



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**Appeal No.: 113/2015**

**The People at the suit of the Director of Public Prosecutions**

**Respondent**

**- and -**

**Gerrit Plug**

**Appellant**

### **Judgment of the Court delivered on the 29th day of July 2016 by Mr. Justice Mahon**

1. The appellant, who is a citizen of the Netherlands, was convicted at the Circuit Criminal Court sitting in Letterkenny in Co. Donegal on 27th March 2015, of three counts from a six count indictment, and has appealed against those convictions. They are as follows:-

• Count No. 1:

Failing to record all estimated discards above 50 Kg. of live weight equivalent in the vessels' log book in contravention of Article 14.4 of the Council Regulations (EEC) No. 2233/2009, and contrary to S.I. 320/2012 and s. 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006.

• Count No. 3:

Discarding species subject to quota during fishing operations in contravention of Article 19 of the Council Regulations (EEC) No. 850/98 as inserted by Article 1 of Regulation (EU) 227/2013 of the European Parliament and of the Council and contrary to Sea Fisheries (Technical Measures) Regulations 2013 (S.I. No. 197/2013) and s. 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006.

• Count No. 5:

Exceeding the maximum allowed space between bars in the water separators of a pelagic vessel targeting mackerel, herring or horse mackerel as prohibited by Article 32.(a) of Council Regulations (EEC) No. 850/98 as inserted by Article 1(15)(i) of Regulation (EU) 227/2013 of the European Parliament and of the Council contrary to the Sea Fisheries (Technical Measures) Regulations 2013 (S.I. No. 197/2013) and s. 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006.

2. Count no. 2 was the subject of a *Nolle Prosequi*. Directions were given in relation to counts no. 4 and 6. Sentences in fines of €35,000 in respect of each of the three counts were imposed.

### **General background**

3. The appellant is the Master of the sea fishing vessel "Annelies Ilena" (registration number KW174). On 22nd November 2013 the appellant's vessel was boarded by naval officers and sea fisheries protection officers ("SFPO") from the Irish Naval Service vessel, L.E. Roisin, which was on routine patrol in seas off County Donegal. The vessel is presently registered in the Netherlands, but was previously registered in Ireland when it was known as "Atlantic Dawn". On boarding the vessel, the officers established that the appellant's vessel had been fishing since 8th October 2013, and that there were no discarded fish ("discards") recorded in the log book since that date. The appellant was directed to update his log book in accordance with Art. 47(1)(d) of the Implementing Regulations (Council Regulations) (EU) No. 404/2011. The appellant indicated that there was no discards and none were recorded. An inspection established that there were in fact discards, weighing 53.04 Kg. and which by reason of their weight were required to be recorded in the logbook. The failure to so record these discards in the log book is the basis for count no. 1.

4. Count no. 3 relates to the alleged unlawful discarding of fish subject to quota, namely mackerel and horse mackerel in the course of fishing operations.

5. Count no. 5 concerns the space between bars in the vessel's water separator. It was alleged that that a number of spaces exceeded the permitted measurement thereby allowing larger fish be discarded into the sea in circumstances where such fish ought to have been retained on board the vessel. The issue in relation to this count concerns the date on which the separators were examined and the spaces measured. That inspection and measurement took place on 24th November 2013, in circumstances where the vessel had been boarded and placed under detention on 22nd November 2013, and had been detained at Killybegs Port between that date, and 24th November 2013.

### **Count No. 1**

6. Count no. 1 concerns a contravention of Art. 14.4 of the Council's Regulations (EEC) No. 1224/2009, and an offence contrary to the Sea Fisheries (Community Control System) Regulations 2012 (S.I. No. 320 of 2012) and s. 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006. Section 14(1) of the Act of 2006 empowered the relevant Minister to make regulations prescribing measures to give effect to treaties governing the European Communities or Community law relating to the E.U.'s Common Fisheries policy. Section 14(2) of the Act of 2006 identifies the matters in respect of which Regulations may be enacted and s. 14(3) provides for the commission of an offence where any regulation enacted pursuant to the Act of 2006 is breached.

