THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 9

Record No. 216/570

Birmingham J.
Mahon J.
Edwards J.

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

(GARDA ADRIAN COFFEY)

RESPONDENT

- AND–

STEPHEN BENNETT

APPELLANT

JUDGMENT of Mr. Justice Mahon delivered on the 25th day of January 2018

1. This is an appeal against the judgment of the High Court (White J.) delivered on the 30th November 2016 and the consequential Order made on the 9th December 2016.

2. The matter came before the High Court by way of case stated by Judge Ann Ryan of the District Court pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961 on the application in writing of the appellant having been dissatisfied with the determination of the learned District Court judge as being erroneous on a point of law. .

3. The question posed by the learned district court judge was:-

> • *In a prosecution pursuant to s. 9 of the Criminal Justice (Public Order) Act 1994, is a sit down political protest - which obstructs the passage of a car for a period of about twenty seconds, in circumstances where there were no threats of violence, overt or otherwise, towards the occupants of the car - an act which is capable of "lawful authority or reasonable excuse".*

4. The grounds of appeal argued on behalf of the appellant are as follows:-

> (i) The learned trial judge erred in law by failing to answer the question posed in the case stated in the affirmative in accordance with the substance of the Court's judgment on the legal question posed in the case stated.
>
> (ii) The learned trial judge erred in law in failing to answer the question posed in the case stated at all, but instead appeared to address the question of law posed in the case stated by indicating that while same might in some circumstances be answered in the affirmative, on the particular facts of the case as found by the learned District Judge, the learned District Judge was entitled to find that in the particular trial, the prosecution had rebutted the defence of reasonable excuse.
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> (iii) The learned trial judge erred in finding that reasonable excuse is a defence and in failing to find that carrying out the relevant actions "without a reasonable excuse" is an ingredient of the offence.
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> (iv) The learned trial judge erred in law in failing to set aside the conviction and if necessary remit the matter for hearing on the basis of an affirmative answer to the question of law in the case stated.
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> (v) The learned trial judge erred in failing to find that it appeared from the terms of the case stated and from the fact that the learned District Judge had agreed to state the case in the terms of the case stated, that the learned District Judge had adopted a wrong view of the law or that the learned District Judge's conclusions were based on a mistaken view of the law to the effect that the correct answer to the question of law posed was in the negative.
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> (vi) The learned trial judge erred in failing to provide sufficient guidance as to the appropriate criteria in applying the law on the basis of an affirmative answer to the said question and in accordance with constitutional and European Convention on Human Rights jurisprudence including that related to proportionality in the interference with the exercise of protected rights.

5. Section 9 of the Criminal Justice (Public Order) Act 1994 provides as follows:-

> *"(9) Any person who, without lawful authority or reasonable excuse, wilfully prevents or interrupts the free passage of any person or vehicle in any public place shall be liable on summary conviction to a fine not exceeding €200."*

6. The background to the prosecution in the Dublin Metropolitan District Court on the 31st March 2015 was as follows. On that date the appellant appeared before the learned District Judge in relation to three charges arising from an incident which had occurred

outside the Israeli Embassy on Pembroke Road, Dublin 4 on the 8th July 2014. The appellant was participating in a protest outside the embassy, with others, in the aftermath of Israeli military air strikes on Gaza city. A short sit down protest took place outside the embassy in the course of which the appellant and another person lay down on the public road for the purposes of obstructing the free passage of the Israeli Ambassador's car, (in which he and a driver were conveyed), and an accompanying unmarked garda car. Gardaí directed the appellant to desist from obstructing the public road under s. 8 of the Criminal Justice (Public Order) Act 1994 and outlined the consequences of any breach of that instruction. The appellant was then physically removed from the road by gardaí and passively resisted such removal. The obstruction caused by the sit down only protest lasted approximately twenty seconds because of the quick intervention by gardaí rather than any decision by the appellant to end it. The protest was generally peaceful and absent of any threat of violence.

7. In the District Court the appellant sought to defend himself arguing that the prosecution had not proved that he had obstructed traffic *without lawful authority or reasonable excuse*. The learned District Judge refused the application for a direction on this ground because she took the view that there were issues of safety, security and sensitivity involved and that therefore the obstruction caused by the appellant and his fellow protester were *without lawful authority or reasonable excuse*. She proceeded to convict the appellant and his fellow protestor, and on a later date sentenced the appellant to five months imprisonment and suspended that term for a period of twelve months on condition that he keep the peace and be of good behaviour.

8. In the course of his judgment, the learned High Court judge stated:-

> *"While the question posed seems to be a general question of law without application to any particular case, the court should answer the question in the context of the specific appeal by way of case stated and the facts as found by the learned judge."*

9. In my view this approach on the part of the learned High Court judge was sensible, appropriate and correct. It would be impossible to answer the question posed without reference to particular facts, either real or imagined. It is certainly not possible to answer the question posed in some general way. The issue which motivated the appellant to seek clarification from the High Court in relation to s. 9 of the Act of 1994 is the defence of the right of a citizen to assemble peacefully and speak freely. Put another way, it is the right to protest peacefully which is at the core of these proceedings.

10. In the course of his judgment the learned High Court judge considered Article 40.6.1 of the Constitution and Article 10 of the European Convention on Human Rights. He noted that Article 40.6.1 of the Constitution states:

> *"The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*
>
> > *(ii) The right of the citizens to assemble peaceably and without arms.*
>
> *Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas."*

11. Article 10 of the ECnHR states:-

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

12. Furthermore, Article 11 of the ECnHR provides:-

> *"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."*

13. It can be seen from the foregoing that while both the Constitution and the ECnHR generously provide for the rights to assemble and freely associate with others, the extent to which such rights may be exercised are subject to restriction under a number of headings, including for the purposes of preventing a breach of the peace,, or avoid a danger or nuisance to the general public, or for the purposes of ensuring national security, public safety, the protection of the reputation of the rights of others and the prevention of disorder or crime.

