Regina v Michael Edward Jagger

Case No. 2014/01891/C4

Court of Appeal Criminal Division

19 February 2015

[2015] EWCA Crim 348

2015 WL 997446

Before: Lord Justice Treacy Mr Justice King and Mrs Justice Andrews DBE

Date: Thursday 19th February 2015

Representation

Miss K Hollis QC and Mr D Pojur appeared on behalf of the Appellant.

Mr J Ageros QC and Mr S Ventom appeared on behalf of the Crown.

Judgment

Lord Justice Treacy:

1 On 13th March 2014 in the Crown Court at Bradford the appellant was convicted of depositing controlled waste without a permit, contrary to section 33(1)(a) of the Environmental Protection Act 1990 . On 4th April 2014 he was fined £1,000 and ordered to pay £3,850 prosecution costs, as well as a £15 victim surcharge.

2 The case is concerned with the depositing of materials on a piece of land at Raglan Street, Halifax between 28th and 30th September 2010. Demolition work had taken place there since August 2010. Such work had been contracted out by the landowner. Others were prosecuted in relation to a different part of the site, but the case relating to the appellant is concerned with part of the land known as Area Three. Area Three was represented by a void created when a floor area of a pre-existing building was removed. The Crown's case was that the appellant was responsible for importing and depositing material into that void, that it was waste material, and that at the relevant time there was no permit in force for the dumping of waste.

3 The appellant acknowledged depositing material in the void at the time concerned. In interview he said that he had tipped some 30 to 40 loads there. He accepted that the material which he had brought to the site and put into the void had originated from a building site at Bright Street. The material had been excavated in the course of housing development and discarded from there. He had collected it and delivered it to Raglan Street. The Crown's case was that the appellant had deposited controlled waste and that he had failed to carry out proper checks as to the existence of any exemption or authority to permit him to deposit it.

4 The defence case raised a number of issues: first, that the material did not constitute controlled waste at the time of the deposit; secondly, that he had acted with due diligence; and thirdly, that in any event his actions had been carried out in an emergency where there was a need to deposit materials to shore up the public street adjacent to the hole and thus avoid danger to health. The appellant was supported in his contention that an emergency had arisen by evidence from an expert, Dr Hill, and by evidence given by others in the case.

5 The depositing of waste material in this country is subject to regulation, and offences are created by section 33 of the Environmental Protection Act 1990 . Where relevant, that section provides:

"(1) Subject to subsection 1(A), (1B), (2) and (3) below … a person shall not –

(a) deposit controlled waste … unless an environmental permit authorising the deposit is in force and the deposit is in accordance with the permit; …

…

(6) A person who contravenes subsection (1) above commits an offence.

(7) It shall be a defence for a person charged with an offence under this section to prove –

(a) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or …

(c) that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where –

(i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution of the environment and harm to human health; and

(ii) particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done."

6 Section 75 of the Act provides:

"(1) The following provisions apply for the interpretation of this Part.

(2) 'Waste' means anything that is waste within the meaning of Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council on Waste .

…

(4) 'Controlled waste' means household, industrial and commercial waste or any such waste."

7 Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council on Waste (the Waste Directive) defines "waste" as any substance or object which the holder discards or intends or is required to discard. Article 3(6) provides that "waste holder" means the waste producer or the natural or legal person who is in possession of the waste.

8 Section 75 of the Act, which provides a definition of "waste", does not provide a comprehensive and self-contained definition since it makes reference to the Waste Directive. That is potentially important in the context of this case because an issue arises as to the circumstances in which waste may alter its character and cease to be waste. There is domestic case law which indicates that the objectives of the 1990 Act and of the Waste Directive need to be considered. Before we consider those matters further, it is necessary to return to the circumstances of the present case.

