



THE COURT OF APPEAL

[214/15]

Birmingham P.
Edwards J.
Hedigan J.
BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
KLASS DIRK MEIJVOGEL

APPELLANT

JUDGMENT of the Court delivered on the 11th day of October 2018 by Birmingham P.

1. On 18th June 2015, following a three-day trial, the appellant was convicted of the sole count that had appeared on the indictment, being an offence of carrying on board a sea fishing vessel, within the exclusive fishery limits of the State, equipment prohibited by Article 32(1) of Council Regulation (EC) No. 850/98, in contravention of S.I. 197 of 2013 contrary to s. 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006. At a subsequent sentence hearing, the judge imposed a fine of €500 and ordered that fish with a value of €344,960 be confiscated and that fishing gear valued at €55,000 be confiscated.

2. The background to the trial and to this appeal against conviction is that on 11th February 2015, the Commander of LE Samuel Beckett decided to board and inspect a fishing vessel, the Wiron 5, of which the appellant was the Master. The boarding party concluded the vessel contained a grading machine and that there was a chute from the grading machine. Based on the observations of the boarding party, the Lieutenant Commander formed the view that the vessel was engaged in "high grading", an activity comprising the selection of the best fish from the catch and returning certain fish to the sea.

3. The grounds of appeal relating to conviction which are now in issue are as follows:

(a) That the appellant was charged on the basis that the equipment was in breach of Article 32(1) of Council Regulation (EC) No. 850/98, that the judge erred in law in not directing the jury as to the weight to be apportioned to Article 32(2)(b)(i). [Ground 2]

(b) The charge failed to address the complexity of the legal issues surrounding the interplay of competing articles and the derogations contained within. [Ground 3]

(c) The charge failed to instruct the jury as to how they should address a direct conflict in the law pertaining to Article 32(1) and 32(2)(b)(i). In a situation where questions were raised by the jury, the trial judge failed to adequately address the jury on the legal issues arising. [Ground 4]

It should be noted that at the outset of the hearing, counsel for the appellant indicated that they would not be proceeding with Ground 1 of the notice of appeal.

4. It is a striking feature of the case that none of the issues that are being canvassed in this appeal were raised to any great extent, or indeed to any real extent at all in the Court of trial. There was no challenge to the form of the indictment, no application for a direction and no requisition arising from the judge's charge.

5. For ease of reference, it is convenient to set out the statutory provisions that appear to be in issue. Section 14 of the Sea Fisheries and Maritime Jurisdiction Act 2006 provides as follows:

"14(1) Without prejudice to the generality of section 3(1) of the Act of 1972, the Minister may by regulations prescribe measures to give effect to any provision either of the treaties governing the European Communities or Community law which authorises any or all of the Member States of the European Communities to restrict, or otherwise regulate in respect of the common fisheries policy in a manner specified in the provision, fishing or fishing gear or equipment or buying, handling, weighing, trans-shipping, transporting, landing, processing, storing, documenting or selling fish. Such regulations may apply to any or all of the following:

(a) sea-fishing boats within the exclusive fishery limits;

(b) an Irish sea-fishing boat, wherever it may be; and

(c) any person engaged in buying, handling, weighing, trans-shipping, transporting, landing, processing, storing, documenting or selling fish within the State or the exclusive fishery limits.

(2) Regulations under this section may, in particular—

(a) prescribe measures such as—

(i) prohibitions of or restrictions on areas or times or methods of fishing or use of fishing boats or fishing gear or equipment on them,

(ii) prohibitions of or restrictions on fishing effort,

(iii) prohibitions of or restrictions on or requirements as regards the equipment of fishing boats or fishing gear, or the use, modification or maintenance or storage thereof or interference therewith,

(iv) prohibitions of or restrictions on the catching, handling, composition of catch, retention and storage on board, trans-shipment and landing of fish, including permitted—

(I) size and type of fish which may be caught, and

(II) times, locations and conditions of landings,

or such other measures as may be prescribed.

(b) impose obligations on the holder of a sea-fishing boat licence including, in particular, obligations in relation to—

(i) the catching, handling, composition of catch, retention and storage on board, trans-shipment and landing of fish, and

(ii) the taking, making and keeping of records and assisting and co-operating with any person appointed by the Department or its agencies to be on that boat,

and

(c) include such incidental, supplementary and consequential provisions as appear to the Minister to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).

