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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

McEvoy's Application [2008] NIQB 112

AN APPLICATION FOR JUDICIAL REVIEW BY JAMES McEVOY

WEATHERUP J

[1] The applicant is a sentenced prisoner at HMP Maghaberry and applies for judicial review of the decision of Governor Kennedy at an adjudication on 10 April 2008 where he found the applicant to have obstructed a prison officer in the execution of his duty, contrary to Rule 38(9) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. Mr K Magill appeared for the applicant and Dr McGleenan appeared for the respondent.

[2] The applicant has been a prisoner at HMP Maghaberry since 25 April 2005. On 20 February 2008 the applicant was moved from a cell in Bann House to a new cell in Erne House. He shared the new cell with another prisoner. That evening a search of the cell uncovered a mobile phone, being an unauthorised article. Both the applicant and his cell mate denied knowledge of the mobile phone and both were charged with possession of an unauthorised article, contrary to Rule 38(12). At his adjudication the other prisoner admitted that he had been in possession of the mobile phone.

[3] The adjudication proceeded against the applicant under Rule 38(12) for possession of the mobile phone. Prison Office Otley stated that he entered the applicant's cell and found the applicant lying on the bottom bunk and the other prisoner sitting on a chair. His evidence was that "I asked the prisoner if he had anything in his cell that he should not and he replied no". On searching the bottom bunk the prison officer found the mobile phone between the mattress and the wall. Prison Officer Boyle accompanied Prison Officer Otley on the search. His evidence was that "McEvoy was asked if there was

anything in the cell that should not be there. He replied no." Prisoner Officer Boyle found a mobile phone charger plugged into a play station.

[4] At the adjudication the applicant denied any knowledge of the mobile phone. Governor Kennedy found that the applicant knew that the mobile phone was in the cell and that the other prisoner had been using the mobile phone. However Governor Kennedy changed the charge to what he described as a lesser charge under Rule 38(9) of intentionally obstructing a prison officer in the execution of his duty. Governor Kennedy stated his conclusion as follows - "I have heard what you have said and I am still satisfied beyond reasonable doubt that you knew that phone was there and when you were asked by the search officers you intentionally obstructed them by saying that there was nothing there."

[5] The Northern Ireland Prison Service Manual on the Conduct of Adjudications refers to obstruction of a prison officer under Rule 38(9) and states –

> "This charge covers physical obstruction but not exclusively so. A prisoner who deliberately provides false information to an officer might be charged with this offence.
>
> Evidence – Before an adjudicator can be satisfied of guilt beyond a reasonable doubt, the following must be established –
>
> - There was an obstruction of some sort physical or otherwise;
> - The person obstructed was an officer of the Prison Service or anyone else (other than a prisoner) who was at the prison for the purpose of working there;
> - The officer was attempting to carry out his or her duty or the person was attempting to perform his or her work; and
> - The accused intended such a person to be obstructed in such a way."

[6] The Manual states correctly the ingredients of obstruction as understood in criminal law. The same ingredients have been imported into prison disciplinary proceedings. The present case raises the issue as to the circumstances in which a false statement may amount to obstruction so as to satisfy the first ingredient. I proceed on the basis of Governor Kennedy's finding that the applicant had knowledge of the presence of the mobile phone in the cell. The obstruction relied on by Governor Kennedy was the

applicant's false denial of knowledge of the presence of unauthorised articles in the cell.

[7] Mr Magill for the applicant raised two preliminary issues on the facts. The first issue concerned the statements by Governor Kennedy by letter and affidavit that the finding of obstruction was based on the applicant's knowledge of the presence of the mobile phone in the cell, without reference being made to the applicant's negative answer to the question he was asked. However it is apparent from the transcript that Governor Kennedy based his finding of obstruction on his conclusion that the applicant had knowledge of the phone and that he had denied knowledge of the presence of any unauthorised article.

