CANADA / JUDGMENT

R. v. Tang

2021 BCSC 642

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2021 BCSC 642 R. v. Tang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tang,

2021 BCSC 642

Date: 20210408

Docket: 30136

Registry: Vancouver

Between:

Regina

Respondent

And

Yu Rang Tang and Deli Gao

Appellants

Before: The Honourable Mr. Justice Thompson

On appeal from: An order of the Provincial Court of British Columbia,

dated January 24, 2020 (R. v. Tang, Sechelt Docket No. 17435-1)

Reasons for Judgment

Counsel for the Appellants:

I. Knapp

Counsel for the Respondent:

A. Clarkson

M. Selanders (A/S)

Place and Date of Hearing

(by teleconference):

Vancouver, B.C.

February 19, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2021

[1] This is a summary conviction appeal. The appellants, Yu Rang Tang and Deli Gao, were convicted of offences under s. 78(a) of the Fisheries Act, R.S.C. 1985, c. F-14. Mr. Tang was convicted of two offences: first, that "he did catch and retain" more than his daily quota of one rockfish; and second, that he "did possess fish caught" in contravention of the Act or its regulations. He was fined a total of $5000 -- $2500 on each offence. Mr. Gao was acquitted of these offences, but convicted of obstructing or hindering a fishery officer contrary to s. 62 of the Act and fined $1500.

[2] The trial judge accepted the evidence of the fishery officers. On 19 July 2018, they were in uniform and in a marked patrol vessel near Egmont Harbour. They were checking that sport fishers were complying with the Act and its regulations. They observed a small boat nearing a dock. After closing to a distance of about 40 feet, the fishery officers announced their presence. Mr. Tang put his boat in reverse, while Mr. Gao dumped a bucket into the water -- the bucket contained at least four rockfish. One of the two fishery officers told the appellants to stop dumping fish, but once at the dock Mr. Gao threw another rockfish overboard.

[3] At trial, the appellants appeared without counsel. Mr. Tang testified. His evidence that he was fishing, but Mr. Gao was not. Mr. Tang testified that no rockfish were caught that day. His further evidence was that the bucket Mr. Gao dumped contained only water. He suggested that the fishery officers were discriminating against him and that the officers had fabricated their evidence.

[4] On appeal, the appellants accept the trial judge's findings of fact; however, they submit that the convictions cannot stand. Mr. Tang argues that he caught but did not in law "retain" or "possess" the over-quota rockfish. In the alternative, he argues that if both offences were committed then the Kienapple rule against multiple convictions requires that a conditional stay be entered on the possession count. Mr. Gao submits that he ought not to have been convicted because there was no evidence that his actions actually hindered the inspection

being conducted by the fishery officers.

Did Mr. Tang "Catch and Retain" or "Possess" Over-Quota Fish?

[5] The statutory interpretation arguments that Mr. Tang advances on appeal were not made at trial. Nevertheless, Mr. Tang argues that in convicting him the trial judge must have erred because in order to "retain" the fish in this sport fishing context, one must "take active steps to take property rights in the fish he has caught." He submits that the evidence leaves room for the possibility that he did not intend to keep all of the fish that were onboard when his vessel was spotted, and, because only one of the fish was dead when the fishery officers arrived, it was not proved beyond reasonable doubt that Mr. Tang had retained more than a single rockfish. Mr. Tang argues that in the circumstances of this case the offence of "catch and retain" could not be complete unless and until Mr. Tang left the dock with the fish in his possession -- the regulation properly interpreted allowed him the option of returning fish to the water up until that time. And, it follows from this line of argument that Mr. Tang was not guilty of possession of over-quota fish, the essence of Count 2, because until Mr. Tang left the dock with the fish he was not over quota.

[6] The Crown submits that the act of retention was complete when Mr. Tang failed to return prohibited catch to the water once he was in sufficient control over the fish to be able to do so. His obligation was to return the fish to the water as soon as possible under the circumstances. In the circumstances of a rockfish caught by rod and reel, the Crown submits that the fish is retained when it is unhooked and not immediately returned to the water. And, it would follow that once the act of "catch and retain" was complete, Mr. Tang was in possession of over-quota fish.

