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*(subject to editorial corrections)**

Record No: 04/054107

IN THE CROWN COURT

BETWEEN: **R. –v-**

AND: **DAVID EDWIN ALLINGHAM**
AND
FREDA ELIZABETH ALLINGHAM

DEFENDANTS

Judge Babington

Following a trial at Omagh Crown Court the defendants were convicted on 9th May 2006 of two offences under the Waste and Contaminated Land (Northern Ireland) Order 1997 namely:-

(1) That they kept controlled waste in a manner likely to cause pollution of the environment or harm to human health contrary to Article 4(1)(c) and Article 4(6) of the aforementioned order and

(2) That they kept controlled waste in or on land otherwise than under or in accordance with a Waste Management Licence contrary to Article (4)(1)(b) and Article 4(6) of the aforementioned order.

Notice had already been given to the defendants and to the court that in the event of conviction the prosecution would be seeking a Confiscation Order against the defendants. Counsel for the prosecution confirmed this following the defendants' conviction and made application to postpone the confiscation proceedings under Section 164 of the Proceeds of Crime Act 2002. I granted that application at that time and on subsequent occasions.

The defendants were subsequently sentenced on 20th June 2006. David Edwin Allingham was sentenced to 9 months imprisonment and his wife Freda Elizabeth Allingham was sentenced to 4 months imprisonment, the operation of which was suspended for a period of 2 years.

It is perhaps helpful to set out briefly the background to the offences.

The defendants lived in the townland of Slattinagh, which is near Garrison, in the County of Fermanagh. They carried on a farming operation at that location and on other lands. Freda Elizabeth Allingham was a partner in the farming operation. She had however worked as a senior staff nurse at The Sheil Hospital at Ballyshannon in County Donegal for over 30 years and continued to do so.

An investigation was commenced by Fermanagh District Council into these lands at Slattinagh as a result of allegations regarding the dumping of waste. On a visit to the property in January 2003 there was evidence of excavations having been carried out beside the defendants' house. The Council instructed Invest NI to carry out a survey of the lands. On 17th July 2003 a notice was issued to the defendants informing them that the Council would be entering the lands for the purpose of examination on 27th August 2003.

On that date Council staff together with staff from Invest NI and police went to the property. They were unable to gain access as the farmyard entrance had been blocked by a cattle trailer and other vehicles. David Allingham was present. The purpose of the visit was explained to him but he denied anyone access.

Application was then made for a court order which was obtained on 5th November 2003. This order was served on David Allingham and a visit was made on 4th December 2003 when a full survey and investigation of the lands took place.

During the inspection several holes were excavated and the area was generally surveyed. Evidence was given at the trial that there was a strong smell of decomposing waste, and gas could be seen bubbling up from the ground through puddles of water. David Allingham declined to be interviewed that day. Letters were left inviting both defendants for interview but there was no response to those letters, and neither of the defendants has ever said anything in relation to the charges.

Measurements were taken of the site at the time of this inspection. Evidence was given of those measurements during the trial and different measurements were put to the prosecution witnesses during cross-examination. It is only fair to comment that the exact measurement of the site was something that was beset with problems as material such as waste cannot accurately be measured unless it is all dug up and removed from the site and by that method is measured.

A considerable amount of documentary information was put before the court, in relation to the confiscation hearing, including written responses by the defendants on essentially four occasions. These responses were in relation to orders made by the court under Sections 167 and 168 of the Act. The final one was one by David Allingham which was received on 21st September 2007. This matter came on for hearing on 24th September 2007.

It transpired shortly prior to the hearing that the prosecution would not be proceeding with an application for compensation orders. Those compensation orders would have been in respect of the cost of the removal of the waste and the reinstatement of the lands. It appeared belatedly that this would be carried out by agencies in the Republic of Ireland and they would be seeking to recover the costs of this operation from individuals or organisations within the Republic of Ireland who were involved in the illegal dumping of the waste in the first place.

Before this court the prosecution was seeking a Confiscation Order against both defendants. The total of that Order was in the sum of £80,868.00. That figure consisted of three parts.

Firstly, the sum of £20,000 was being sought in respect of payments received for permitting the waste to be deposited on the site. It had been agreed between prosecution and defence that the waste on the site amounted to some 4,000 tonnes and that the Defendants would have been paid £5.00 for each tonne of material thus making up the figure of £20,000.00.

