page 70, lines 2-3.

[18] The officers inquired how the fishing was that morning and the occupants of the boat told them it was “good”. The officers then asked how many fish they had on board and Mr. Adams answered that they had “20 or so”. The officers knew the daily limit for two fishers to be ten fish so they immediately believed that Mr. Adams and Mr. Blagdon had exceeded their quota and concluded that “[t]here was obviously a violation...”¹⁵. The number reported by Mr. Adams was also consistent with the observations the fishery officers made of the plastic pan which was in plain view at that time: “...there was a pan that was three parts full of cod and, just at a quick glance, Your Honour, you could determine that there was more than 10 fish in that pan”¹⁶. Officer Drover acted immediately by reading the police caution to both fishers and advised them of the right to counsel. Officer Bateman boarded Mr. Adams’ boat and began his inspection.

[19] Officer Bateman counted the fish in the plastic pan twice and noted that it contained thirty-three cod. He asked who owned the fish and Mr. Adams said they each owned an equal number of sixteen. Mr. Blagdon did not respond to the question other than to nod his head in an affirmative manner by which the officers understood that he agreed with dividing them as Mr. Adams suggested. Mr. Adams also claimed the extra fish that would be left by that division, for a total of seventeen fish. Mr. Blagdon testified at trial that he did not agree with the division and challenged the officers’ claim that he had nodded in assent.

[20] Officers Bateman and Drover seized the boat and motor, all the contents of the boat, including the pan of cod fish, the plastic pail and mackerel, and all fishing gear. They charged Mr. Adams and Mr. Blagdon with exceeding the daily quota of groundfish allowed during the recreational fishery. Mr. Adams pleaded guilty and received the same sentence as Mr. Blagdon. The Crown did not ask for forfeiture of the boat and its gear and eventually returned the seized items to him.

[21] Mr. Blagdon denied that he caught or kept more than five groundfish on October 3, 2007 when he testified at trial. He said he knew that Mr. Adams had exceeded his quota but there was nothing he could do about it. Mr. Blagdon said Mr. Adams owned the boat and was the “skipper” and that he was just aboard the boat as Mr. Adams’ guest and had to wait until Mr. Adams stopped fishing and

¹⁵ Ibid, page 6, line 3.

¹⁶ Ibid, page 6, lines 10-12.

returned to shore. Mr. Blagdon claimed that he stopped fishing for groundfish when he reached his daily quota that he modified his handline so he would catch no more cod and that he directed his gear for mackerel, catching the two which the officers seized from the boat.

[22] The trial judge convicted Mr. Blagdon of the offence. He found that:

- Mr. Blagdon and Mr. Adams were fishing together in the same boat.
- Mr. Blagdon and Mr. Adams stored their catch in the same fish pan.
- Mr. Blagdon accepted that he owned half of the catch by nodding affirmatively when Mr. Adams told the fishery officers how it would be divided.

[23] The trial judge was satisfied that section 21 of the **Criminal Code of Canada**¹⁷, which deals with parties to offences, applies to regulatory offences under the **Fisheries Act**; and that Mr. Blagdon and Mr. Adams were parties to the offence because they shared a common purpose and followed the same practices.

[24] He also found that Mr. Blagdon was not a credible witness and that he did not meet the onus on him, after the Crown had proved the *actus reus* of the offence, of showing that he exercised due diligence to avoid committing the offence. In the event, he dismissed Mr. Blagdon's explanation as "illogical and unpersuasive"¹⁸ and said, after hearing Mr. Blagdon, that his testimony did not raise a reasonable doubt with him: "It follows from this that the only correct verdict in this case is to find the accused guilty"¹⁹.

Appeal against Conviction

[25] Mr. Blagdon challenged his conviction on several grounds. He said:

- Putting the fish together in the same pan did not prove that he and Mr. Adams were engaged in a "common enterprise".
- The trial judge ignored "irregularities" in the evidence.

¹⁷ R.S.C. 1985, c. C-46.

¹⁸ Ibid, footnote 13, page 137, line 2.

¹⁹ Ibid, page 137, lines 13-14.

- The trial judge did not apply the “due diligence defence” correctly.
- The trial did not apply the “burden of proof” correctly.

[26] I will examine each of Mr. Blagdon’s arguments in more detail momentarily. I want to make it clear now, however, that they have no merit. My reasons for that conclusion will be clearer as I proceed. But it is sufficient to note here that the trial judge made appropriate findings of fact, including as to credibility; that he identified and allocated the correct burdens of proof between the parties; and that he interpreted and applied the law correctly, especially when he found that Mr. Adams and Mr. Blagdon were “parties” to the offence.