(3) Where there is a contravention of a regulation under this section—

(a) in relation to a sea-fishing boat or to fishing gear or equipment on board the boat, the master and owner of the boat and the owner of the fishing gear or equipment each commits an offence, or

(b) in relation to fish, the master and owner of the boat concerned and the buyer, handler, weigher, transporter, processor, person storing or documenting and seller of the fish each commits an offence.

(4) In any proceedings for an offence under this section it shall be for the accused to show (as the case may be)—

(a) entitlement to any exemption or relief from any prohibition or restriction or requirement alleged to have been contravened, or

(b) that in the circumstances it was not possible to know or not reasonable to ascertain that a regulation was being contravened."

Council Regulation (EC) No. 850/98

6. Article 3 provides definitions for the various terms used in throughout the Regulation:

"(a) Marine organisms shall mean all marine fish, including anadromous and catadromous species during their marine life, crustaceans and molluscs and parts thereof.

7. Article 19 outlines the minimum size requirements with respect to marine organisms:

"(1) Undersized marine organisms shall not be retained on board or be trans-shipped, landed, transported, stored, sold, displayed or offered for sale, but shall be returned immediately to the sea.

(2) Paragraph 1 shall not apply to

(a) Sardine, anchovy, herring, horse mackerel and mackerel, within a limit of 10% by live weight of the total catches retained on board of each of these species. The percentage of undersized sardine, anchovy, herring, horse mackerel or mackerel shall be calculated as the proportion by live weight of all marine organisms on board after sorting or on landing. The percentage may be calculated on the basis of one or more representative samples. The limit of 10% shall not be exceeded during trans-shipment, landing, transportation, storage, display or sale."

8. Article 32 provides the restrictions and exceptions pertaining to the use of automatic grading equipment on fishing vessels:

"(1) The carrying or use on board a fishing vessel of equipment which is capable of automatically grading by size or by sex herring or mackerel or horse mackerel shall be prohibited.

(2) However, the carrying and use of such equipment shall be permitted provided that:

(a) The vessel does not simultaneously carry or use on board either towed gear of mesh size less than 70mm or one or more purse seines or similar fishing gears

or

(b) (i) the whole of the catch which may be lawfully retained on board is stored in a frozen state, the graded fish are frozen immediately after grading and no graded fish are returned to the sea except as required by Article 19

and

(ii) the equipment is installed and located on the vessel in such a way as to ensure immediate freezing and not to allow the return of marine organisms to the sea." [emphasis added]

9. Regulation 3 provides:

“The Master of –

(a) an Irish sea fishing boat wherever it may be

or

(b) a sea fishing boat in the exclusive fishing limits of the State shall comply with the requirements imposed by the Technical Measures Regulations in respect of fishing vessels and Masters of such vessels.”

10. Regulation 4 provides:

“An operator shall comply with the requirements of the Technical Measures Regulations which relate to operators.”

Council Regulation (EU) 1380/2013 Article 15 (Landing Obligation)

11. Article 15(1) states that “all catches of species which are subject to catch limits and, in the Mediterranean, also catches of species which are subject to minimum sizes as defined in Annex III to Regulation (EC) No 1967/2006, caught during fishing activities in Union waters or by Union fishing vessels outside Union waters in waters not subject to third countries' sovereignty or jurisdiction, in the fisheries and geographical areas listed below shall be brought and retained on board the fishing vessels, recorded, landed and counted against the quotas where applicable, except when used as live bait, in accordance with the following timeframes:

“(a) From 1 January 2015 at the latest:

— small pelagic fisheries (i.e. fisheries for mackerel, herring, horse mackerel, blue whiting, boarfish, anchovy, argentine, sardine, sprat);

— large pelagic fisheries (i.e. fisheries for bluefin tuna, swordfish, albacore tuna, bigeye tuna, blue and white marlin).”

Direction as to the Weight to be Apportioned to Article 32(2)(b)(i)

12. On the hearing of this appeal, the appellant has drawn attention, first, to the terms of Article 19 of Council Regulation (EC) No. 850/98, pointing out that subject to the exception in relation to sardine, anchovy, herring, horse mackerel and mackerel, provided for by sub-paragraph 2(a), that the Article prohibits the retention on board of undersized marine organisms and mandates their immediate return to the sea. The appellant says that this is highly relevant when one comes to consider the import of Article 32 of the same Regulation and in particular, the import of Article 32(2)(b)(i) and (b)(ii).