9 The issue which arises in this appeal is whether the judge's direction in summing up as to the meaning of "waste" was defective. It is submitted that the definition of "waste" and "controlled waste" given by the judge was too restrictive; that it paid insufficient regard to the Waste Directive , and guidance relating to it, including guidance from DEFRA, the Development Industry Code of Practice (CL:AIRE), and case law. Allied to that is the submission that the judge's direction meant that the jury could not apply the relevant meaning to the facts of this case and that the judge's direction as to the test to be applied in considering whether the material had the status of waste at the time of its deposit was defective. It is submitted that there was a failure to put into context question 3 in the Route to Verdict document provided to the jury.

10 At the close of the evidence, Mr Pojur raised the issue of the categorisation of material as waste in circumstances where potential re-use of the material might take it out of the category of waste provided that re-use was consistent with the aims and objectives of the 1990 Act and the Waste Directive . Counsel made particular reference to the decision of this court in *R v W, C and C [2010] EWCA Crim 927* , and in particular paragraph 34 of the judgment of McCombe J (as he then was).

11 The judge was clearly anxious not to over-complicate the jury's task by introducing matters from the European Directive or putting substantial materials deriving from that before the jury. He said that each case of this sort had to be dealt with on a case-by-case basis and he was unconvinced that the evidence required that the jury should receive anything like the level of direction suggested as to what amounted to waste. He considered the point to be very straightforward on the facts. Clearly we shall have to consider whether what he proceeded to do was sufficient, or whether it failed sufficiently to give clear guidance on relevant issues so as to render the verdict unsafe.

12 When he summed up, the judge correctly told the jury that there was no permit in force authorising the deposit and that the appellant accepted that he had deposited material at the site. He correctly identified the three issues of (i) whether what was deposited was controlled waste, (ii) due diligence, and (iii) the emergency defence. He told the jury that the burden of proving that the material deposited was controlled waste lay with the prosecution.

13 After those directions, the judge turned to the definition of “waste” and “controlled waste” as part of a Route to Verdict document provided to the jury. It provides as follows:

> **“Definition of Waste and Controlled Waste**
>
> 1. Waste means any substance or object which the holder discards or intends or is required to discard.
>
> 2. In the context of this case, controlled waste means waste arising from works of construction or demolition including waste arising from work preparatory thereto. You must be sure the prosecution have proved this.
>
> 3. Excavated soil which has to be discarded by the then ‘holder’ is capable of being controlled waste and in any individual case, ordinarily will be – although this remains a matter for you to determine. Having become controlled waste it remains controlled waste unless something happens to alter that. Whether such an event has happened is a matter for you.
>
> 4. If the prosecution have made you sure that the material is controlled waste, it is for the defence to persuade you that it is more likely than not that the material is not controlled waste, because it has been acceptably recovered or acceptably disposed of.”

14 The judge then commented that applying that definition to the evidence in this case the Crown said that the material deposited was controlled waste. That deposited by the appellant came from another site. He continued:

> “On the other hand, the defence say the material deposited may not have been controlled waste given that it may have been acceptably recovered and acceptably disposed of.”

15 He said no more on the topic but subsequently turned to a consideration of the due diligence and emergency defences which had been raised.

16 Having done that, the judge provided the jury with a Route to Verdict. He did not read through it but instructed the jury to consider it during their deliberations. He made further passing reference to the definition of waste already cited but said no more than that he hoped it would assist the jury in determining the issues outlined in the Route to Verdict.

17 Insofar as that document concerns the appellant, where relevant, it was in the following terms:

> "Q3 – Are you sure that the material deposited was controlled waste?
>
> If the answer is no then you must find Michael Edward Jagger not guilty.
>
> If the answer is yes, consider question four.
>
> Q4 – Do you find it more likely than not that Michael Edward Jagger took all reasonable precautions and exercised all due diligence to avoid the commission of the offence?
>
> If the answer to that question is yes then you must find Michael Edward Jagger not guilty.
>
> If the answer is no, then consider question five.
>
> Q5 – Do you find it more likely than not that Michael Edward Jagger acted in an emergency to avoid danger to human health? When considering that question consider whether or not the situation at Raglan Street was 'a state of things unexpectedly arising and urgently demanding immediate attention' and take into account the degree and character of any emergency and any other means of dealing with it.
>
> If the answer to that question is yes then consider question six.
>
> If the answer is no, then you must find Michael Edward Jagger guilty and you do not have to consider question six."