Common Enterprise

[27] Mr. Blagdon stated the following in his “factum”: “Common enterprise was not proven just because the fish were in the pan”. Mr. Blagdon was right (although not as he intended) when he made that statement because their putting the fish together in the same pan was not the only evidence of a “common enterprise”. However, Mr. Blagdon is wrong when he infers that the trial judge relied on that fact alone to support the finding; because the trial judge did not and he made it clear that he took other factors into account. The following excerpt from his judgment pertains:

The clear evidence is that the accused and Adams had between them one pan of fish containing significantly more than the permitted daily quota. I accept the evidence of the fisheries officers that the accused nodded in agreement when they asked whether what Adams had said about their being on the halves with the catch was true. That, in the circumstances, amounted to an adverse admission by the accused of his guilt²⁰.

[28] It is evident from these comments that Mr. Blagdon’s “nodding” affirmation when Mr. Adams said they were “halving the catch” also influenced the trial judge’s decision²¹. Mr. Blagdon denies that he ever nodded in affirmation and

²⁰ Ibid, page 137, lines 6-13.

²¹ Crown counsel asked whether he should conduct a *voir dire* to determine if the officers’ testimony about Mr. Blagdon’s “nodding affirmation” was admissible. The trial judge concluded both that Mr. Blagdon understood his right to remain silent and that he had a right to speak to counsel as soon he came under suspicion of committing an offence (in fact, Mr. Blagdon not only said he understood but actually insisted that he understood what he was told) and also that Mr. Blagdon waived the need for a *voir dire*. Quære, whether gesturing by body language as a form of

even questioned that Officer Bateman could have seen him nod, given their relative positions in the boat. The trial judge rejected Mr. Blagdon's evidence which "stood in stark contrast to the evidence of the two fisheries officers"²² and said he did not believe Mr. Blagdon. He described Mr. Blagdon as a "less than credible witness"²³ who "insisted on arguing with crown counsel during his cross-examination, and abused the opportunity to cross-examine the fisheries officers by arguing with them"²⁴. He concluded that there was "no credible evidence to rebut the strong inference of a joint enterprise flowing from the circumstances discovered by the fisheries officers"²⁵.

[29] There are other facts from the evidence, which were established either directly or are there by inference, that the trial judge might have relied on them to support his decision:

- Mr. Blagdon said he resumed fishing, but for mackerel, after he caught his quota of five groundfish for the day. He said he disabled the Norwegian jigger on his handline and released the two "blinded", smaller, hooks on the line above it and shortened his handline so that it would only sink down to where the mackerel were. Mr. Blagdon eventually acknowledged during cross-examination that he might have caught groundfish on the smaller hooks although he insisted that he only intended to catch mackerel. He agreed, albeit reluctantly, that he "was...not to fish for cod fish anymore"²⁶ after he caught his quota of five groundfish.
- Mr. Blagdon was in the boat when the fisheries officers questioned Mr. Adams about who owned the catch. They say (and the trial judge accepted it) that he nodded in agreement. He says (and the trial judge rejected it) that he has a hearing deficit and he did not have his hearing aid that day so he did not know what the officers and Mr. Adams were talking about. He cannot deny, however, that he knew generally that the officers and Mr.

communication should be subject to the admissibility requirements for statements against interest given to a person in authority?

²² Ibid, footnote 13, page 136, lines 11-12.

²³ Ibid, page 136, line 4.

²⁴ Ibid, page 136, lines 5-8.

²⁵ Ibid, page 136, lines 8-10.

²⁶ Ibid, page 89, line 7.

Adams were discussing the catch; and that he also knew the fish in the pan, some of which belonged to him, easily exceeded the total daily quota for him and Mr. Adams. He also knew that he would be implicated unless Mr. Adams claimed all of the fish and that Mr. Adams did not claim them. In these circumstances, it was incumbent on Mr. Blagdon to defend himself by disavowing ownership of any more than five groundfish and put the blame squarely on Mr. Adams. His apparent silence (if we believe him) begs questions that remain unanswered.

- Mr. Blagdon had yet another chance to deal with the ownership of the fish at trial. He might have called Mr. Adams to testify on his behalf. In fact, the trial judge asked Mr. Blagdon about Mr. Adams, as this exchange between him and Mr. Blagdon attests:

The Court: Mr. Blagdon, are there any other witnesses you want me to hear from?

Mr. Blagdon: No, Your Honour.