[7] I agree that the "catch and retain" offence that Mr. Tang was charged with was complete when, already having his quota of one rockfish on board, he caught and failed to return the other rockfish to the water as soon as possible under the circumstances. I find the reasoning in two Maritimes cases persuasive. In R. v. McIntyre, [1999] N.B.J. No. 459 (Q.B.), the accused was charged with catching and retaining undersize clams. At the time Mr. McIntyre was approached by fishery officers, he had these clams in a container. He argued that it was open to him to continue fishing, to measure the catch later, and then return the undersize clams to the water. The trial judge acquitted on the basis that he was not convinced beyond reasonable doubt that Mr. McIntyre intended to retain or keep the undersize clams. In his reasons allowing the appeal, Riordan J. referred to dictionary definitions of "retain" and "garder" in support of his conclusion that Mr. McIntyre did in fact catch and retain the clams by fishing them, then holding or keeping them in possession by the act of placing them in the storage container. In coming to his conclusion, the judge considered whether the accused complied with the s. 33(2) of the Fishery (General) Regulations (SOR/93-53) which require that where a person catches a fish, the possession or retention of which is prohibited, they must forthwith return it to the place from which it was taken. The judge concluded that Mr. McIntyre had not.

[8] In R. v. Gallant, 2005 PESCTD 6, aff'd 2006 PESCAD 4, the accused was charged with catching and retaining undersized oysters. As in the case at bar, the question was whether the oysters had been retained. Mr. Gallant had collected seven tubs of oysters in his boat, about 80% of which were undersized. After collecting the oysters, he moved his boat about ten minutes away and began cleaning the oysters and throwing the undersized catch in the water. The accused was acquitted at trial. On appeal, Campbell J. referred to R. v. McIntyre, and said this:

[11] I agree with Riordon J.'s analysis and interpretation of the word "forthwith". It is important to note that while the accused were not charged with a violation of section 33 for failing to return the incidental catch "forthwith" to the place from which it was taken, the interpretation of the word "retain" must be placed in context with the entire Fisheries Act and Regulations, making section 33 of the Fisheries (General) Regulations relevant to the proper interpretation of that word.

. . .

[13] . . . It is not only the length of time the oysters are in his possession that is a determinant of whether a fisher has "retained" them contrary to the Regulations. The process employed by the fisher is also important. Upon taking possession of a cluster of oysters, it is incumbent upon the fisher forthwith to engage in the process of eliminating undersized oysters from his possession. While it may not be as convenient to stop so frequently to separate and return undersized oysters, or while the fisher may prefer to fish for an extended period before stopping to do so, no evidence was presented that could lead to the conclusion that it was not practicable or possible to clean the clusters as they were taken into the dory. By keeping the uncleaned oysters in the dory for an extended period, including periods of moving from place to place, the accused was exercising dominion over the oysters beyond what was necessary to complete the process of catching and [returning] undersized oysters and is guilty of catching and retaining them.

On further appeal, in his reasons for the Court, Mitchell C.J. observed that Campbell J. interpreted "retain" in light of s. 33 of the Fishery (General) Regulations, and that it was appropriate to do so because it is important that the interpretation of "retain" be in harmony with the scheme and purposes of the Act and regulations as a whole (paras. 8-9). The Court found no error of law in his conclusion that oysters are retained if they are not returned to the water as soon as possible in the circumstances after being caught (para. 10).

[9] I adopt this line of reasoning as applicable to the sport fishing context in the case at bar. The concept of catch-and-retain stands in binary opposition to catch-and-release. That is, read in harmony with the scheme and purposes of the legislation, I think it must be concluded that Mr. Tang retained the over-quota rockfish at the point in time when he did not forthwith engage in the process of returning the rockfish to the water. Of course, he was entitled to catch and retain one rockfish. That was his quota. And, he was entitled to catch more rockfish, but he was required to return those fish to the water forthwith. Having failed to do

so, he is guilty of catching and retaining over-quota rockfish.