18 The starting point in support of the appellant's submission that the summing-up did not direct the jury sufficiently on the issues surrounding the question of waste in this case is the decision of this court in R v W, C and C . That too was a case where the appellant had moved excavated soil from one site to another without a relevant licence being in force. There the defendants' case was that the material was to be used for creating an area of hard standing for the extension of farm facilities and the construction of a new farm building on top of it. The defendants had successfully submitted at the close of the Crown's case that the Crown had failed to establish that the material deposited was waste or controlled waste. The judge had accepted those submissions and the Crown had appealed under section 58 of the Criminal Justice Act 2003 against that terminating ruling. In holding that the defence submission of no case to answer was wrongly accepted, this court made an analysis of relevant case law and materials which it is helpful to recite.

> "31. The respondents in the present appeal not unnaturally relied heavily upon *Inglenorth* , as they did before the judge. They submitted that the immediate re-use of the deposited materials took them outside the definition of 'waste' in the Act, since that removed the element of 'discarding' which the European Court has consistently adopted at the touchstone of the definition of waste.
>
> 32. Given the findings of fact in *Inglenorth* and (importantly) the nature of the materials involved, we consider, as did Sir Anthony May and Dobbs J, that the material deposited at the second site, at the only moment that it mattered for the purpose of the prosecution in that case (namely the date of the deposit itself), could properly be considered not to be waste within the meaning of the Act.
>
> 33. However, we do not take the view that the question of immediate re-use of the relevant material can be entirely determinative of the status of the material regardless of other considerations. Sir Anthony May's example of hardcore delivered for the immediate invisible repair of a domestic driveway may be one thing, but (by way of further example) the piling up of hardcore and subsoil, which was waste in the hands of the party who extracts it from the land, for the construction [of] an intrusive artificial ski-slope on someone else's land may well be another. As Girvan LJ said in O'Hare such material may well remain as waste which has to be disposed of in some manner notwithstanding an immediate intention of the recipient to re-use it. 'The term "discard" must be interpreted in the light of the aims of the [Directive] …' and '… material which was originally waste needs to continue to be so treated until acceptable recovery or disposal has been achieved': see again per Carnwath LJ in OSS , paragraphs 14(iv)

and 56.

34. We conclude, like the Court of Appeal in Northern Ireland, that excavated soil which has to be discarded by the then 'holder' is capable of being waste within the Act and, in any individual case, ordinarily will be. Having become waste it remains waste unless something happens to alter that. Whether such an event has happened is a question of fact for the jury. The possibility of re-use at some indefinite future time does not alter its status: see Palin Granit , and indeed ARCO . Actual re-use may do so (*Inglenorth*), but only if consistent with the aims and objectives of the Act and of the Directive: (c.f. O'Hare), the principal ones of which are the avoidance of harm to persons or to the environment, as set out in the recitals to the Directive. Which of those aims and objectives are relevant to an individual case will depend on the cases presented by the parties. In this case, for example, the main concern maintained by the Crown is for the environment around the village where the respondents' farm lies (as a Special Area of Conservation) and visual amenity in the area generally. Matters which, in our judgment, are readily capable of assessment by a jury in deciding whether any material in issue is in fact 'waste'.

35. Accordingly, and with respect to the judge who grappled admirably with an opaque and extremely difficult area of law, we find that he was wrong to accede to the first defence submission in this case.