The Court: All right, thank you.

Mr. Blagdon: I, probably – Mr. Adams was supposed to, was thinking about coming over but, unfortunately, he had a doctor’s appointment this morning, so he couldn’t make it.

The Court: All right. Well, if you want to call him, we can probably schedule it to a time when he can come. I’d be interested to hear from him if you wanted to call him.

Mr. Blagdon: No, I don’t think that be necessary to –

The Court: Okay, all right. I just wanted to make sure you have every opportunity, you know²⁷.

- Mr. Blagdon also implied, if he did not submit it outright, that the trial judge might attribute the whole catch to Mr. Adams, regardless of who caught it, simply because Mr. Adams was the owner and the “skipper” of the boat. This comment from his evidence pertains: “It’s my understanding that the master of a vessel...is supposed to be responsible.²⁸” Mr. Blagdon’s suggestion that Mr. Adams, and not him, should be solely

²⁷ Ibid, page 107, lines 9-21.

²⁸ Ibid, page 93, lines 12-14.

responsible for exceeding the daily quota because he was the “master” is disingenuous and self-serving because Mr. Blagdon also caught some of the groundfish, even if only five of them.

- Mr. Blagdon also acknowledged he knew that Mr. Adams was “breaking the law” but that both he and Mr. Adams continued to fish after he came to that realization²⁹. Mr. Blagdon appears not to have challenged Mr. Adams about his overfishing, other than to inquire innocuously about when they were returning to port.
- Finally, Mr. Blagdon acknowledged that he told Mr. Adams not to dump the fish when they saw the fisheries officers coming towards them at sea because of the risk that he would be charged with “obstruction”. This shows that Mr. Blagdon was fully aware of the jeopardy that he faced before the fishery officers conducted their inspection and again raises the question of why he (as he insists) sat blithely by while they did their investigation without protesting his innocence.

[30] It is clear from the preceding that there were ample, and possibly overwhelming, reasons for the trial judge to conclude that Mr. Blagdon and Mr. Adams were engaged in a joint enterprise.

Irregularities in the Evidence

[31] Mr. Blagdon pointed to two kinds of what he called “irregularities”: differences between his copy of the inspection report, the yellow one, and the white copy which the fisheries officers retained; and, differences between Officer Drover’s handwritten notes from her notebook and her testimony.

[32] As to the former, the officers addressed the differences in their evidence and explained them to the complete satisfaction of the trial judge. He found that they were of no consequence. I too find they are inconsequential and accept the trial judge’s assessment of that evidence. As to the latter, Mr. Blagdon did not put any of the differences, such as they may be, to Officer Drover when he cross-examined her. Nor did he put Officer Drover’s notebook in evidence even though I assume the Crown disclosed a copy of it to him. He cannot raise any discrepancies now for those reasons.

²⁹ Ibid, pages 91 , 92 & 93 (see page 91, lines 1-8 in particular).

Due Diligence Defence

[33] Section 91(3)(a) of the **Atlantic Fishery Regulations** creates a strict liability offence. Strict liability offences were described by Dickson, J. of the Supreme Court of Canada in **R. v. Sault Ste. Marie (City)**³⁰. He made it clear that the Crown did not have to prove *mens rea*, but could rest after it had proved beyond a reasonable doubt that the accused had committed the "prohibited act"³¹. The accused could "...avoid liability by proving that he took all reasonable care"³². Dickson, J. called this the defence of due diligence and said "...it 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"³³.

[34] The burden of proving due diligence is on a balance of probabilities. It is a positive onus and the accused will be convicted if he does not meet it. The doctrine of reasonable doubt applies to the first stage of the proceedings when the Crown bears the burden of proof, but it does not apply when the onus shifts to the accused. When the trial judge is satisfied that the Crown has proved the *actus reus* beyond a reasonable doubt (and he must be satisfied of this proof before the accused has to prove due diligence) he need take no further note of the standard. In fact, reasonable doubt plays no part in the proceedings after that point and the trial judge would err in law to apply it to either the accused's proof of due diligence, or overall of the proceedings.

[35] The trial judge referred to the charge against Mr. Blagdon as a "regulatory offence", a term which is often used as a substitute for the phrase "strict liability offence" that Dickson, C.J. defined in **Sault Ste. Marie**. Of regulatory offences, the trial judge said the Crown must first prove the *actus reus* of the offence beyond a reasonable doubt before the burden of proving due diligence shifted to the accused for him to meet on a balance of probabilities. This excerpt from his judgment is verbatim of the law I quoted above from **Sault Ste. Marie**: "In a regulatory offence, once the prosecution has established beyond a reasonable doubt

³⁰ [1978] 2 S.C.R. 1299 (SCC).