[10] Mr. Tang argues that courts should be hesitant to apply the McIntyre and Gallant reasoning to sport fishing on this coast. To do so would, he submits, inhibit the practice of taking after-catch photos of anglers with their fish, and this raises the spectre of harm to the guiding industry. I see little merit in this in terrorem argument. There is nothing in the record to support this argument, and I suspect that fishing guides have ways and means of taking excellent photographs while ensuring that their clients comply with catch and release requirements.

[11] Drawing on the many activities that can form part of the activity of "fishing," Mr. Tang argues that retention can only occur after the fish has become the property of the fisher. The short answer to this argument is that the charge Mr. Tang faced was that he did "catch and retain," not that he did "fish and retain." Whichever activities the definition of fishing might encompass in these circumstances, Mr. Tang caught over-quota fish. And, having caught these fish, he did not return them to the water forthwith. I agree with the Crown that a plain, harmonious, and purposeful reading of the legislation required Mr. Tang to release the fish at the point when he was in sufficient control of the fish to do so.

[12] Mr. Tang did "catch and retain" over-quota rockfish, the offence charged in Count 1. In the circumstances of this case, it follows that he also committed the offence of being in possession of those same fish.

Does the Kienapple Principle Apply to the Possession Offence?

[13] The rule against multiple convictions arising from the same act was addressed by the Supreme Court of Canada in R. v. Kienapple, [1975] 1 S.C.R. 729, R. v. Prince, [1986] 2 S.C.R. 480, and R. v. Wigman, [1987] 1 S.C.R. 246. In R. v. R.A.J., 2010 BCCA 304 at para. 6, Bennett J.A. summarized the principles:

The principle against multiple convictions was considered in R. v. Prince, [1986] 2 S.C.R. 480. The Court clarified some of the confusion which had arisen as a result of the decision in Kienapple. The court concluded that there had to be both a factual nexus and a legal nexus between the charges before the Kienapple principle could be invoked. The factual nexus requirement is generally satisfied when this question is answered affirmatively: "Does the same act of the accused ground each of the charges?": Prince at para 20. In order for there to be a sufficient legal nexus or sufficient proximity between the offences there will be no additional and distinguishing elements of the offence. There are some exceptions to this latter principle if a lesser offence is the second offence. Prince at paras. 32-33. Here, all of the sexual offences have the same maximum penalty of ten years and therefore the exception is not in issue.

[14] I agree with the Crown that there is a useful parallel to be drawn to the relationship between theft and possession of stolen goods. In a sense, by keeping the over-quota rockfish, Mr. Tang took what was not his to take, and was found in possession of these fish. However, I think the argument by analogy actually supports Mr. Tang's position that Kienapple applies to the charge of possessing the over-quota fish.

[15] In R. v. Van Dorn (1956), 20 W.W.R. 231 (B.C.C.A.), stolen goods were found in the accused's possession some hours after a theft, and he was convicted of both theft and possession. In his reasons for the Court dismissing the appeal, Coady J.A. referred to its unreported case, R. v. Dale, in which the accused had been found guilty of theft and possession of the stolen goods where the goods were found in possession some months after the theft. Coady J.A. said:

It seems to me that where the possession charged is so removed in time and place from the actual offence of theft as not to be or form a part of the theft, or is not so intimately identified in time and place with the theft as to form a part of it that it is then a distinct and separate offence for which the person may be convicted.

It was argued that since the theft necessarily involves the actual physical temporary possession by the thief of the goods at the time, then possession is necessarily involved in the act of theft itself, and as such could be considered an included offence and the thief consequently, under these circumstances, could not be convicted of both the offences of theft and possession. But it seems to me that cannot be said to be true when the possession is remote in time and place and is not the temporary possession incidental to the act of theft.

In both Dale and Van Dorn, the issue was somewhat academic because the sentence imposed on the possession charge was made concurrent with the sentence imposed on the theft charge. The issue in the case at bar is of practical importance, because fines were imposed on Mr. Tang on both the retain count and the possession count.