36. In the first place, he was in error in assessing the status of the materials entirely by reference to the respondents as 'holder'[s]: see paragraph 9 of the judgment, last sentence. The hauliers were also clearly 'holders' of materials which it was open to the jury to find to have been waste from the moment of excavation at the neighbouring farm and requiring to be discarded by the land owners as 'holders'. The additional question was whether what the jury could find to be 'waste' from the moment of excavation to the moment immediately prior to deposit on the respondents' land ceased to be so because of the intended and actual use of it by the new holders. That too, in our judgment, was a question of fact for the jury.

37. Secondly, the judge fell into error, we think, because he then concentrated entirely upon the intentions of the respondents to put the material to immediate use and found that it could not be waste because there was not the slightest element of discarding in the use to which they put it immediately after the deposit: see paragraph 18. At the close of the Crown's case there was to our minds undoubtedly evidence to go to the jury which would entitle them to find that these materials were waste that were required to be disposed of by the producers and by the hauliers and that the respondents had been paid to relieve that need on their part. If satisfied, on that material, that this was waste at that stage, the further question that remained for the jury was whether, having regard to the aims of the Directive, the materials ceased to be waste, no longer being discarded by anyone, which was being subjected to acceptable recovery or disposal.

38. …There may be cases where what is deposited as waste in the recipient's hands is deprived of that character by later acceptable use. However, in the present case, the answer to the question posed at the end of paragraph 37 above is likely to resolve all five counts on the indictment, by virtue of the jury's view of the respondent's intended and immediate actual use of the materials. Was that a use in accordance with the objectives in the Directive and particular[ly] recital (2), quoted in paragraph 19 above? If so, that would seem to us to be likely to resolve all the counts, for it is difficult to see how in this particular case the character of the material, when received into the possession of the respondents, could be held to change at the instant of deposit on their land. This is not to cast doubt on the pleas of guilty entered by the hauliers who may well have accepted that their sole purpose was to dispose of the controlled waste, the intended and actual purposes of the respondents in receiving it being immaterial to them."

19 Whilst accepting the observation at paragraph 34 that excavated soil which has to be discarded by the then holder is capable of being waste within the Act and, in any individual case ordinarily will be, the appellant submitted that the judge did not give the jury any sufficient direction as to whether an event had occurred which had changed the status of the material from

waste. That was a question of fact for the jury. Re-use might change the status of waste but only if consistent with the aims and objectives of the Act and the Directive. Because each case is fact-specific, a direction to the jury tailored to the facts of the instant case was needed. It had not been given in this case, despite the invitations made by defence counsel.

20 The approach of the court in R v W, C and C was *followed in R v Evan Jones and Another [2011] EWCA Crim 3294* . At paragraph 5 of R v Evan Jones , Toulson LJ (as he then was) observed that the statute was silent about the circumstances in which waste may alter its character and cease to be waste. The court cited R v W, C and C with approval, stating at paragraph 11:

> "The court concluded that 'this was a question of fact for the jury'. In short, the court in W, C and C did not contradict Inglenorth but developed it by holding that an intention of immediate reuse does not provide an automatic defence to a charge under section 33 . It will depend on the nature of the material and the intended reuse. The court recognised importantly that this legislation was passed in order to give effect to a European Directive and that in interpreting and applying it, it is necessary to have regard to the environmental objectives which underpin the Directive."

21 Article (1) of the Directive shows those objectives as follows:

> **"Subject Matter and Scope**
>
> This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use."

22 Attention was drawn to the European Commission Guidelines on the Interpretation of the Waste Directive . In particular at paragraph 1.1.2.1 concerning the term "discard", it observes that the alternative by which a holder "discards, intends or is required to discard" are not always easy to distinguish. A holder's intention is to be inferred from his actions in the light of the aims of the Waste Directive . An example is given of an item thrown in a dustbin as being discarded, and is thus waste. On the other hand

> "For a number of cases and in a very wide range of circumstances, there remains uncertainty. The CJEU had recognised a need for flexibility in adopting a case by case approach as well as a need to consider all the specific factual circumstances involved. Furthermore the court has held that in view of the aims and objectives pursued by the WFD [the Waste Directive] the concept of waste cannot be interpreted restrictively."