7. The Sea Fisheries (Community Control System) Regulations 2012 sought to give full effect in Irish domestic law to Council Regulation (E.C.) No. 1224/2009 of the 20th November 2009 (other than Art. 92A) and Commission Implementing Regulation (E.U.) No. 404/2011 of 8th April 2011 (other than Title VII). However, both of these Regulations were in any event binding in their entirety and directly applicable in all Member States.

8. Article 14 of Regulation 1224/2009 provides for the "*completion and submission of the fishing log book*". Article 15 of the same Regulation provides for the "*electronic completion and submission of the fishing log book data*".

9. Article 14.4 of Council Regulation (EEC) No. 1224/2009 imposes the following requirement:-

*"Masters of Community Fishing Vessels shall also record in their fishing log book all estimated discards above 50 Kg. of live weight equivalent in volume for any species".*

10. Article 15.1 of 1224/2009 states as follows:-

*"Masters of Community fishing vessels of 12 metres length overall or more shall record by electronic means the information referred to in Article 14, and shall send it by electronic means to the competent authority of the flag Member State at least once a day."*

11. It can be seen that Article 15.1 of Regulation 1224/2009 imposes two separate and discrete obligations on Masters of Community fishing vessels of 12 meters length overall or more. It imposes (i) an obligation to record certain information (referred to in the heading to Article 15 as the "electronic completion of logbook data"), and (ii) an obligation to transmit that information to the competent authority at least once a day. The terms in which the recording obligation is imposed is as follows: "*Masters of Community fishing vessels of 12 meters length overall or more shall record by electronic means the information referred to in Article 14*". It is breach of this recording obligation that is charged in Count No 1.

12. The additional transmission obligation appears in the second clause of Article 15.1, following the comma that appears after "*Article 14*", and it reads as follows: "*and send it by electronic means to the competent authority of the flag Member State at least once a day*", (emphasis added).

13. Article 15.9 of Regulation 1224/2009 provides for the making of "*detailed rules*" for the application of Article 15. Those detailed rules are to be found in Commission Implementation Regulation (EU) No. 404/2011. Regulation 404/2011 is sometimes referred to as the *Implementation Regulation*, and Regulation 1224/2009 is sometimes referred to as the *Control Regulation*. Both regulations require to be read together.

14. The structure of the Regulation 404/2011 is not user friendly and it is sometimes difficult to follow. It is divided into "Titles" "Chapters" "Sections" and "Articles". In so far as the issues arising in this case are concerned the relevant Title would appear to be Title III dealing with "*Control of Fisheries*".

15. Title III is then subdivided into eight chapters, of which only Chapters I, II and III appear to be potentially relevant for the purposes of this case. Chapter I is entitled "*Fishing logbook, transshipment declaration and landing declaration in paper format*"; Chapter II relates to "*Fishing logbook, transshipment declaration and landing declaration in electronic format*"; and Chapter III relates to "*Common rules for fishing logbooks, transshipment declarations and landing declarations in paper or electronic format*".

16. In this case we are concerned neither with the rules relating to fishing logbooks in paper format (save to the extent that there may be common rules relating to fishing logbooks in paper or electronic formats), nor with the rules relating to transshipment declarations and landing declarations in either format. We are therefore only concerned with certain parts of Chapters II and III.

17. Chapter II is divided into two sections. Section 1 is entitled "*Completion and transmission of a fishing logbook, landing declaration and transshipment declaration data in electronic format*", and is comprised of 11 individual articles, being Articles 36 to 46 inclusive. Again, we are only concerned with those articles to the extent that they relate to completion and transmission of a fishing logbook. Rules relating to completion and transmission of landing declaration and transshipment declaration data are not relevant to this case.