[16] In R. v. Siggins, [1960] O.R. 284 (C.A.), the accused was convicted of both theft and unlawful possession of motor vehicles. He was found in possession of the vehicles within days or weeks of their theft. On appeal, it was held that the jury having convicted on the counts charging theft, the convictions for possession could not stand. The majority reasons of MacKay J.A. referred to R. v. Van Dorn, and its holding that both convictions could stand where the possession offence is not intimately identified in time and place as to form part of the theft, but reasoned that while this may be so in certain circumstances, Mr. Siggins stole the vehicles and had continuous possession of them since and in these circumstances the two offences arise from the one act.

[17] These cases and others were reviewed by the Supreme Court of Canada in R. v. Côté, [1975] 1 S.C.R. 303, which in turn was referred to in R. v. Loyer, [1978] 2 S.C.R. 631 at 635-636, in the course of Chief Justice Laskin's summary of how the rule against multiple convictions applies to the offences of theft and possession of stolen property:

Of course, there is always the central question whether the situation is an appropriate one for the application of res judicata as dealt with in Kienapple. Typical cases of its application are those where an accused is charged both with theft and with unlawful possession, such possession being that obtained by the theft: see, for example, R. v. Siggins. In such cases there cannot be a conviction on the possession count if the accused has been found guilty of theft. Yet there may be cases where the possession, obtained subsequent to the theft of the same articles, will support a separate conviction of unlawful possession despite an earlier conviction of theft: see Côté v. The Queen.

[18] I turn to the application of the principles in these cases to our facts. The acts of retaining and possessing are intimately connected in time and place. Where, as in this case, Mr. Tang was found in possession of these over-quota fish before he had even docked his boat, there is a strong legal nexus between the act of retaining and the act of possessing. While they are not the same offences, in the circumstances of this case the same act grounded both the retain offence and the possession offence -- every act of catching and retaining over-quota fish resulted in the possession of those same fish. Mr. Tang has been convicted (and punished) twice for the same act: keeping over-quota rockfish. Suppose he had stolen the rockfish from another boat and was found in possession of those same fish before he docked his boat. In those circumstances, the authorities suggest that he could not be convicted of both theft and possession of stolen property. In the case at bar, he has taken fish from the ocean when he was prohibited from doing so, and soon after was found in possession of the same fish. The argument by analogy favours the application of Kienapple to the possession count.

[19] Moreover, I think the case for applying Kienapple is stronger for retention/possession than it is for theft/possession. The act of retaining over-quota fish is akin to theft, except that the act of retaining is a continuing act and this strengthens the case for staying the possession count. To retain is to "continue to have; keep possession of": The Concise Oxford English Dictionary (12th ed.). Mr. Tang caught the over-quota fish and kept possession of them. Keeping these over-quota rockfish was one act leading to multiple convictions for offences where, on the facts of this case, the actions of retaining and the act of possession have no additional or distinguishing elements.

[20] Before leaving this issue, I will refer to two fishery cases. In R. v. White, 2006 NLCA 71, the accused was found checking a moored net and removing three salmon from it. He was charged with possession of fish and fishing for salmon during close time. He was convicted at trial of the possession charge. He was acquitted of the fishing charge, in part on the basis that the judge was not satisfied that the taking of fish out of the net constituted fishing. On summary conviction appeal, the judge treated the case on the basis that Mr. White removed a number of fish from an illegal net that he came across. The appeal judge held that this isolated event did not constitute fishing. On further appeal, Mr. White's actions were found to be "fishing" and the Crown's appeal against acquittal was allowed. The Court of Appeal made a finding of guilt on the fishing charge, but ordered a stay of proceedings on the basis

of Kienapple, "which precludes multiple convictions based on substantially the same facts." I consider that the outcome of this case lends some support to Mr. Tang's position.