[8] The second issue on the facts concerned the content of the question that was asked of the applicant, as there were two versions of the question given by the prison officers. According to PO Otley the applicant was asked whether he (the applicant) had anything in his cell that he should not have. According to PO Boyle the applicant was asked if there was anything in the cell that should not be there. Mr Magill contended that the first form of the question related to the personal possession and responsibility of the applicant for the item and in respect of that question the applicant was entitled to answer in the negative. For the purposes of the charge of obstruction in the circumstances of the present case I do not accept that there is any difference in principle that emerges from the different forms of the question.

[9] Blackstone's Criminal Practice 2008 at paragraph B2.36 describes the elements of resisting or wilfully obstructing a constable as follows:

> "A defendant obstructs a police constable if he makes it more difficult for him to carry out his duty (*Hinchcliffe v Sheldon* (1955) 1 WLR 1207, *obiter*). While 'resisting' implies some physical action, no physical action is necessary to constitute obstruction. Simple refusal to answer questions does not constitute an obstruction (*Rice v Connolly* (1966) 2 QB 414), neither does advising another person not to answer (*Green v DPP* (1991) 155 JP 816). Answering questions incorrectly may, however, amount to obstruction, although the distinction is not always clear (*see Ledger v DPP* (1991) Crim. LR 439).
>
> A person may obstruct by omission, provided that such a person is under an initial duty to act (*Lunt v DPP* (1993) Crim. LR 534)."

[10] "Obstruction" of a police officer has been defined as "making it more difficult for the police to carry out their duties".

This statement of Lord Goddard CJ in Hinchcliffe v Sheldon has been followed in Northern Ireland in the Divisional Court judgment of MacDermott LJ in Clinton v Kell (1993) NIJB 10 page 52 and in the judgment of Campbell LJ in the Court of Appeal in Chief Constable v Devlin (2008) NICA 22.

[11] "Obstruction" may include a refusal to answer a question, provided there is a legal duty to answer.

This issue has been recently considered by the Court of Appeal in Northern Ireland in Chief Constable v Devlin. The charge against the defendant of obstructing a constable under Section 66(1) of the Police (Northern Ireland) Act 1998 arose from his refusal to give the police officer his name and address after he had been arrested for disorderly behaviour. The Court of Appeal found that the failure to give the name and address could not amount to obstruction as there was no legal duty to give the information.

The policy considerations relating to the offence of obstruction of a constable were considered by Dr. Glanville Williams in his Textbook of Criminal Law 2nd Ed. at p 202 and led him to conclude that, in the absence of a legal duty to answer a question, obstruction must be taken to mean active obstruction -

> "…. the logical and proper reason why a failure to answer the questions of the police is not an obstruction is not because of any specific right the citizen has but simply because an "obstruction" must be taken to mean an active obstruction, not a mere failure to co-operate. If we are to be put under a legal *duty* to help the police, it must be by an Act of Parliament; and Parliament should say in what respects we are required to help the police on their request, and it should provide proper exemptions, and name the appropriate penalty for refusal. The job ought not to be done by judicial "interpretation" of the obstruction offence, which was obviously designed to do nothing more than prevent active obstructions."

[12] "Obstruction" may include the making of a false statement.

Blackstone's Criminal Practice refers to Ledger v DPP where the defendant had given an obviously false name and was convicted of obstructing a police officer. Professor Smith's commentary on the report in the Criminal Law Review states that the reply was not intended to be believed and was no more than a contemptuous way of telling the police that he was not going to give

his name and address. The constable had no right to an answer to the question and so the refusal to answer was not obstruction.

In The Matter by Her Majesty's Attorney General under Section 15 of the Criminal Appeal (Northern Ireland) Act 1980 and in the Matter of The Queen v Lee William Clegg and Others (NICA 21 October 1994) the question before the Court of Appeal concerned obstruction of a constable contrary to Section 7(1)(a) of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968. The Court of Appeal stated that a constable may be obstructed in the execution of his duty by physical or non-physical acts and the latter acts may include the making of a false statement. The Court of Appeal also stated that in every case the tribunal of fact must be satisfied beyond doubt that the constable was in fact obstructed.

