Neutral Citation: [2016] IEHC 272

THE HIGH COURT

[2015 No. 440 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 O'LEARY)

PROSECUTOR/RESPONDENT

AND

KENNETH FINN

ACCUSED/APPELLANT

JUDGMENT of Ms. Justice O'Regan delivered on the 18th day of April, 2016

Background

1. On the 11th November, 2014, the appellant was accused and convicted of an offence of obstruction of the taking of a forensic sample contrary to s.2 (9) of the Criminal Justice (Forensic Evidence) Act, 1990 in the District Court.

2. By virtue of an appeal by way of case stated from the District Court the opinion of the High Court was sought on two questions, namely:-

a. For the purposes of the obstructive offence contained within s.2 (9) Criminal Justice (Forensic Evidence) Act, 1990, can a detainee be said to have obstructed the taking of a buccal sample where the Garda has not attempted to take the sample, by using reasonable force if necessary, and the detainee has obstinately and deliberately refused to provide the requested sample?

b. In all of the circumstances, was I correct to convict the appellant?

3. The effective issue before this Court was as to whether or not the behaviour of the appellant amounted to obstruction.

4. The offence at s.2 (9) of the 1990 Act provides:-

> "(9) A person who obstructs or attempts to obstruct any member of the Garda Síochána or any other person acting under the powers conferred by subsection (1) of this section shall be guilty of an offence..."

Submissions on the part of the appellant

5. The appellant's submissions might be summarised as follows:-

i. Where the remedy available to An Garda Síochána to use reasonable force to obtain a forensic sample was not exhausted, the offence of obstruction cannot be made out.

ii. The behaviour of the appellant was not obstructive but rather uncooperative.

iii. The meaning of obstruction should not have been afforded a wide interpretation as suggested by the District Court.

Submissions of the prosecutor

6. The submissions on behalf of the prosecutor might be summarised as follows:-

i. As there was no choice available to the appellant in giving the sample there was an obligation on him to give same.

ii. The absence of force or an attempt to use force by the Gardaí was not a prerequisite to a finding of obstruction.

iii. The behaviour of the appellant did amount to obstruction having regard to various case law.

Findings of fact by the District Court

7. The District Court found that it had been proven that while the appellant was lawfully detained, a valid authorisation to take a buccal swab was made and Detective O'Leary made a demand of the appellant to allow the swab to be taken. The appellant was cautioned that obstructing the taking of a sample amounted to a criminal offence; the appellant had access to and availed of independent legal advice and the appellant refused to allow the swab to be taken.

8. At para. 4 of the case stated, the District Court judge who reviewed the relevant video recording advised this Court that the appellant was recorded in a seated position with his head down and his arms crossed, and on being required to provide the sample obstinately refused to do so. The appellant was polite and non-violent throughout but obstinately and deliberately refused to submit to the firm requests of Detective Garda O'Leary who admitted that there was no attempt to use any force.

Case law

9. Of the case law referred to by both parties the following principles or definitions emerge:-

a. The concept of obstruction differs from noncooperation: see para. 146 of the judgment in *Murphy v. Flood* [2010] 3 I.R. 136.

b. In *Swallow v. London County Council* [1916] 1 K.B. 224 mere refusal to assist does not constitute obstruction.

c. In *Burrow v. Howland* [1896] 60 J.P. 391 the accused stood in a doorway and refused access to his dwelling which was held to amount to obstruction.

d. In *Hinchcliffe v. Sheldon* [1955] 3 All E.R. 406 it was held that obstructing means making it more difficult for the Police to carry out their duties.

e. In *Rice v. Connolly* [1966] 2 Q.B. 414 the appellant had refused to answer questions and was sarcastic and awkward throughout. However the appellant court held that obstruction is the doing of an act which makes it more difficult for Police to carry out their duties.

f. In the case of People (*DPP) v. Gormley and White* [2014] I.L.R.M. 377 the Supreme Court held that Mr. White had "no option" and was as a matter of law obliged to allow the forensic testing which was required of him.

g. In the case of *Dibble v. Ingleton* [1972] 1 Q.B. 480 the court held there was a distinction between a refusal to act and the doing of some positive act.

h. In the case of *DPP v. Boyce* [2008] IESC 62 the Chief Justice stated that as this is a penal section the benefit must be given to the accused where the intent of the Oireachtas is unclear.

Conclusion

10. The Court does not accept that because the appellant had "no option", in the words of the Supreme Court in *Gormley and White*, that this in fact equated to an obligation on his part.

11. Neither does the Court accept the appellant's suggestion that the offence of obstruction cannot be made out in the absence of exhausting the use of reasonable force.

12. Given the fact that mere refusal to assist does not constitute obstruction (see Swallow) and one must differentiate between noncooperation on the one part and obstruction on the other part (see Murphy v. Flood), and given the fact that it is acknowledged that the appellant was polite and non-violent throughout, his obstinate and deliberate refusal to provide the requested sample could not alone amount to obstruction.

13. In the within case however the obstinate and deliberate refusal to provide the requested sample was coupled with the appellant maintaining his head down and arms folded (see para. 4 of the case stated).

14. Further, there is a finding of fact that the appellant refused to allow the swab to be taken (see para. 3(g) of the case stated).

15. The Court is of the view that the combined effect of the obstinate and deliberate refusal to allow the swab to be taken (see para. 3(g) of the case stated) coupled with the appellant maintaining his head down and arms folded amounted to behaviour which made it more difficult for the Police to carry out their duties (see *Rice v. Connolly* and *Hinchcliffe* aforesaid). The totality of such conduct frustrated the Garda objective (see the textbook of Heffernan and Ní Raifeartaigh, Evidence in Criminal Trials (Dublin, 2014) at para. 10.163).

16. The Court would answer the questions posed therefore as follows:

a. No.

b. Yes.