18. Section 2 is entitled "*Specific rules for the fishing logbook in electronic format*", and is comprised of just one article, namely Article 47 which itself is entitled "*Frequency of Transmission*". As Article 47 is referred to by the appellant in his argument as to why his conviction on count no 1 ought to be quashed, it may be convenient at this point to set out its terms:

*"1. "When at sea the Master of an E.U. fishing vessel shall transmit the electronic fishing log book information to the competent authority of the flag member State at least once a day and no later than 24.00 even when there are no catches. He shall also send such data:*

*(a) at the request of the competent authority of the flag member State;*

*(b) immediately after the last fishing operation has been completed;*

*(c) before entering into port;*

*(d) at the time of any inspection at sea;*

*(e) at the time of events defined in E.U. legislation or by the flag State.*

*(f) when the last fishing operation took place not more than one hour before the entry into port the transmission referred to in (b) and (c) may be sent in a single message.*

*2. The master may transmit corrections to the electronic fishing log book and transshipment declaration data up to the last transmission referred to in para. (i)(c). Corrections can be easily identifiable. All original electronic fishing log book data and corrections to those data shall be stored by the competent authorities of the flag member State.*

*3. ...*

*4. ..."*

19. *Prima facie*, Article 47 appears to relate entirely to the second obligation imposed by Article 15.1 of Regulation 1224/2009, i.e., the transmission obligation.

20. To the extent that Chapter II contains detailed rules relating to the first obligation imposed by Article 15.1 of Regulation 1224/2009, i.e., the recording obligation, some such rules are to be found in Section 1, though for the most part they relate to the obligation to have a working fishing logbook in electronic format and with specifying what the Master of a fishing vessel must do in terms of recording and reporting in the event that his electronic system is malfunctioning. Section 1 does not in fact specify any rules concerning logbook recording procedures. Rather, these are to be found in Chapter III.

21. Chapter III is divided into three sections. Section 1 is entitled "*Common rules for the determination of live weight*", and comprises Article 48 to 50 inclusive. Section 2 is entitled "*Common rules for the completion and submission of the fishing logbook*", and comprises just one article, Article 51, entitled "*General rules for fishing logbooks*". For completeness, Section 3, comprised of Articles 52 to 55 inclusive, is entitled "*Common rules for the completion and submission of transshipment / landing declarations*", and is clearly not relevant.

22. Article 51, entitled "*General rules for fishing logbooks*" contains rules relating to the margin of tolerance in the estimation of quantities, the classification of "*live bait*", and the recording and reporting obligation where a fishing boat crosses a so-called "*effort zone*". None of these rules have a direct relevance in this case.

23. The appellant maintains that count no. 1 ought to have been withdrawn from the jury, as the prosecution evidence did not disclose the commission of any offence under the Regulations specified, i.e. Regulation 1224/2009. He contended that he had not been charged with a contravention of Council Regulation No. 404/2011, and that therefore the commission of an offence of contravening Art. 47 of those Regulations could not arise in circumstances where he had only been charged with an offence under 1224/2009.

24. The appellant is right that Count No 1 does not charge him with a breach of Article 47 of Council Regulation No. 404/2011, i.e., a breach of the transmission rules. On the contrary, it charges him with a breach of the recording obligation created by Article 14.4 of Regulation 1224/2009. The issue, however, is whether there was evidence of a breach of the recording obligation.

25. The appellant maintains that, as provided for by Article 47.1 of Regulation 404/2011, he was entitled to provide his logbook information to the authorities at any time up to midnight on the date in question. The inspection of the vessel had taken place shortly after 9 a.m. on the morning of the date in question, and he maintains the failure to record discards in the log book at that time did not constitute an offence as he was entitled to correct any erroneous information provided in any earlier transmission of information up to midnight on the day. He argued that in this way the return of information of no discards (as was indicated to the boarding party from L.E. Roisin) was open to correction (with the more accurate information of discards in excess of 53 Kg.) at any time up to midnight on the date in question. It was therefore not open to charge him with the offence based on the log book information provided earlier in the day.

