

**THE HIGH COURT**

**[2011 No. 2461 SS]**

**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 (AT THE SUIT OF GARDA DENISE SWEENEY)  
PROSECUTOR/RESPONDENT**

**v.**

**CHRISTIAN ROIBU**

**ACCUSED/APPELLANT**

**Judgment of Mr. Justice Hedigan delivered the 7th of June 2012**

1. This case stated arises from proceedings which took place at Dublin District Court 52 on the 23rd July, 2009. Judge Mary Collins sought the opinion of the High Court on the following the questions:-

(a) Whether my decision to allow Garda Sweeney to put the said questions to the appellant as to his failure to make a claim to the Garda that another person had broken the window and my direction to the appellant to answer them was in accordance with law or in accordance with the appellant's right to silence?

(b) Whether I was entitled as a matter of law (i) to take into account in deciding to convict the appellant the failure by the appellant to make the relevant claims to Garda Sweeney while he was under arrest and (ii) to infer from the said failure that the said claims were untrue.

(c) Whether I was entitled to take into account the alleged failure by the appellant to deny breaking the window in circumstances where evidence was not given in the matter.

**Background**

2.1 On 23rd July, 2009, District Judge Mary Collins convicted the accused on a charge of causing criminal damage to a window at "Dr. Quirkeys Amusement Arcade", O'Connell Street, Dublin, contrary to section 2 of the Criminal Damage Act 1991. The incident occurred on 18th January, 2009 and on 23rd November, 2009 the accused was fined €300 for that offence. The accused wished to appeal by way of case stated but upon being so requested Judge Collins declined to state a case. As a result the accused brought judicial review proceedings and on 21st December, 2010 the High Court granted him an order of *mandamus* compelling Judge Collins to sign the case stated as drafted on behalf of the accused.

2.2 There were three prosecution witnesses in this case, Garda Denise Sweeney, Mr Justin Marinaskus and Mr David Clarke. Both Mr. Marinaskus, a security guard employed at "Dr. Quirkeys" and Mr. Clarke, his security manager, testified that on 18th January, 2009 they saw the accused break the window. They both rejected the assertion put to them on behalf of the accused that another male present at the scene rather than the accused had broken the window. Garda Denise Sweeney testified that Mr. Clarke had made a complaint about the incident and he had identified the accused to her. She secured CCTV footage of the incident which was played in Court however it did not show the incident clearly.

2.3 The accused and a fellow Romanian national, Adrian Eoaue, gave evidence on behalf of the defence. They testified that another Romanian male and not the accused had broken the window. They stated the culprit had been in their company but they did not know his name. In her cross-examination of the accused Garda Sweeney enquired of him as to why he had not previously informed the Gardaí about that which he was now claiming, i.e. it was not he but rather, it was another Romanian who had broken the window. Although Counsel for the accused objected to that question on the basis that it offended against the accused's right to silence, Judge Collins permitted the question as she did not consider the purpose of the question to be that as inferred by counsel. The Judge decreed that the question should be answered as it was relevant in the context of the case. When the question was asked again the accused testified that he had indeed informed the Gardaí that he had not broken the window. He further stated he had not given the name of the person he claimed had broken it because he did not know it. The accused also claimed to have made a complaint of assault as against the security man. Garda Sweeney disputed this account by the accused and put it to him that he was not telling the truth.

2.4 At the conclusion of the case Counsel for the accused sought to dismiss proceedings on the basis that the appellant's right to silence had been infringed. Judge Collins refused to dismiss the case and convicted the accused of s. 2 criminal damage. In this regard the judge found as a fact that the evidence of the defence witnesses was not sufficient to raise a reasonable doubt as to the prosecution evidence. In making this finding she took into account the fact that the appellant had not made a claim to the investigating garda that another person had broken the window and that the other defence witness had not made such a claim to gardai. In light of these findings the judge found that the evidence of the prosecution witnesses was reliable beyond reasonable doubt.

**Submissions of the Accused/Appellant**

3.1 The appellant asserts that his right to silence was breached in a number of ways during the hearing of the case against him. The learned District Judge held that Garda Sweeney had a right to cross-examine the appellant in relation to a failure by him to disclose

his defence to the Garda upon arrest. The learned District Judge allowed Garda Sweeney to cross-examine the appellant on why he had failed to inform the Garda of the name of the person who had committed the offence. The appellant was also cross examined on why he had not made a complaint of assault to Gardai against the doorman, this was in circumstances where the doorman had accepted that he had punched the appellant without any retaliation on the part of the appellant. The learned District Judge allowed this line of questioning despite an objection having been raised by the appellant's Counsel, in circumstances where Counsel's objection was raised with the stated aim of preserving his client's pre-trial right to silence while in Garda custody, which in his view, extended to a right not to have any adverse inference drawn by the court from the fact that his client did not disclose his defence to the Garda after he had been cautioned and arrested. Counsel submitted that any inroads that had been made into a person's right to silence had been done legislatively and that any such legislative provisions that had been enacted also contained safeguards which aimed to ensure that any incursion into the appellant's right to silence was done proportionately and constitutionally. Counsel submits that the breach of the appellant's right to silence in the instant case, if it were to be upheld, would amount to a haphazard and casual trammelling of an important right.