13. The appellant points out that the structure of the Article is that there is an initial stipulation in unqualified terms that equipment of a particular type i.e. equipment capable of automatically grading by size or by sex herring or mackerel or horse mackerel shall not be carried on board. However, the initially, apparently absolute prohibition, is immediately qualified by the statement:

“the carrying and use of such equipment shall be permitted [provided certain conditions are met].”

Article 32(2)(a) deals with the first situation in which the prohibition does not apply, namely, where the vessel does not carry or use mesh gear of a particular size or purse seines or similar fishing gear. This issue in relation to mesh size and purse seines was raised in the course of the appellant's written submissions where, it was submitted, that the judge should have withdrawn the case from the jury given the absence of any evidence on the issue, or alternatively, should have directed the jury that they had to be satisfied beyond a reasonable doubt on the evidence that equipment of the type in issue was on board. This submission was advanced, notwithstanding that the issue had not surfaced during the course of the trial. However, in the course of oral submissions, Senior Counsel for the appellant expressly stated that the point was not being pursued, it not having been raised at trial. This was a realistic and responsible approach and in the circumstances, it is not necessary to consider the mesh size/purse seine issue further. Rather, the focus of attention has been on sub-paragraphs (b)(i) and (b)(ii). At the outset, it will be noted that sub-paragraphs (b)(i) and (ii) are conjunctive. If the prohibition is not to apply, sub-paragraphs (b)(i) and (b)(ii) must be complied with.

14. The appellant points out that the issue of return to the sea is dealt with differently at sub-paragraphs (b)(i) and (ii). The former contemplates some returns, the returns required by Article 19, while the latter requires the equipment to be installed so as not to allow the return of marine organisms and appears to do so without any qualification or derogation.

15. The appellant says that there is a conflict between (b)(i) and (ii), but also between (b)(ii) and Article 19. He says that a Master is placed in an impossible position, pulled in opposite directions by (b)(ii) and Article 19. Alternatively, it is said that the interaction of Article (b)(ii) and Article 19 gives rise to such a state of uncertainty as to legal obligations that the imposition of criminal liability is excluded.

16. On behalf of the respondent, the conjunctive nature of (b)(i) and (b)(ii) is stressed. Counsel for the Director says that in order for the prohibition on having the equipment to be dis-applied, four conditions must be met, namely:

(i) that the whole of the catch is stored in a frozen state;

(ii) the graded fish are frozen immediately after grading;

(iii) no graded fish are returned to the sea except as required by Article 19; and

(iv) the equipment is installed and located on the vessel in such a way as to ensure immediate freezing and so as not to allow the return of marine organisms to the sea.

17. He says that irrespective of what view is taken in relation to the arguments that have been raised in relation to Article 19, the

prohibition is not dis-applied because it is absolutely clear that the equipment on board was capable of allowing the return of organisms to the sea. Again, the graded fish was not immediately frozen as there was an intermediate stage of manual grading.

18. In the course of additional written submissions, the Director has, for the first time raised the relevance of Council Regulation (EU) 1393/2014 referring to Article 15(1). The submissions contend that Article 19 had been repealed by Article 15(1). In contrast, during the hearing itself, counsel for the Director appeared to conduct his case on the basis that Article 19 was still operative. It was his contention that Article 19 was irrelevant to the test outlined in Article 32(2)(b) notwithstanding the internal reference to same. While the written submissions ostensibly refer to Regulation 1393/2014, it appears that the submissions in fact refer to provisions contained within Council Regulation 1380/2013.

19. The procedural situation that has developed is a wholly unsatisfactory one. The arguments now sought to be advanced in relation to the interaction of Article 19 and Article 32 were never raised with the trial judge. No submissions were made to him as to how he should charge the jury or as to what issues needed to be dealt with by him in the course of his charge. There has been reference in the course of the appeal to the well-known and established Cronin line of jurisprudence, a reference to the decision of the Court of Criminal Appeal in DPP v. Cronin [2003] 3 IR 377. It will be recalled that was a case where the appellant had been convicted of murder, the case against him being that he had discharged a shot from a firearm in a nightclub. At trial, the defence was that the accused had nothing to do with the shooting and never had a gun at any stage. At the appeal stage, the defence sought to argue as a Ground of Appeal that the judge had not directed the jury as to accidental discharge and what was described as the defence of accident. It must be said at once that what has happened in the present case is altogether different. Here, there was no engagement with the issues now said to arise by the defence at trial. Instead, the Court is asked to deal with the matter as a Court of first instance. The Court is prepared to accept that there would appear to be possible tension between Article 19 and Article 32. It may be that there are issues that will have to be resolved in that regard by a Court on a future occasion. Indeed, there may be a need for legislative intervention to bring greater clarity to the area. Again, the extent to which Article 19 has been affected by Regulation (EU) 1380/2013 and (EU) 1393/2014 is a matter that requires elucidation. The question is whether that can or should happen in the context of the present appeal.