³¹ *Ibid.*, paragraph 60.

³² *Ibid.*

³³ *Ibid.*

the *actus reus* of the alleged offence, then the onus shifts to the accused to try to establish the defence of due diligence on a balance of probabilities”³⁴.

[36] After the trial judge stated the law, he discussed aspects of the evidence from which he concluded that the Crown had proved the *actus reus* of the offence; and he found that there was no “credible evidence to rebut the strong inference of a joint enterprise flowing from the circumstances discovered by the fisheries officers”³⁵. In the result, he concluded, as I have quoted earlier that “...the only correct verdict in this case is to find the accused guilty”. I will reflect on the process the trial judge followed to arrive at this conclusion, at the risk of stating what may be patently obvious and of repeating myself:

- He reviewed the Crown’s evidence and found that it supported the charge beyond a reasonable doubt.
- He reviewed Mr. Blagdon’s evidence and found that he had not proved due diligence, even to the extent of raising a reasonable doubt of his guilt, and further concluded that a reasonable doubt was not available on the whole of the evidence.
- Thus, he had to convict Mr. Blagdon because it was the only result that the law would support on this evidence. It was, to use the trial judge’s own words, the “only logical verdict open...”³⁶.

Burden of Proof

[37] Mr. Blagdon claims that the trial judge misapplied the burden of proof. His primary argument on this point is directed to the trial judge’s findings about his credibility. The trial judge explained clearly why he did not believe Mr. Blagdon:

- He argued with Crown counsel during cross-examination and was evasive and equivocal and refused to answer the clear and simple questions put to him.
- He was belligerent and quarrelsome with the fisheries officers when he cross-examined them.

³⁴ Ibid, footnote 13, page 135, lines 26-29.

³⁵ Ibid, page 136, lines 8-10.

³⁶ Ibid, pages 136-137, line 22 & line 1.

- His evidence was “illogical and unpersuasive”. The trial judge illustrated his point by referring to Mr. Blagdon’s claims that he could not hear what the fisheries officers were saying because of his hearing deficit, yet he could converse freely with Mr. Adams unimpaired by any hearing problem.
- Mr. Blagdon’s evidence was in “stark contrast” to the evidence of the fisheries officers.

[38] Otherwise, as to Mr. Blagdon’s claim that the trial judge misapplied the burden of proof, I refer back to what I said above when discussing due diligence.

Sentence Appeal

[39] The trial judge fined Mr. Blagdon \$1000 and prohibited him from fishing in the coastal waters of the province for twelve months. Mr. Blagdon appealed only the fine portion of the sentence, about which he said that the trial judge:

- relied on his previous record to “justify...[his] bias [sic] decision”;
- fined him the same amount as “the skipper” and that was “unjust”; and
- failed to take his “financial situation” into account.

[40] In **R. v. Cluett**³⁷, I addressed the scope that an appellate court has when reviewing a sentence. I noted then that “the only question...[the]...court need ask is whether the sentence is ‘clearly excessive or inadequate’”³⁸. Of the sentence the trial judge imposed on Mr. Blagdon, let me say generally that it is neither “clearly excessive” nor “inadequate”. Nonetheless, I will address the specific concerns he raised about it.

Previous Record

[41] The trial judge knew of Mr. Blagdon’s previous record because Crown counsel put it to him in cross-examination and he acknowledged his prior convictions for fishing lobster without an approved trap in 1987 contrary to the **Fisheries Act** and for several offences under the **Criminal Code** in 1998 and 2000.

³⁷ 2002 CarswellNfld 271, 217 Nfld. & P.E.I.R. 87, 651 A.P.R. 87 (NLTD).

³⁸ Ibid, see paragraph 18.

As to the former, the trial judge noted that it "...was a long time ago, 21 years ago" and he only mentioned it to note that "[the present conviction is] not his first conviction under the Fisheries Act"³⁹. As to the latter, the trial judge said "[t]hose are not particularly relevant to the fisheries issue, other than they set out a number of antecedents displaying a disregard for the law". In neither instance does it appear that any of Mr. Blagdon's prior convictions influenced the trial judge's sentence for he said "[a]t the end of the day, there's no reason to sentence Mr. Blagdon much differently than his co-accused, Mr. Adams, even though I believe Mr. Adams might have been a first offender"⁴⁰.