3.2 The appellant contends that the District Judge's ruling on the issue was a breach of his right to silence and led to an unfair hearing. The learned District Judge acknowledged that she had taken the appellant's answers to these questions into account in deciding the issue of guilt and based upon the fact that there were two conflicting bodies of evidence in this case it is submitted by the appellant that the judge's ruling upon whether the question could be put was a pivotal factor resulting in the conviction of the accused. Added to this the judge appears to have treated the question put by Garda Sweeney to the accused as evidence that he did not reveal his defence to the Garda when arrested, in circumstances where no prosecution evidence had been led of this during the prosecution case and there was no evidence to contradict the answer provided by the appellant.

3.3 The appellant was not detained for interview and there was no contemporaneous record of things said between the Garda and the appellant at the time of arrest. This is significant and to allow the Garda to rely upon an assertion that certain things were not disclosed to her upon arrest would place the accused in an invidious position, because if indeed he did wish to disclose a defence that he later proposed to rely on in court he would be entirely dependant upon the motivation of the arresting member to take a contemporaneous note of what was said. If it were permissible as a matter of law to rely upon a failure to inform the Gardai of information, where the accused person has not been detained for questioning nor had access to a solicitor this novel principle would prove unworkable and open to manipulation and abuse.

3.4 The appellant submits that the District court, on the facts before it, should have upheld the principle cited by Counsel in the District Court and enunciated in *D.P.P. v Finnerty* [1999] IESC 130. There the Supreme Court held:-

"The principles applicable in a case such as the present where a defendant while detained under the provisions of the 1984 act has refused to answer questions put to him can be stated as follows:-

(1) Where nothing of probative value has emerged as a result of such a detention but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained but that nothing of probative value emerged.

(2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant during the course of his detention to answer any questions be permitted.

(3) In the case of a trial before a jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention.

The application of the first and second of these principles to the present case must result in the appeal being allowed. Unfortunately, the difficulties were compounded by the passage in the trial judge's charge which was by implication critical of the appellant for having made statements as to what transpired during the course of his detention which had not been put to the gardai and which, the trial judge invited the jury to infer, had not been transmitted to his legal advisers.

It must be said, in fairness to the trial judge, that, once the misapprehension he was under when making those observations was made clear to him, he might have been prepared to rectify the matter when the jury was recalled. The defence, however, adopted the position, as they were entitled to do, that the matter was beyond rectification and sought the discharge of the jury, a course opposed by the prosecution which the trial judge did not adopt. The jury, accordingly, in deliberating on the guilt or innocence of the accused, might well have been under the impression that they were not only entitled to draw adverse inferences from the failure of the defendant to give his version of events in detail in the garda station but that they were also entitled to draw such inferences from the supposed failure of the applicant to instruct his legal advisers as to what had transpired during the course of that questioning.

Any inferences which the jury might have drawn to that effect would have been in direct violation of the applicant's constitutionally guaranteed right to remain silent, and might well have been a factor in the jury's assessment of the credibility of the applicant's account of what happened between him and the complainant on that night. The verdict of the jury cannot, accordingly, in those circumstances be regarded as safe or satisfactory. The appeal will be allowed and in place of the order of the Court of Criminal Appeal there will be an order reversing the conviction and directing that the applicant be retried in respect of count number 2."

The appellant contends that the rationale underpinning the decision in *Finnerty* applies equally to the case before this court. The difference between that case and the appellant's case lies only in the fact that the appellant's case was dealt with summarily by a District Judge and Mr. Finnerty's case proceeded on indictment before a jury. A second difference is that the appellant had not been detained for questioning as had occurred in *Finnerty*. This difference, it is submitted only serves to strengthen the appellant's case, as one consequence of it is that the appellant had not had access to a solicitor, nor was the alleged exchange between himself and Garda Sweeney recorded. For the court to decline to apply the *Finnerty* case in the appellant's situation would result in considerable injustice and would create a real risk that summary trials would be attended by considerable unfairness, if upon each occasion that an accused gave evidence he could be cross-examined on a failure by him to disclose his defence at the time that he was arrested.

3.5 It is submitted on behalf of the applicant that the court should answer the questions posed in the case stated:-

(a) No, that the decision to allow the question to be put and the direction to the appellant to answer the question was not in accordance with law or the appellant's right to silence;

(b) No, the learned District Judge was not entitled as a matter of law to take into account in convicting the appellant the failure by the appellant to make the relevant claims to Garda Sweeney while he was under arrest, Nor was she entitled to infer that these claims were untrue, and;

(c) No, the learned District Judge was not entitled to take into account the alleged failure by the appellant to deny breaking the window in circumstances where evidence was not given by the Garda on that matter.