26. It seems to this Court that the appellant misses an important point which is that the recording obligation, and the transmission obligation, are separate duties. Article 47 provides detailed rules governing the frequency with which relevant data which the Master of a fishing vessel is obliged to record must be transmitted to the competent authority. It is true that, in general, the transmission of relevant data can be effected at any time up to midnight on a particular date, and that the rules make provision for the transmission of corrective information where an earlier transmission may have contained an error. However, quite apart from any data transmission requirements the Master of a fishing vessel is required to record pertinent data, including estimated discards above 50kg of live weight, in his log on an ongoing basis throughout the voyage. This obligation does not derive from Article 47 of Regulation 404/2011, rather it derives from Article 14.4 of Regulation 1224/2009 as applied by Article 15 of the same regulation to "*Masters of Community fishing vessels of 12 metres length overall or more*".

27. Moreover, and in any event, Article 47 creates a transmission obligation "*at the time of any inspection at sea*".

28. An *inspection at sea* is precisely what occurred on the morning of 22nd November 2013. When so requested by the naval boarding party, the appellant was required to provide the relevant log information. That detail indicated no discards, whereas there was evidence that discards exceeding 53 Kg. existed at the time, and the log book details provided to the Naval Authorities at the time, and which he was concurrently obliged to transmit to the competent authority, ought to have recorded same.

29. The Article 47 *Rules* clearly require that the log book information be provided *at the time of any inspection at sea*. Otherwise, and ordinarily, the requirement is that such data be transmitted to the relevant authorities on or before midnight on each day while the vessel is at sea. Article 47.2 provides that the Master may transmit corrections to the electronic fishing log book and transshipment declaration data up to the last transmission referred to in para. (i)(c), that is *before entering into port*. No such corrections were transmitted in this case. The only relevant information is that provided to the SFPO's on the morning of 22nd November 2013.

30. On day 3 of the trial, and at the conclusion of the prosecution case, counsel for the appellant applied for a direction in relation to count no. 1. He did so on the basis that the case made against the appellant concerned a breach of Regulation 404/2011, whereas the appellant had not been charged with any such breach. He submitted that even if he had been charged with a breach of Regulation 404/2011 such could not have been sustained because the appellant had until 12 midnight on 22nd November 2013 to update his log book. That submission, in focussing on the transmission obligation as governed by Article 47 of Regulation 404/2011, completely ignored the separate recording obligation arising under Regulation 1224/2009 and was therefore misconceived and entirely off point.

31. The learned trial judge refused the application for a direction on count no. 1. In the course of his ruling, he recalled the evidence that when the appellant was asked by SFPO Hedderman as to why he was not recording discards in his log book he had stated that he was not doing so because he did not believe he was obliged to do so.

32. The learned trial judge was correct to refuse to grant a direction in relation to count no. 1. It was not necessary to specify in the count a breach of the Council Implementing Regulations 404/2011 as Council Regulation (EU) 1224/2009 incorporated the former and must be read in conjunction with the former. Moreover, the prosecution were not seeking to make the case that there had been a breach of Article 47 regulating frequency of transmission of electronic fishing logbook information. Rather, they were basing their case four square on the failure to record discards at all.

33. Count no. 1 sufficiently described the offence in respect of which SFPO Hedderman gave evidence to the trial, and the issue was properly left to the jury for its determination.

### **Count No. 3**

34. The essence of this count was that the appellant discarded certain species, subject to quota, namely mackerel and horse

mackerel into the sea in contravention of Article 19 of Council Regulation (EC) 850/98, as inserted by Art. 1 of EU Regulations 227/13.

35. The relevant part of Art. 19 of 850/98 provides as follows:-

*"Undersized marine organisms shall not be retained on board or be transhipped, landed, transported, stored, sold, displayed or offered for sale, but shall be returned immediately to the sea."*

36. Article 1.7 of 227/2013 inserts into 850/98, at Article 19(a), the following headed, Prohibition of high grading:-

"Within Regions 1, 2, 3 and 4 the discarding, during fishing operations, of species subject to quota which can be legally landed shall be prohibited."