Secondly, the prosecution said that the defendants would have benefited as a result of their evasion of Landfill Tax on the waste. It was said that Landfill Tax, at the relevant time, was £13.00 per tonne and that the defendant by operating an unlicenced and illegal landfill site had deprived Customs and Excise of some £52,000.

Thirdly, the balance of the claim was made up by what is termed in the Act as being the change in the value of money – in other words, in my opinion, inflation – and that amounted to some £8,867.57.

Mr Lowry appeared on behalf of the prosecution case and during his opening and before the prosecution case had closed it appeared that there were certain matters that were accepted and could be said to be agreed between the parties.

1) **Although the recoverable amount - £80,868.00 could in the view of the prosecution be directed against each defendant they were only seeking a**

recoverable order of that sum against both the defendants and it would be a matter for the court if that should be apportioned and if so by how much.

2) **It was accepted that the defendants had sufficient realisable assets to meet the recoverable amount and accordingly there would be no need for the court to prepare a schedule under section 159 of the Act.**
3) **In accepting that the defendants had sufficient realisable assets it was made clear by Defence Counsel that liability itself was not accepted.**

I intend to deal with the two heads of recoverable amount separately – that of payment received by the defendants and secondly that of Landfill Tax – as there are different matters to be considered on each head.

In relation to the amount received I have already stated it was agreed between the parties that this was £20,000, agreed at a figure of £5.00 per tonne of waste. The total tonnage of waste was agreed at 4,000 tonnes. This figure of £5.00 was agreed to be the figure that the defendants would have received for allowing a person or persons to dump the waste on their land.

Section 156 of the Act deals with the making of Confiscation Orders. Of particular relevance to this case is Section 156(4) which sets out how the court is to proceed. Subsection (a) deals with cases where a defendant might have a criminal lifestyle, subsection (b) indicates that if that is the case the court must decide whether he has benefited from his general criminal conduct. Neither subsection is relevant in this case. Mr Lowry opened the case on the basis that it was not a criminal lifestyle case and therefore the relevant provision is section 156(4)(e) where the court must decide whether the defendant has benefited from his particular criminal conduct.

"Particular criminal conduct" is dealt with at Section 224(3). That subsection states:-

> **Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs -**

(a) conduct which constitutes the offence or offences concerned.

That is the only sub-paragraph of 224(3) which is relevant to this case and therefore the court must only consider criminal conduct constituting the offences on which the defendants were convicted.

Mr Ferris, who appeared with Mr McHugh for Mrs Allingham, made various submissions on behalf of his client. These submissions were adopted by Mr Mallon who appeared with Mr Gallagher for Mr Allingham.

Mr Ferris said that was not necessarily the position as the court had to look carefully at when the offences were committed. He says that the defendants took money for waste being deposited on the land and therefore the deposit and the payment came first. He reminded the court that the defendants were convicted of keeping waste.

He then referred me to the Commencement Order for the Proceeds of Crime Act 2002 which is known as The Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003. Rule 2(1) states that the provisions of the Act listed in column 1 of the schedule shall come into force on 24th March 2003. Schedule 1 details part 4 of the Act which deals with confiscation in Northern Ireland. Rule 4(1) states that Section 156 of the Act, which deals with the actual making of Confiscation Orders shall not have effect where the offence, or any of the offences, mentioned in Section 156(2) was committed before 24th March 2003. He also referred me to Rule 9 which is a transitional provision relating to particular criminal conduct which states that conduct which constitutes an offence which was committed before 24th March 2003 is not particular criminal conduct under Section 224(3) of the Act. Put concisely Mr Ferris' analysis is that if money was handed over prior to 24th March 2003 the Proceeds of Crime Act and in particular Section 156 relating to Confiscation Orders has no application over any subsequent conviction.

In this regard he also referred me to evidence that was given at trial by

Dr Kieran Coogan relating to landfill gas when he said that waste was probably present on the site in January 2003 and of Robert McCullough who said that he had visited the site in January 2003 and had observed excavations. This was the visit which sparked the subsequent investigation leading to the prosecution. Mr Ferris said that it was clear that by January 2003 some deposits had already been made.

Mr Lowry, for his part, whilst agreeing that Mr Allingham says at paragraph 1 of his provision of information under Section 168 dated 4th May 2007 (Page 173 of the bundle) that he had received two payments prior to 24th March 2003 says that if payments were received before that date they still can be recovered. This is because the offences themselves are after 24th March 2003.