[21] The Crown relies on R. v. Armstrong, 2010 BCSC 1041. In that case, 45 commercial gillnetters participated in a protest fishery. They were convicted at trial of unlawfully setting fishing gear during a close time, unlawful fishing during a close time, and unlawful possession of salmon. At para. 67, Justice Gray distinguished R. v. White on the basis that the evidence did not establish that Mr. White placed the net and the act of fishing in the White case was the act of removing salmon from the net -- which was also the basis of the charge of possessing salmon. She held that the possession count in her case had an additional and distinguishing element from the acts of setting gear or fishing because not every act of setting gear or fishing results in the possession of fish (para. 66). This critical finding is what clearly distinguishes the Armstrong case from Mr. Tang's case: every act of retaining an over-quota rockfish led to Mr. Tang's possession of these same fish. Mr. Tang's acts of retaining these fish were also the basis of the charge of possessing the fish.

[22] The appeal is allowed against conviction on the possession charge on this Kienapple ground. This implies no criticism of the trial judge -- neither Mr. Tang, who appeared without counsel, nor Crown counsel (not the same counsel as appear on appeal) seem to have raised the potential application of Kienapple during the proceedings at trial.

[23] The retain offence and the possession offence carry the same potential penalty, and the same fine was imposed for each offence. In these circumstances, the conviction on the possession count is set aside and a conditional stay substituted. Of course, the fine imposed on the possession count falls away with the conviction.

Did Mr. Gao "Obstruct or Hinder" a Fishery Officer?

[24] Section 62 of the Act provides that no person shall obstruct or hinder a fishery officer who is carrying out duties or functions under the Act. The trial judge held as follows:

[46] For the reasons previously given, I reject the testimony of Mr. Tang on this point. I accept that a bucket or pail containing rockfish was dumped after Mr. Tang said something to Mr. Gao. I also accept the fisheries officers' testimony that, at the dock, Mr. Gao threw a rockfish overboard.

[47] Both of these acts that I have described by Mr. Gao hindered and obstructed the fisheries officers in their investigation. The bucket should not have been dumped until the officers had an opportunity to inspect it, and no fish should have been removed from the boat until the officers had a chance to inspect the boat.

[25] Mr. Gao submits that in the absence of "actual evidence of a deleterious impact to an inspection" there is no evidence of obstruction or hindrance, and the conviction cannot stand. He argues that Fishery Officer Rahier was able to determine the species of fish dumped by Mr. Gao, and was apparently able to collect all of the information he felt necessary to complete his task. However, in my opinion the finding that Mr. Gao hindered

and obstructed by dumping the bucket before the fishery officers had an opportunity to inspect its contents is sound. Officer Rahier saw at least four rockfish in the water after the bucket was dumped, but he was unsure of the exact number that had been in the bucket. Mr. Gao's actions prevented him from getting an accurate count or being able to check for other prohibited catch in the bucket.

[26] Recall that at trial Mr. Tang denied having caught any rockfish or having any rockfish on board his boat. Fishery Officer Maestrello tried to retrieve a rockfish that was still at the surface after being dumped out of the bucket by Mr. Gao, but it swam away. But for Mr. Gao's actions that prevented the fishery officers from preserving evidence, Mr. Tang's unfortunate allegations about fabrication of evidence against him might not have been aired.

[27] Subsection 49(1) of the Act authorizes the inspection of the contents of vessels and containers. As the Crown argues, Mr. Gao's actions prevented the fishery officers from checking compliance with a variety of regulations including those pertaining to protected and endangered species and length-restricted species. His actions not only slowed an inspection, in some respects they prevented an inspection altogether.

[28] Whether or not the fishery officers explicitly testified that they were hindered or obstructed in their inspection, there is ample evidence to support the trial judge's conclusion that they were. Hurriedly dumping catch when fishery officers are approaching is surely an archetypal form of s. 62 violation.

Conclusion

[29] Mr. Tang's appeal on Count 1, the catch-and-retain charge, is dismissed. His appeal on Count 2, the possession charge, is allowed; his conviction is set aside and a conditional stay substituted. Mr. Gao's appeal is dismissed.

"Thompson J."

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