37. The offence in question related to species mackerel and horse mackerel, both of which were subject to quota. What is disallowed (and known as the practice of highgrading) is the retention on board of fish within the relevant quota which is of a particular size, or greater than that size. The evidence in this case was that horse mackerel in excess of 15 cm in size was being discarded into the sea. SFPO Hedderman gave evidence that fish recovered from the discard chute included a number of horse mackerel each of which were above the legal minimum size. He stated:-

*"We measured every individual fish in the box, and every single intact fish was over the legal minimum size. The only fish that were under the legal minimum size were fragments of fish, damaged fragments, but every intact fish was over 15 cm."*

38. It was contended on behalf of the appellant that there was no evidence that any fish were being actually returned to the sea. This contention, however, flies in the face of the fact that SFPO Hedderman was told by the appellant himself that the chute identified by him, and in which he found the fish in question, returned fish to the sea, and that short of physically getting into the sea and observing from under the water line of the vessel that fish were emerging from the chute, no firmer proof of the fish being returned to the sea was possible. The fact that SFPO Hedderman observed what he saw, coupled with the admission to him from the master of the vessel that the chute was returning fish to the sea, was sufficient proof that this was in fact the purpose and practice of the chute.

39. A further issue arose in that it was contended on behalf of the appellant that there was no evidence as to the weight of the fish being discarded into the sea. In the context of the offence charged in count no. 3, the weight of the fish is irrelevant. It is the size of the fish that is relevant. For example horse mackerel which exceeded 15 cm were required to be retained on board the vessel, as horse mackerel was a species within the vessel's quota. The evidence was clearly to the effect that horse mackerel in excess of 15cm were being discarded into the sea.

40. In his ruling in relation to the direction that count no. 3 be withdrawn from the jury, the learned trial judge stated:-

*"The point is made that they were not in fact discarded, in other words they were retained. They were on board the ship or the vessel and they had not left the vessel, so how could it be said that they were discarded? I don't believe that is a good argument, it is quite clear that this particular chute that was used on this particular occasion, which was being flushed out with water from time to time, was in fact carried out with the effect of removing these fish from the vessels. There is a confusion of evidence as to where they were removed to, but there is a concession, not concession, but there is a .. there is evidence in fact that while the Lieutenant indicated that he did not see anything going over the side of the deck, but there is evidence of the fact that these particular scuppers that we are talking about were in fact scuppers that lead below the water line and whatever was going out was going out to sea."*

41. The court is satisfied that the learned trial's ruling was correct on the basis of the evidence heard, and that consideration of count no. 3 was properly left to the jury. This ground of appeal is therefore dismissed

#### **Count No. 5**

42. Count no. 5 concerns the water separator mechanism which acted to control the size of fish permitted to be discarded into the sea. The distance between the separator bars in this mechanism was capable of being increased / reduced by human intervention. It was normal practice to set them to limits decreed for different jurisdictions. The appropriate measurement for EU fishing waters was a maximum of 10 mm between any two separator bars. A wider gap was appropriate for another jurisdiction in which the vessel sometimes operated.

43. Following the boarding of the vessel by Fisheries Protection officers on 22nd November 2013, the vessel was taken to Killybegs and detained there for a period of time. Measurements of the gaps between bars in the separator were taken by SFPO Ivory, and a number of them were found to be in excess of 16 mm, 60% in excess of the permitted measurement of 10 mm. There was evidence that the vessel, on arrival into Killybegs harbour on 22nd November 2013, was detained there by gardai until 25th November 2013. It was therefore the case that the inspection and measurement of the gaps between bars in the separator was undertaken within this period, on 24th November 2013.