23 A little later the Guidelines state that it must be noted that no single factor or indicator is conclusive of what is waste and it is necessary to consider all the circumstances. Similar observations appear in the Development Industry Code of Practice (CL:AIRE). It seems to us that the Guidelines are consistent with the approach of this court.

24 It was submitted that the following factors should have been drawn to the jury's attention and weighed by them in considering whether what the appellant had deposited should be regarded as waste.

> i) The protection of human health and protection of the environment. The jury should have been asked to consider whether the deposit of the material created unacceptable risks to the environment or of harm to health. If so, it was likely to be waste.
>
> ii) Suitability for use without further treatment. Material must be suitable for its intended use. If it is used in that way without the need for further treatment it is less likely to be waste.

iii) Certainty of use. The holder of the material must be able to demonstrate that the material will actually be used and that the use is not just a probability but a certainty.

iv) Quantity of material. Material should only be used in the quantities necessary for that use and no more. Use of an excessive amount of material will indicate that it is being disposed of and is waste.

25 It is submitted that those factors identified were relevant to an assessment of whether what was being deposited by the appellant was waste at that stage. His case that what he was depositing was excavated stone and soil from works preparatory to a housing development which was to be used at Raglan Street for the emergency purpose of filling the void there which had created a serious risk of the wall adjacent to Raglan Street collapsing with resultant risk to the public. Whilst there were in evidence counter-indications to that case advanced by the appellant, the matter was for the assessment of the jury with appropriate assistance on the issues from the judge in the summing-up. The judge, it was submitted, failed to provide the necessary assistance; in the result the conviction was unsafe.

26 On behalf of the respondent it was submitted that paragraphs 3 and 4 of the definition of waste were accurate and reflected paragraph 34 of R v W, C and C . Whilst the four factors contended for by the appellant were not specifically mentioned in the summing-up, they had been referred to by counsel for the appellant in cross-examination of the Environment Agency Officer and covered in counsel's closing speech. (Counsel for the respondent did not submit that the factors, which can be derived from the Directive and guidance, and which seem to us to be consistent with the approach in R v W, C and C , were not relevant in this case). The respondent went on to submit that the judge had been rightly concerned not to over-complicate the case by references to the Directive or guidance given in relation to it. It was further submitted that in any event the state of the evidence was such that the conviction can be regarded as safe.

27 We accept that there was a genuine issue for the jury to resolve as to whether what was deposited by the appellant constituted waste at the time of its deposit. Although the material constituted waste at the time it left the original site, it was accepted on all sides that its status was capable of change. The essential question for us is whether the judge did sufficient in his summing-up to put that issue before the jury.

28 We accept that the judge was entirely correct in his approach to try to avoid over-complication of matters for the jury. His view that to provide extracts from the Waste Directive or guidance upon it would be helpful is entirely understandable. On the other hand, if he was not to provide such materials, the question arises as to whether he should at least have referred to the effect of them in order to be consistent with the approach taken in R v W, C and C .

29 If there was such a requirement on the judge in the circumstances of this case, we do not think that it is an answer that defence counsel had referred to any relevant considerations in cross-examination or in his closing speech. Those do not have the same status in the eyes of a jury as the directions of a judge whom the jury will understand is the sole arbiter of the law and whose legal directions are provided to the jury as definitive. The submissions of counsel in this context have the disadvantage of appearing partisan unless they have the imprimatur of the judge.

30 Considering the written definition of waste provided to the jury, we note that at paragraph 3 the judge stated that material remained controlled waste unless something happened to alter that. The judge did not then go on to assist the jury in any way by reference to the facts of this case by indicating to them factors which might have a bearing on the question of whether such altercation had taken place. We also note that at paragraph 4 the judge referred to the possibility that material was not controlled waste if it had been acceptably recovered or disposed of. Again there was no reference to what that might mean in the context of this case. It seems to us that it was far from self-evident what that phrase meant.