He also says that Mr Allingham in his statement at page 173 and then at page 117 is inconsistent. In the former statement of 4th May he says that he received cash – payment in Euros for the waste. He gives the name of the person who paid him and says that he received 200 Euros per load. In the latter statement he says that he received both cash and credit towards sheep. Obviously both statements cannot be correct in their totality.

Turning to the question of the Landfill Tax Mr Lowry says that to evade the tax is to obtain a pecuniary advantage. In this connection he referred me to Dimsey – v- Allen [2002] 2 Cr. App. R. (S) 497. The matter is further considered in R. –v- Rowbottom [2006] EWCA Crim. 747 which was a cigarette smuggling case. In the final paragraph of his judgment in that case Lord Justice Rose says –

> **"In our judgement, it follows unavoidably that that continuing process involved the evasion of duty". An evasion of duty, as Lord Rodger of Earlsferry made clear in Cadnam Smith, is the obtaining of a pecuniary advantage and a pecuniary advantage is a benefit. In our judgement, it follows that the Learned Judge was correct in reaching the conclusion that she did, and this appeal must be dismissed".**

It would seem that almost without exception, that the cases cited by Mr Lowry all involved the evasion of duty on cigarettes and/or alcohol. This is a point that was made forcibly by Mr Ferris.

It is important to understand how Landfill Tax is charged. Evidence on this point was given by Ann Blacker, who is a senior principal scientific officer in the Environment & Heritage Service, and who has been involved in illegal dumping investigations for the previous four or five years. She said that the tax is paid by the owner of a landfill site and that it is a cost that is passed on to those who wish to use the site. It follows, therefore, that someone using a legal landfill site will have to pay the tax to the owner and the owner then passes it on to H.M. Customs. Indeed she said, in her experience, that normally the fee charged by the landfill site and the amount of tax would be shown separately on any docket or receipt issued by the operator.

The prosecution argument was that the defendants should have disposed of the waste legally and if they had they would have had to pay this tax. Accordingly by leaving the waste where it was on their land they did not have to pay the proper rate for disposal which would have included the amount of the Landfill Tax.

The prosecution say that there is a wider principle at work within the Proceeds of Crime Act, namely to deprive criminals of their ill-gotten gains. In this regard reference was made to the House of Lords case of Rezvi [2003] 1AC 1099 and in particular comments made by Lord Steyn:-

> **"The provisions of the 1988 Act (which is materially identical to the Proceeds of Crime Act) are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises".**

Mr Lowry made reference to comments made by Lord Justice Pill in R. –v- Ellingham [2004] EWCA Crim. 3446 where he said the words of Section 71(4) – that being of the Criminal Justice Act 1988 had a deliberately wide

ambit. He contrasts Section 71(4) with the language used in Section 224(4) and (7) of the Proceeds of Crime Act.

Mr Ferris, for his part, says that there is no pecuniary advantage as the defendants were never liable to Landfill Tax in the first place. He says how could there be an advantage if they were not obliged to pay it. He referred me to extracts from Halsbury at paragraph 665 (footnote 5) from which he says it is clear that the land is not a landfill site. That footnote sets out when land can be considered as a landfill site and therefore when waste on that land can be subject to landfill tax. He also referred me to Paragraph 666 (footnote 4) which sets out who can be classed as operators and that the defendants were clearly not the operators. Finally he makes reference to paragraph 750 which deals with various offences relating to the failure to pay Landfill Tax.

He also goes on to say that the cases on which the prosecution rely – predominantly cigarette smuggling cases, are distinguishable because the Import Duty payable on cigarettes is payable immediately the cigarettes are brought into the country and the offences, for the most part, were evasion of that Import Duty. He said there was no doubt that they had obtained a pecuniary advantage in that case over legitimate retailers of cigarettes. He says, however, the defendants in this case only had waste – that the waste cannot be sold, that it was not an asset and it could only ever be a liability. He says it is complete nonsense to suggest, as the prosecution have done, that if the transaction had been carried out legitimately and the waste taken to a legal landfill site the tax would have been paid.

On a different matter Mr Ferris says that Sections 156(5) states that if the court decides, as in this case, that the defendants had benefited from their particular criminal conduct that an order must be made – in other words a Confiscation Order – requiring them to pay the amount in question.

However that must be read subject to subsection (6) which states that the court must treat the duty referred to above in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start

proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

Mr Ferris says this is the very situation that exists in this case and he says that the court should take the view that proceedings are intended and in that regard he referred me to Part 3 of the Waste and Contaminated Land (Northern Ireland) Order 1977. Part 3 encompasses Articles 53 to 61 which, in broad terms, deal with remediation of contaminated land and the mechanisms by which a District Council can recover any costs involved in carrying out this work. It also extends to polluted waterways and other matters which are not strictly relevant to this case.