14. In submissions made to this Court the appellant accepts that the right to protest, as he describes it, is subject to limitations. The appellant's relevant submissions in this respect include the following:-

> *"11.5. It is submitted that safety and security consideration are proper matters to be taken into account in considering whether there is a reasonable excuse for an obstruction.*
>
> *11.6. However, such considerations must be put in the balance as part of consideration of all the circumstances in the context of appropriate criteria under constitutional and ECHR principles such as necessity and proportionality."*

15. More particularly, the appellant submits at para. 11.7 in his written submissions the following:-

> *"It is respectfully submitted that the learned High Court judge was incorrect in appearing to hold that merely because of*

a security sensitivity, that fact alone could justify a finding that there was no reasonable excuse for an obstruction, no matter how short and peaceful and no matter what the circumstances. That would amount to a judicial determination that criminal sanctions could be used to render immune from inconvenient demonstrations particular classes of persons".

16. However that submission by the appellant does not accurately represent what in fact was decided by the learned High Court judge. He was satisfied that the learned District Court judge had not adopted an incorrect view of the law nor did she draw any inferences which no reasonable judge could draw. He expressed this view on the basis of his summary of the reasoning of the decision of the learned District Judge as set out in paras 22 and 23 of his judgment:-

> *"22. The trial judge considered the issues of safety, security and sensitivity to be paramount and found that the occasion of a protest outside the Israeli Embassy, where the ambassador's car was obstructed, was a particularly sensitive situation. She took notice that the State provides extra security to this particular embassy on an ongoing basis. The learned judge found that the Defendant's protest was well organised and motivated politically and that the intention was to prevent the ambassador gaining access to the embassy, that the protest took place at a time of the day at which the public road was busy with vehicular and pedestrian traffic and found that the Defendant had no consideration of the possible dangers that might have arisen to the ambassador, the staff of the embassy, the Gardaí or the general public and that the Defendant's protest could have caused a heightened security risk, because of the particular ambassador involved. She considered that there was a possibility of provoking others to commit unlawful acts.*
>
> *23. The trial judge found in this particular case that considering safety, security and sensitivity concerns that the obstruction caused by the Defendant was without lawful authority or reasonable excuse. The length of time of the obstruction is a factor to be taken into account, but not relevant in this prosecution, as the Defendant did not voluntarily desist from the activity when asked to do so, but had to be forcibly removed. A non-violent obstruction comes within the ambit of the Section."*

17. It is clear that the learned High Court judge was of the view, and correctly so, that the learned District judge's concerns were not simply confined to *"sensitivity"*. There were issues relating to safety, security, prevention of access by the Ambassador to the embassy, the provocation of others to commit unlawful acts and the failure on the part of the appellant to voluntarily desist from the protest activity thus requiring her to be forcibly removed.

18. There is, it must be said, good reason to be concerned that a protest which prevents, or blocks or otherwise obstructs the free passage of an Ambassador, in respect of whom there is an obvious security risk, and no matter how well intentioned the protesters might be, might lead to a situation where lives could be endangered. It is also noteworthy in this case that while the sit down protest in question cannot be said to have been violent in the ordinary use of that term, it did involve some,albeit limited physical resistance in that there was evidence in the District Court that the appellant resisted or challenged efforts by the gardaí to physically remove him in order to clear a passage for the Ambassador's car by holding on to the leg of another protestor.

19. The learned High Court judge answered the question posed *in the negative*. He expressly did so *applying the facts as found in (the) case stated*. He answered the question posed by the learned District judge in the context in which it was asked. In other words, he considered the question by reference to the facts of the case heard and determined in the District Court.

20. His answer to the question posed is in effect that the learned District Judge applied the correct legal principles to the facts presented to her, namely that she was entitled to determine that the sit down protest, as it occurred, amounted to a prevention or interruption of the Israeli Ambassador and his driver in a public place without lawful authority or reasonable excuse.

21. The learned High Court judge, in the final paragraph of his judgment explained clearly the basis upon which he had answered the question posed to him when he said (in para 25):-

> *"There may well be occasions, where a peaceful protest causes obstruction in a public place, and a trial judge in a prosecution pursuant to s. 9 decides that the prosecution has not rebutted the defence of reasonable excuse, but this prosecution and conviction is not one of them."*

22. He could equally have answered the question in the affirmative to the same effect. He could have answered Yes to the question *"..is a sit down political protest - which obstructs the passage of a car…in circumstances where there were no threats of violence..an act which is capable of lawful authority or reasonable excuse."*

23. Section 9 of the Act of 1994 creates the offence of "Wilful Obstruction". It provides that a person who wilfully *prevents or interrupts the free passage of any person or vehicle in any public place..without lawful authority or reasonable excuse..shall be liable on summary conviction to a fine not exceeding €200.* Section 8 of the Act of 1994 provides that where a person acts in a manner contrary to the provisions of, *inter alia*, s. 9, and if called upon by a member of An Garda Síochána to *desist from acting in such a manner, and leave immediately…in a peaceable or orderly manner* that person shall be guilty of an offence in respect of which there can be imposed a fine not exceeding €500 or imprisonment for a term not exceeding six months or to both. There may well be, and there undoubtedly are, circumstances where the wilful prevention or interruption of free passage in a public place can be undertaken with lawful authority or reasonable excuse. On the facts as found by the learned District Judge such circumstances certainly did not arise on this occasion.

24. In the circumstances I would dismiss the appeal.