44. The appellant maintained that in order for the prosecution to prove that he had committed the offence of breaching Art. 32(a)(i) of Council Regulation (EC) No. 850/98, they were required to establish that the following circumstances existed on the 22nd of November 2013:-

- (a) that the maximum permissible gap of 10mm between the separator bars was exceeded;
- (b) that the vessel was a pelagic vessel;
- (c) that the vessel was targeting mackerel, herring and horse mackerel; and
- (d) that the vessel was in the NEAFC Convention Area.

45. It was contended on behalf of the appellant that the only evidence adduced at the trial concerning the gaps between the separator bars, and suggesting that in some instances those gaps were in excess of 10 mm, was in relation to the 24th November 2013. He contended that there was no evidence that such was the case on 22nd November 2013, the date on which the offence is said to have occurred.

46. In the course of rejecting the appellant's application for a direction on this issue, the learned trial judge stated as follows:-

*"I am satisfied that the operation here: the fishing operation ceased on 22nd November 2013, the vessel was brought to Killybegs and it remained there under detention over a period of time and that on inspection of this particular system, those bars were found to be wanting. There is no evidence that they had been interfered with in any way and there has been no fishing involved..."*

47. The court is satisfied that in these circumstances evidence of measurements taken on 24th November 2013 could reasonably ground a charge to the effect that the gaps between the separator bars exceeded the maximum permitted measurement in some instances on 22nd November 2013. The vessel had been directed to proceed to Killybegs following its boarding at sea by the LE Roisin's boarding party on 22nd November 2013. It had been detained in Killybegs upon tying up there. During the period when it was detained it was not involved in fishing operations. and there was nothing in the evidence to suggest that anyone on board would have had any reason to interfere with, or to seek to widen the gaps between the separator bars in the interval between the time of the vessel's detention and the time at which SFPO Ivory took his measurements on the 24th of November 2013. While the vessel was not formally preserved for forensic purposes between the time of its detention and the time at which SFPO Ivory took his measurements, this would not have rendered SFPO Ivory's evidence inadmissible. At most, it could have had possible implications for the weight to be attached to his evidence. However, it was also open to the jury to draw the inference that there had been no likely interference with the separator bars, and for them to have been satisfied beyond reasonable doubt that the gaps as measured on the 24th of November 2013 represented the gaps that must have existed on the 22nd of November 2013.

48. There was evidence that the fishing vessel in question was a pelagic fishing vessel. Evidence from Lt. Michael Devaney and SFPO Hedderman adequately established that this was the case.

49. As to the species of fish being targeted by the fishing vessel, there was ample evidence that the species targeted included mackerel and horse mackerel. There was evidence from Lt. Devaney that the vessel had a quota for both mackerel and horse mackerel, and substantial quantities of horse mackerel were found on board the vessel by sea fisheries protection officers. Such evidence as was given in relation to this species being targeted by the fishing vessel in its fishing operations was not challenged on behalf of the appellant.

50. Finally, in relation to the suggestion that there was no evidence that the vessel was operating within the NEAFC convention area, there was evidence from Lt. Commander Terence Ward that he plotted the position of the vessel at the time of the inspection, and that at that time it was in the NEAFC convention area. In evidence, Lt. Commander Terence Ward stated:-

*"After I instructed Sub Lt. Deveney at the time to caution and detain the vessel, I plotted the position of the fishing vessel. And this position was within the exclusive fishing limits of the State and in NEAFC, the North Eastern Atlantic Fisheries Commission region, too, and as defined by Council Regulation 850/1998."*

51. For the reasons stated, the appeal relating to count no. 5 must fail.

## **Conclusion**

52. This was a difficult and unusual prosecution. It involved a detailed consideration of complex EU Regulations, and the application of those regulations to the activities of the appellant's large fishing vessel at sea by sea fisheries protection officers, its detention at Killybegs and the subsequent examination of that fishing vessel when tied up in harbour. In general terms the trial was conducted over a period of three days in exemplary fashion. The learned trial judge's charge to the jury was fair and reasonable, with the issues raised by the appellant in this appeal properly left to the jury for its consideration and verdict. The appeal is therefore dismissed.