Same Sentence as Keith Adams

[42] I noted at the end of the previous paragraph that the trial judge treated Mr. Blagdon and Mr. Adams the same, despite their obvious differences: Mr. Blagdon has previous convictions; and Mr. Adams was owner and skipper of the boat. The trial judge's common sentence for the two offenders is consistent with his belief that they were engaged in a common enterprise and he was more heavily influenced by that factor than any other. This exchange between Mr. Blagdon and the trial judge illustrates my point:

The Court: Mr. Blagdon, Mr. Blagdon. I just spent 20 minutes explaining to you why I found you guilty. I don't want to hear from you now that you disagree with my reasoning. What I want to hear from you is is there any reason why you shouldn't be sentenced to the same sentence that Mr. Adams was sentenced to?

Mr. Blagdon: Well, Adams, Mr. Adams is the owner of the boat and is the master, and he was the owner of the boat, and if you got, and as I've said previous date, someone has to be held responsible, I guess. That's one of the things that wrong with this.

The Court: Did you understand Section 21 of the Criminal Code as to parties to an offence? I went over it, I thought, in very clear and detail⁴¹.

Mr. Blagdon's Financial Situation

³⁹ Ibid, footnote 13, page lines 18-20.

⁴⁰ Ibid, page 141, lines 2-5.

⁴¹ Ibid, page 138, lines 19-22 & page 139, lines 1-9.

[43] Mr. Blagdon claims that the fine he received is “unjust”. He believes that the trial judge had “[n]o regard for...[his] financial situation”. He also believes that the trial judge “assumed that...he could easily afford to pay the \$1000.00 fine”⁴². Mr. Blagdon challenged the trial judge after he imposed the fine by claiming, “I haven’t got the money to pay fines...”⁴³.

[44] The trial judge did not ignore Mr. Blagdon’s finances when he ordered him to pay the fine. He considered the following in assessing Mr. Blagdon’s ability to pay it:

- Mr. Blagdon receives a pension.
- Mr. Blagdon worked during the 2008 tourist season as a skipper on a tour boat.
- Mr. Blagdon had twelve months to pay the fine, which the trial judge considered was “...ample time and opportunity to pay...” it.

[45] Otherwise, the fine the trial judge imposed, though it might be a substantial penalty to Mr. Blagdon, is actually quite low. The maximum fine under section 78 of the **Fisheries Act** on first conviction for this offence is \$100,000.

[46] Deterrence, both specific and general, is the primary goal of sentences for offences under the **Fisheries Act**. The trial judge was aware of Mr. Blagdon’s previous conviction under that legislation but he did not stress it because it is quite dated. However, he might have taken more note of it and could easily have justified imposing a larger fine on Mr. Blagdon than on Mr. Adams because of the need to deter Mr. Blagdon. Overall, however, I find that the trial judge exercised the discretion that was available to him appropriately and I defer to his judgment as to the propriety of the penalty. I ought not, and will not, interfere with it unless it was excessive or unreasonable. It is clear from my comments above that I regard the fine as being on the lower and not the higher end of the scale and certainly not excessive.

⁴² See page 5 of Mr. Blagdon’s Factum.

⁴³ Ibid, footnote 13, page 141, line 13.

[47] I uphold the trial judge’s decision to convict Mr. Blagdon and the sentence he imposed on him. I dismiss Mr. Blagdon’s appeal against both conviction and sentence.

SUMMARY AND DISPOSITION

[48] William Blagdon appealed a conviction and the sentence he received in the Provincial Court for breaching section 91(3)(a) of the **Atlantic Fishery Regulations**, contrary to section 78(a) of the **Fisheries Act**. He claimed that the trial judge erred by finding he was engaged in a “common enterprise” with another fisher, ignored “irregularities” in the evidence and did not apply the “due diligence defence” or the “burden of proof” correctly. Mr. Blagdon claimed the sentence he received was “extreme”.

[49] The court dismissed the appeal, both as to conviction and sentence. The trial judge understood the law which applied to the offence and applied it properly. He believed the Crown evidence. He did not believe Mr. Blagdon’s evidence and after considering all the evidence he was satisfied that the Crown had proved the charge beyond a reasonable doubt. He also exercised his discretion appropriately when he sentenced Mr. Blagdon for the offence.

ORDER

[50] In the result, I order that:

1. William Blagdon’s appeal is dismissed, both as to conviction and sentence.
2. The conviction and sentence which the trial judge imposed on William Blagdon are confirmed.

GARRETT A. HANDRIGAN
Justice