Mr Ferris makes the point that Article 53 imposes a duty on the enforcing authority to require remediation. Mr Ferris accepts that Part 3 of the order has not yet come into force but says that the basic assumption is that it will become effective. Indeed he goes further and says that there is a reasonable probability that if the law has been passed by the legislature it will come into force and the Council will therefore have to act. That being the case he says the duty in Section 156 becomes a power and the court should therefore look at Article 157(3) and only order the defendants to pay what amount is just.

The final matter in issue was whether there should be any apportionment between the defendants. Mr Ferris says it would be unjust to treat Mrs Allingham equally. She is a nurse in Ballyshannon. She looks after the house and she was, at all times, open with the investigators. He says it is clear that she was not an active participant in the farming enterprise although he accepted that she was a partner in that enterprise, although that could have been for fiscal reasons.

Mr Lowry, for his part, says for her to ignore what was happening or to say that she did not know what was happening must be complete nonsense because the waste was being dumped very close to the dwelling house and if one accepted the evidence of some of the prosecution witnesses at the trial there must, at times, have been a smell of decomposing waste. However it is quite clear that waste was

being dumped and furthermore it is accepted that Mrs Allingham deposited most of the lodgements at a bank in Ballyshannon.

Conclusions

I have already indicated Mr Ferris says that the money was paid for the depositing of the controlled waste rather than for keeping it – indeed he says it was not for keeping at all and he then makes the point that however the defendants were convicted only of keeping it. He says that accordingly no order should be made against either of the defendants.

However the third party or third parties paid for the disposal of the waste which, in my opinion, means not only just the actual dumping or depositing of it but the whole process which must, in this type of situation, involve keeping it as well. Having reached that conclusion I am of the view that as the actual offences post date the relevant date for the legislation – 24th March 2003 – it does not matter that the defendant has received payment prior to that date.

Indeed it is quite wrong, in my opinion, to say that the money had only been paid for depositing the waste. The money was paid so that the third parties had nothing more to do with the waste. In other words that it was for the defendants to keep and deal with as they intended and there is no other evidence before me that they intended to do anything other than keep it on their property. Neither defendant gave evidence at the trial nor at the confiscation hearing It therefore does not matter that the payments for some of the waste were received prior to the commencement of the legislation as they clearly relate to the offences. The offences relate to the keeping of the waste and they occurred on certain dates after the commencement of the legislation. It is therefore quite clear in my mind that the defendants benefited from their particular criminal conduct and that criminal conduct, in strict terms, was a keeping of waste for which they received payment. It is not correct to say that they only received payment for depositing waste rather than keeping it.

In relation to Landfill Tax it is quite clear that a Confiscation Order can be made with reference to the evasion of a tax – because that is to obtain a pecuniary advantage. The prosecution say that the defendants in this case evaded Landfill Tax and thus obtained that pecuniary advantage.

It is clear that the operator of a legal landfill site has to pay Landfill Tax, which as Miss Blacker says, is passed on to those who use the site. Here as the defendants had not legally disposed of the dumped waste they avoided paying the tax.

The legislation deals with the pecuniary advantage that a person obtains as a result of his criminal conduct. The prosecution referred me to R. –v- Ellingham [2004] EWCA Crim. 3446 where Pill LJ said at paragraph 16:-

> **"In our judgement the words of Section 71(4) have a deliberately wide ambit. The word "obtains" is neither qualified nor defined. Parliament has not laid down any rules governing the way in which a court could approach this task in determining the benefit obtained as a result of or in connection with an offence".**

The definition of benefit in Section 71(4) which is a reference to the Criminal Justice Act 1988 is

"for the purposes of this part of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained".

This language is very similar to the language used in the Proceeds of Crime Act at Section 224(4) and (7), which is:-

(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
(7) If a person benefits from conduct his benefit is the value of the property obtained.

The only difference is the substitution of the word "conduct" for the word "offence". In my view conduct is a word of wider definition and encompasses at least the offence in question which must be part of a defendant's conduct.