31 We note that at page 102 of the summing-up, in summarising the appellant's evidence, the judge quoted him as follows:

> "I did regard what was deposited at Raglan Street as other material, not controlled waste. It was virgin material and gave us the necessary compaction. It was totally harmless to human health, didn't have any purpose to us, it had been discarded from where we collected it but it did have a purpose when we put it into Raglan Street. We had evacuated – excavated – the material from Bright Street, it was only when we saw the situation at Raglan Street that I then intended that that material should go into Raglan Street. I didn't know exactly the quantity that was involved, but 27 loads gave us sufficient material to do what we needed to do. I didn't move any more material than was necessary to fill the hole and buttress the wall."

32 That evidence potentially provided a factual basis for the defence submissions on this point. This came at a late stage of the summing-up significantly after the judge's legal directions, and indeed on the day after those directions had been given. In reciting the appellant's evidence, the judge did not refer back to his legal directions in any way or draw attention as to how this evidence might fit in with the directions given as to the definition of waste. Equally, when he summarised the evidence, the judge did not specifically identify factors which might have supported the prosecution's case that the material remained waste. We note, however, that the thrust of the definition provided in paragraph 3 was that material would ordinarily remain waste unless something happened to alter that.

33 We do not underestimate the task of the judge in this case. He had other defendants to deal with and a number of other issues to cover in relation to them, as well as those pertaining to the appellant's case. As has previously been observed, this is not a straightforward area of the law, and the question of what is waste at any given time is not clear-cut. This perhaps underlines the need for a judge to give the jury sufficient directions on what is a fact-sensitive decision. We have come to the conclusion that there is considerable force in the argument that as a result of his understandable desire to keep the case simple for the jury, the judge oversimplified his directions to the detriment of the appellant's case. The effect of this was unduly to restrict the jury's consideration of valid arguments available to the appellant on the question of waste. The result was that he was deprived of fair consideration by the jury of a significant issue. As the Route to Verdict shows, if the jury could not answer the third question in the affirmative they would have to find the appellant not guilty.

34 We have considered the Crown's fall-back position which is that the conviction can nonetheless be regarded as safe because of the nature of the evidence available to contradict the appellant's case. We do not intend to lengthen this judgment by an analysis of the respective sides of that argument. We deal with that point by stating that we consider that there was sufficient in the points raised by the appellant to mean that, had they been more fully deployed before the jury in the summing-up, there was a real possibility that the jury might have found differently. In those circumstances the Crown's alternative arguments must fail.

35 Our conclusion is that this conviction was unsafe and that it must be quashed.

36 Mr Ageros, is it the intention of the respondent to seek a retrial?

MR AGEROS : My Lord, it is a matter for the court. Can I turn my back very briefly?

LORD JUSTICE TREACY: Yes.

MR AGEROS: My Lord, I may say that we did give this consideration at an earlier stage, anticipating this stage might arise. The case dates back some years now, and the fines which were imposed were, in the scheme of things relatively low. In all the circumstances the prosecution would not seek a retrial in this particular case.

LORD JUSTICE TREACY: We think you are wise. Thank you. That concludes the hearing, subject to anything you have to say, Miss Hollis?

(The court retired for a short time)

LORD JUSTICE TREACY: What we propose to do is this, Miss Hollis. At present we are in doubt as to whether we have any power to make a defendant's costs order in the way that you seek, either in relation to this court or the court below. We will say that if there is power to make such an order in this case, we would be minded to grant an order for the defendant's costs insofar as

they have reasonably been incurred, but that the onus will lie with you and those behind you to submit to the Criminal Appeal Office within seven days a fully-reasoned document setting out the powers under which you submit that there would be power for such an order to be made.

MISS HOLLIS: My Lord, I am very grateful for that. In fact, that was going to be my submission, whatever my Lords had said when you came back in. Thank you very much.

LORD JUSTICE TREACY: All right. Thank you.