20. This Court is of the view that it is neither necessary or appropriate. The Court takes that view because it believes the submission of counsel for the Director that the prohibition on having the equipment is dis-applied only when all relevant conditions are met is well-founded and that it is the case that if one condition for derogation is not met, that the prohibition applies with full force and effect. If that is so, the fact that the vessel might be or would be in a position to come within the terms of some or all of the other conditions is irrelevant.

21. The Court is satisfied that in the present case, there was evidence on foot of which the jury could be satisfied that there was equipment of the prescribed type on board and that the prohibition on the equipment was not dis-applied because the equipment was not installed or located on the vessel in such a way as to ensure immediate freezing and not to allow the return of marine organisms to the sea.

22. The Court has considered the criticism of the judge's charge that has now been formulated. The Court accepts that the charge was somewhat terse and agrees that there were a number of elements which could, with benefit, have been elaborated upon. However, we cannot lose sight of the fact that those who heard the charge delivered did not raise any criticisms and it must be the case that they did not feel at that time that they were so inadequate as to prevent the jury considering the evidence and then applying the relevant law to the evidence they had heard. The judge is criticised for not explaining the ingredients of this offence in greater detail and for his actions in providing the jury with a copy of the Regulations to read. It is the case that the course of action taken was unusual though certainly not unknown. There was no criticism at the time or any suggestion that the course of action proposed required to be supplemented. The possibility of the jury having the EU Regulations had been raised by counsel for the prosecution in his opening statement and did not provoke any reaction. Indeed, when the jury, in the course of deliberations, asked to see the Regulation that contained Article 32, though why they needed to do this given that the judge had told them that they were getting the Statutory Instruments and Regulations at the end of his charge, is not clear, there was no objection from either side. Prosecution counsel said expressly there was no objection while the defence solicitor went so far as to pull out a copy and provide it.

23. The adequacy of the judge's charge must also be seen in the context where there had been no controversy in the course of the trial as to the applicable law. Prosecution counsel, as is not unusual, in both his opening statement and closing remarks, had made reference to the law applicable. The defence advocate's first words in his closing address were to say "on behalf of the accused, that Mr. McCarthy [prosecution counsel] has outlined the legal concerns and questions which you must ask yourself very fairly".

24. In the course of written submissions, the appellant criticised the judge for telling the jury that the word 'immediate' was to be construed in its ordinary meaning, immediate, and not providing further assistance. However, the point did not feature to any significant extent. At the appeal hearing, counsel for the appellant, indicating that he was not going to labour that point, that it was just another factor that goes into the pot. Neither at trial, in oral submissions or on the appeal has an alternative formula that the judge should have employed been identified. The word 'immediate' is a commonly used word, used day in, day out. Unlike words such as provocation or corroboration or defilement, the word 'immediate' is not a legal term of art. We do not think the judge is to be criticised for telling the jury that it should be given its ordinary meaning. Had the trial judge sought to gloss the word 'immediate', for example, by saying "without the possibility of any intermediate process", then by so doing he might well have disadvantaged the defence. There were other aspects in which the charge was, if anything, overly favourable to the defence. It stressed, as is usual, that the onus of proof is on the prosecution and that the defence did not have to prove anything, and they were told repeatedly that if they had any doubts, they should acquit. However, no mention was made of s. 14(4) of the Sea Fisheries and Maritime Jurisdiction Act 2006 with its stipulation that in proceedings for an offence under this section, it was for the accused to show an entitlement to any exception or relief from any prohibition or restriction or requirement alleged to have been contravened, or that in the circumstances, it was not possible to know or not reasonable to ascertain that a regulation was being contravened.

25. Overall, the Court has not been persuaded that the trial was unsatisfactory or the verdict unsafe or that the case was one in which the verdict should be quashed.

26. Accordingly, the Court will dismiss the appeal against conviction.