### **Submissions of the Respondent**

4.1 Judge Collins permitted Garda Sweeney to question the accused in relation to what she contended was his failure to inform the Garda before the trial that another Romanian and not the accused had broken the window. However, according to the accused's answer he had previously denied committing the damage and he had so informed the Gardai. He claimed he did not give the name of the other Romanian because he did not know it. In the circumstances on the accused's own evidence no "right to silence" issue arises.

4.2 The decision in *D.P.P. v Finnerty* [1999] IESC 130 can be distinguished from the instant case as unlike *Finnerty* the accused in this case was not detained for questioning and in that respect there is no finding of fact or suggestion that any adverse inferences were drawn from his failure to answer questions whilst in custody. Insofar as Judge Collins concluded the accused had not denied the offence and/or he had not indicated that another person had committed the damage the Judge simply "took [it] into account" as a basis for her determination that the defence had not created a reasonable doubt. In that regard she also had regard to the fact that the other defence witness had not made such a claim. Against a background where the accused claims to have engaged with the Gardai and to have furnished them with the relevant information, it may be that his testimony was regarded as not credible.

4.3 Counsel on behalf of the respondent submits that there was significant other evidence in the case including the direct observations of two prosecution witnesses, one of whom had pointed out the accused to the Gardai and in that regard it is not at all clear from the case stated how pivotal, if at all, to the Judge's ultimate decision was her determination that the accused had not denied committing the offence and/or had not otherwise proffered details in relation to the other individual he claimed had broken the window.

4.4 On 21st December, 2010 the High Court granted the accused an order of *mandamus* compelling Judge Collins to sign the case stated as drafted on behalf of the accused. Counsel for the respondent submits that there are difficulties in answering the questions posed. It is noteworthy that this Court is not asked by the District Judge whether or not she was correct in law in convicting the accused. That is somewhat unusual in the context of a case-stated under section 2 of the Summary Jurisdiction Act, 1857, as extended. However, even if that question was asked it would be difficult to definitively answer that question in the absence of sufficient information and/or indications and/or of facts as found by the District Judge. While the format of the case stated and more particularly the lack of detailed findings of fact therein present difficulties for this Court in answering the case stated, it is submitted that the questions can be answered as follows:-

(a) The decision to permit Garda Sweeney put the questions to the appellant as to his failure to make a claim that another person had broken the window and the direction that he answer the questions did not breach the appellant's right to silence although in permitting that cross-examination the Judge acted contrary to the *dicta* of the Supreme Court in *DPP v. Finnerty* insofar as persons questioned in custody are concerned.

(b) The Judge was not entitled as a matter of law (i) to take into account in deciding to convict the appellant his failure to make the relevant claims to Garda Sweeney while he was under arrest and (ii) was not entitled to infer from the said failure that the said claims were untrue. However there is nothing to suggest that taking either of these matters into account was in any way pivotal to the Judge's determination, or that the Judge was solely concerned with the appellant's failure to proffer an explanation during the time he was in custody. There is no express finding on the point made by the Judge in the case stated and there is nothing to suggest that the Judge inferred the appellant's claims were untrue on the basis of an alleged failure to previously mention them. The Judge was clearly impressed by the strength of the prosecution case and concluded that the appellant had not raised a reasonable doubt. (c) Whereas the Judge ordinarily would not be entitled to take into account the failure by the appellant to deny breaking the window in circumstances where he was questioned in custody and evidence was not given in the matter, the appellant in this case testified that he had in fact denied to Gardai that he had broken the window. In that regard it was open to the Judge to assess his demeanour in giving that evidence and his credibility or otherwise was an appropriate matter for assessment by the Trial Judge.