Mr Lowry said that a broad approach should be taken to the question of whether a person had obtained a pecuniary advantage. In this regard he had referred me to the case of R. –v- Sharma [2006] EWCA Crim. 16 where the Court of Appeal had said that there was no room for the application of trust principles and the application of normal legal consequences which flow from the receipt of money for others and indeed Mr Justice Newman who gave the judgement of the court went on to say:-

> **"Nor in this area of the law would the purpose of the statute, namely to deprive criminals of the benefits of their criminal enterprise, be assisted by the introduction of collateral enquiries on an issue as to whether, when the benefit or part of the benefit is paid on to another criminal or other person participating in the crime, the original recipient is to be regarded as having never held a benefit for himself and to have obtained no fresh or continuing benefit from making the disposal to another".**

Mr Ferris, as I have already said, attempted to distinguish the case law which generally deals with evasion of duty offences and in particular cigarettes.

Amongst other authorities I was referred to was the case of Smith [2002] 2 Cr. App. R(S) 37 which related to cigarettes being imported with a view to evading duty. Those cigarettes were seized by the customs. In that case the defendant had suffered loss, that being the cost of buying the cigarettes and of course he couldn't realise anything towards that loss because the cigarettes had been forfeited. The House of Lords, however, took the view that he still owed Customs the duty. They felt that the benefit to the defendant was the amount of duty and it was irrelevant that the cigarettes had been seized. Lord Rodger delivered a speech with which the rest of the House agreed and he said:-

"If in some circumstances it can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgement of the legislature".

I consider that the analogy to the present case is a fair one. In this case the waste was dumped and it would therefore seem that it is irrelevant what then happened to the waste. I do not accept the argument put forward by Mr Ferris that in some way Landfill Tax does not have to be paid because the defendants were not running a legal landfill site.

Having come to that conclusion I am satisfied that the defendants have obtained a pecuniary advantage and therefore the amount of Landfill Tax sought by the prosecution should form part of the confiscation order.

<u>The Article 156 argument</u>.
I have already set out the arguments put forward by Mr Ferris – in effect that proceedings against the defendants are intended and will happen once the relevant Part and Articles of the Order are brought into force. Even if I were to accept his submission that as the provisions were passed by the legislature they will come into force, there can be no certainty that the Council or the relevant organisation will act. This legislation was passed ten years ago and is still not in force. There are pieces of legislation that, although passed by Parliament, have never come into force. As I see it I can only deal with the law that is in effect at the relevant date and therefore I reject Mr Ferris' submission on this point.

The third part of the prosecution's case related to the change in the value of money and is dealt with in section 228(2) (a) of the Act. This arises when, as in this case, there is a period of time that has elapsed between the offence and the confiscation hearing. The mechanisms of such a calculation was set out in the statement of the financial investigator,Miss Traynor, and were not challenged in any way by the Defence. I am satisfied that they are correct.

It follows therefore that I am satisfied that the three parts of the claim making up the Confiscation Order sought by the prosecution have been proved to the necessary standard that being on the balance of probabilities.

Apportionment between the defendants.

The defendants have farmed in partnership since October 1998 and this continues – in my view this may have been for fiscal or tax reasons but I am satisfied that it was Mr Allingham who was the active partner in dealing with agricultural matters. His wife, after all, was a nurse employed in County Donegal and had been for over 30 years, and she was obviously away from the home for long periods whilst at work. She did, however, deal with most of the lodgements – the proceeds of the crime – this may have been because she was in Ballyshannon regularly so it is clear that she was involved to an extent. Her claim, through Mr Ferris, to be treated differently to her husband in these proceedings is not assisted by her failure to give evidence either here or at the trial. Furthermore his claim that she was open with the investigators does not really hold water. The best that can be said of her attitude is that it was not obstructive in the way that her husband was on one occasion.

Furthermore the waste was dumped close to the family home and within full view of it as can be seen by the photographs produced at trial and to which Mr Lowry has referred in these proceedings.

I consider that a fair apportionment would be 60% in respect of Mr Allingham and 40% in respect of Mrs Allingham.

That being so I make a Confiscation Order against Mr Allingham in the sum of £48,520.80 and against Mrs Allingham in the sum of £32,347.20.

In default of payment Mr Allingham will serve 16 months in prison and Mrs Allingham will serve 14 months in prison.

Time to pay

Mr Murnaghan made an application for time to pay on behalf of both Defendants indicating that they were in financial difficulties and at this stage asked for the maximum time. He also referred to the fact that they were involved in insolvency proceedings.

In accordance with section 161(7) I asked Mr Lowry if he had any representations but he had not.

After taking into account all that was said I allowed both Defendants six months in which to pay.

28th November 2007