[13] The respondent contended that "obstruction" for the purposes of Rule 38(9) is the sole basis for disciplinary proceedings, whereas the criminal law statutes have concerned a person who "assaults, resists, obstructs or impedes" any constable. The contention therefore is that the criminal law jurisprudence has developed in a context where obstruction has been coloured by the notions of assaulting, resisting or impeding and this has had the effect of limiting its meaning. On the other hand where obstruction stands alone it is said by the respondent that obstruction will have a wider meaning than the interpretation accorded under the criminal statutes. This contention was not accepted by the Divisional Court in Clinton v Kell and I respectfully agree.

[14] The false statement relied on in the present case was the applicant's false denial of knowledge of the presence of unauthorised articles in the cell. Whether that denial is capable of amounting to the act of obstruction depends on whether the applicant had a legal duty to provide the information requested. The applicant contended that there is no such legal duty. The respondent contended that there is such a legal duty imposed on the applicant in the circumstances. It is contended that in the general context of the prison and the requirements for control and discipline of prisoners by prison staff there is a duty on prisoners to respond to requests for information. Further it is contended that, as Rule 38(24) provides that it is an offence against prison discipline to offend against good order and discipline, this imposes an obligation on prisoners to maintain good order and discipline and that positive obligation includes the duty to provide accurate information on request.

[15] I am satisfied that neither the general context of the prison nor the existence of Rule 38(24) imposes upon prisoners, further to a general request from prison staff for information about their knowledge of the presence of unauthorised articles, any legal obligation to provide information. There may be particular circumstances in the prison where a prisoner is under an

obligation to answer particular questions but it is not proposed to examine such other circumstances in the present case. In circumstances such as the present case there was no such legal obligation. I equate a mere denial of knowledge, in the absence of a legal duty to provide information, to a refusal to answer. A mere denial of knowledge, in the absence of a legal duty to provide the information, is not capable of amounting to obstruction.

[16] Not only must the false statement involve more than a mere denial of knowledge, where there is no legal obligation to answer, but the false statement must make it more difficult for the prison officers to carry out their duties. The duties being undertaken by the prison officers in the present case involved a search of the applicant's cell for unauthorised articles. The applicant's negative answer to the question did not add to the duties that the prison officers were performing of searching the cell for unauthorised articles. Had the applicant admitted the presence of the mobile phone and handed it over it is to be expected that the prison officers would have completed the search of the cell for unauthorised articles in any event. On the other hand, had the applicant sought to divert the prison officers by stating falsely that there was an unauthorised article in another cell so as to encourage an additional search elsewhere, or had otherwise intentionally added to the duties the officers were performing, that would have been capable of amounting to obstruction.

[17] In relation to disciplinary proceedings for obstruction based on statements by prisoners I would summarise as follows. Obstruction may be defined as making it more difficult for the officers to carry out their duties; it may include a refusal to answer a question, provided there is a legal duty to answer; there is no legal duty to provide information in response to a general question about a prisoner's knowledge of the presence of unauthorised articles; a mere denial of knowledge in response to a general question about the presence of unauthorised articles does not amount to obstruction; a false statement that makes it more difficult for the officers to carry out their duties, and intended to have that effect, is capable of amounting to obstruction.

[18] The second ingredient of obstruction set out in the Manual, that PO Otley and PO Boyle were prison officers, was not in dispute. The third ingredient that the prison officers were carrying out their duties was not in dispute. The fourth ingredient is that the applicant intended to obstruct the prison officers. Had the action of the applicant in falsely denying knowledge of the unauthorised article amounted to obstruction I would have been satisfied that the applicant intended such obstruction. However I am satisfied that the action of the applicant did not amount to "obstruction" for the purposes of Rule 38(9). Accordingly the finding in the adjudication will be quashed.