### **Decision of the Court**

5.1 This case stated arises from proceedings heard by District Judge Mary Collins on the 23rd of July, 2009, at Dublin District Court 52. District Judge Mary Collins convicted the accused on a charge of causing criminal damage to a window at "Dr. Quirkeys Amusement Arcade", O'Connell Street, Dublin, contrary to section 2 of the Criminal Damage Act 1991. The incident occurred on the 18th January, 2009 and on 23rd November, 2009, the accused was fined €300 for that offence. At the hearing Mr. Marinaskus, a security guard employed at "Dr. Quirkeys" and Mr. Clarke, his security manager, testified that on 18th January, 2009 they saw the accused break the window. They both rejected the assertion put to them on behalf of the accused that another male rather than the accused had broken the window. Garda Denise Sweeney testified that Mr. Clarke had identified the accused to her. The accused and a fellow Romanian national, gave evidence on behalf of the defence. They testified that another Romanian male and not the accused had broken the window. In her cross-examination of the accused Garda Sweeney enquired of him as to why he had not previously informed the Gardai that it was another Romanian who had broken the window. Although Counsel for the accused objected to that question on the basis that it offended against the accused's right to silence, Judge Collins decided the question should be answered. When the question was asked again the accused testified that he had informed the Gardai that he had not broken the window. He further stated he had not given the name of the person he claimed had broken it because he did not know it. Garda Sweeney disputed this account by the accused and she put it to him that he was not telling the truth. At the conclusion of the case Counsel for the accused sought to dismiss the proceedings on the basis that the applicant's right to silence had been infringed. Judge Collins refused to dismiss the case and convicted the accused. In this regard the judge found as a fact that the evidence of the defence witnesses was not sufficient to raise a reasonable doubt as to the prosecution evidence. In making this finding she took into account the fact that the appellant had not made a claim to the investigating garda that another person had broken the window and that the other defence witness had not made such a claim to gardai. In light of these findings the judge found that the evidence of the prosecution witnesses was reliable beyond reasonable doubt.

5.2 The legislation governing the appeal by case stated procedure is contained in section 2 of the Summary Jurisdiction Act, 1857, which provides:-

"Justices on Application of a Party aggrieved to state a Case for the Opinion of Superior Court.

After the Hearing and Determination by a Justice or Justices of the Peace of any Information or Complaint which he or they have Power to determine in a summary Way, by any Law now in force or hereafter to be made, either Party to the Proceeding before the said Justice or Justices may, if dissatisfied with the said Determination as being erroneous in point of law, apply in writing within three Days after the same to the said Justice or Justices, to state and sign a Case setting forth the Facts and the Grounds of such Determination, for the Opinion thereon of One of the Superior Courts of Law to be named by the Party applying; and such Party, herein-after called "the Appellant," shall, within Three Days after receiving such Case, transmit the same to the Court named in his Application, first giving Notice in Writing of such Appeal, with a Copy of the Case so stated and signed, to the other Party to the Proceeding in which the Determination was given, herein after called " the Respondent."

5.3 The questions posed by District Judge Collins in this case stated are as follows:-

"(a) Whether my decision to allow Garda Sweeney to put the said questions to the appellant as to his failure to make a claim to the Garda that another person had broken the window and my direction to the appellant to answer them was in accordance with law or in accordance with the appellant's right to silence?

(b) Whether I was entitled as a matter of law (i) to take into account in deciding to convict the appellant the failure by the appellant to make the relevant claims to Garda Sweeney while he was under arrest and (ii) to infer from the said failure that the said claims were untrue.

(c) Whether I was entitled to take into account the alleged failure by the appellant to deny breaking the window in circumstances where evidence was not given in the matter."

5.4 The complaint herein is that the appellant's right to silence was breached during his hearing. District Judge Collins held that Garda Sweeney had a right to cross-examine the appellant in relation to his failure to disclose his defence to the Garda upon arrest. The Judge allowed Garda Sweeney to cross-examine the appellant on why he had failed to inform the Garda of the name of the person who had committed the offence. The appellant was also cross-examined on why he had not made a complaint of assault to Gardai against the doorman. Judge Collins allowed the question to be put to the accused and compelled him to answer the question. Judge Collins considered the accused's answers to the questions as relevant in assessing credibility and drew inferences from the fact that the accused had not disclosed a defence to Gardai upon arrest. Judge Collins found that the defence had not raised a reasonable doubt as to the prosecution evidence. It seems to me that had Judge Collins upheld counsels objection and directed that the appellant did not have to answer Garda Sweeney question, the Judge would have been perfectly entitled to have accepted the evidence of the prosecutions witnesses and to have recorded a conviction. However this was not the approach adopted and I am satisfied from the case stated that pivotal to the Judge's ultimate decision was her determination that the accused had not denied committing the offence and/or had not proffered details in relation to the other individual he claimed had broken the window.

In the result it seems to me that there was an interference with the appellant's right to silence which is protected under Article 38.1 of the Constitution. The appellant should not have been cross-examined in this way. Compelling the accused to answer the question violated the privilege against self-incrimination, and to draw inferences from the answers given was impermissible.

5.5 In light of the above findings the answers to the questions posed in the case stated are as follows:-

(a) The decision to allow the question to be put and the direction to the appellant to answer the question was not in accordance with the appellant's right to silence,

(b) In deciding to convict the appellant the Judge was not entitled to take into account the failure by the appellant to make the relevant claims to Garda Sweeney while he was under arrest. Nor was the Judge entitled to infer that these claims were untrue,

(c) The Judge was not entitled to take into account the alleged failure by the appellant to deny breaking the window in circumstances where evidence was not given by the Garda on that matter.

The proceedings against the appellant should be dismissed.