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Judgment: approved by the Court for handing down | *Delivered:* **14/03/16**
(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

_____

SEAN O'REILLY

Appellant

and

PUBLIC PROSECUTION SERVICE

Respondent

_____

Before: Weatherup LJ, Treacy J and McBride J

_____

TREACY J (delivering the judgment of the Court)

Introduction

[1] This matter comes before the Court as an appeal by way of case stated from the conviction of the Appellant by District Judge Watters who sat as a Magistrates' Court for the Petty Sessions District of Lisburn on 12 December 2014. On that date she heard a complaint against the Appellant that he:

> "On the 11th day of March 2014, in the County Court Division of Craigavon, obstructed Christopher Boyd, a constable in the execution of his duty, contrary to section 66(1) of the Police (Northern Ireland) Act 1998."

[2] The facts were not in dispute and are set out in the case stated as follows:

i. The Appellant was stopped at 18.25 hours on the 11 March 2014 in his vehicle by Constable Boyd. The Constable explained to the Appellant

that he had stopped him under Section 21 of the Justice and Security Act 2007. His vehicle was also searched.

ii. The Constable then asked the Appellant to provide details of his movements namely where he was coming from and travelling to.

iii. The Appellant said he was coming from his home and going to his mother's home. The Constable was aware of the Appellant's address but was not aware of the Appellant's mother's address.

iv. The Constable asked the Appellant where his mother lived and he refused to tell the Constable. He was informed that it was an offence under the Justice and Security Act 2007 not to provide the required information. The Appellant responded "look it up in your system".

v. The Constable could not find any details of the Appellant's mother's address on the police system and despite further requests and warnings that the Appellant was liable to be arrested the Appellant continued to refuse to provide the information.

vi. At 18.40 hours the Appellant was arrested and cautioned for obstruction of a police officer in the due execution of his duty, contrary to Section 66(1) of the Police (Northern Ireland) Act 1998.

vii. As the Appellant was subsequently being taken to the police vehicle he provided the required information. At 18.42 hours he was informed that he was no longer under arrest and he replied "my solicitor will have a field day with this". He was informed that he would be reported to the Public Prosecution Service.("PPS")

[3] At the hearing before the District Judge the Appellant's counsel argued that he should have been charged under Section 21 of the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act") rather than Section 66(1) of the Police (Northern Ireland) Act 1998 ("the 1998 Act"). Counsel argued that the District Judge should stay the proceedings as an abuse of process.

[4] The District Judge took the view that the PPS could charge the Appellant with either offence as each offence was made out on the facts. The Appellant was convicted and fined £50.

[5] The question posed for the opinion of the Court of Appeal is:

> "Was I correct in law in ruling that an offence under Section 21(3)(b) of the Justice and Security Act 2007 could alternatively be prosecuted as obstructing a police officer

in the due execution of his duty [contrary to] Section 66(1) of the Police (Northern Ireland) Act 1998?"

The relevant Law

[6] Section 66 of the 1998 Act reads as follows:

> "66.-(1) Any person who assaults, resists, obstructs or impedes a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence.
>
> 1(A) Any person who assaults, resists, obstructs or impedes a designated person in the execution of his duty, or a person assisting a designated person in the execution of his duty, shall be guilty of an offence.
>
> (2) A person guilty of an offence under subsection (1) or (1A) shall be liable
>
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or to both."

[7] Any offence under Section 66 is hybrid and therefore capable of being tried on indictment, and it also carries a potential period of imprisonment.

[8] Section 21 of the 2007 Act is as follows:

> "21. **Stop and question**
>
> (1) A member of Her Majesty's forces on duty or a constable may stop a person for so long as is necessary to question him to ascertain his identity and movements.
>
> (2) A member of Her Majesty's forces on duty may stop a person for so long as is necessary to question him to ascertain –
>
> (a) What he knows about a recent explosion or another recent incident endangering life;

(b) What he knows about a person killed or injured in a recent explosion or incident.

(3) A person commits an offence if he –

(a) fails to stop when required to do so under this section;

(b) refuses to answer a question addressed to him under this section; or

(c) fails to answer to the best of his knowledge and ability a question addressed to him under this section.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) A power to stop a person under this section includes a power to stop a vehicle (other than an aircraft which is airborne)." (Emphasis added)

[9] It can be seen from Section 21(4) that a failure to provide details under section 21(3)(b) renders that person liable to prosecution for a summary only offence punishable by a fine only, not exceeding level 5 on the standard scale. As the statutory offence is summary only, it must be prosecuted within 6 months or it becomes statute barred in accordance with Article 19(1)(a) of the Magistrates' Courts (Northern Ireland) Order 1981.

[10] Before proceeding further it is necessary to briefly address some preliminary points which were raised by the PPS concerning alleged failures by the Appellant to comply with certain time limits contained in Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order"). The PPS no longer contend that the requisition to state the case was not served on them within 14 days of the decision as required by art 146(2) of the 1981 Order as it is now accepted that it was delivered by hand within time.

[11] The other two objections which are maintained arise from the failure to lodge a copy of the case stated that had been stamped by the Clerk of Petty Sessions ("CPS") at all and the failure to lodge that document within 14 days in accordance with art 146(9) which states:

> "(9) Within fourteen days from the date on which the clerk of petty sessions dispatches the case stated to the applicant (such date to be stamped by the clerk of petty sessions on the front of the case stated), the applicant shall transmit the case stated to the Court of Appeal and serve on the other party a copy of the case stated with the date of transmission endorsed on it."

[12] The stamped case stated was dispatched by the CPS on 10 June 2015. It is accepted that it was posted to the PPS and the Appellant's solicitors at the same time. The PPS received it but the Appellant's solicitors have averred that they did not receive it. Since the Appellant did not receive that document we accept that in those circumstances it was impossible to lodge the stamped copy within the 14 day time limit. Lowry LCJ in Dolan v O'Hara [1975] NI 125 at p130 letters E-G recognised the principle that impossibility may excuse non-compliance even where the requirement is imperative. In light of the Appellant's solicitors unchallenged averment that they did not receive the stamped case stated we accept that compliance with the time-limit stipulated in art 146(9) was not possible.

[13] The matter is complicated by the fact that staff mistakenly assumed that an earlier dated copy of the case stated, though not marked as such on the face of the document, represented the actual case stated and it was this document which was lodged. Art 146(9), however, requires the stamped copy to be transmitted to the Court of Appeal within the requisite time limit. The draft and the stamped copy are in identical terms. As the Court and the parties now have both, we propose to now examine the merits of the appeal.

Discussion

[14] The offence of obstructing a police officer in the execution of their duty was considered by the Court of Appeal in Gerard Devlin [2008] NICA 22. That case involved the refusal by the defendant to provide his name and address to the police. In directing the Youth Court to acquit, the Court of Appeal stated at paragraph [21]:

> "Although it made it more difficult for the constable to perform his duty the appellant could not be guilty of an offence under s.66 of the Police (Northern Ireland) Act 1998 as he was not obliged either at common law or by statute to give the constable the information that he requested."

[15] Counsel for the Appellant correctly acknowledged that the key difference in the present case is that, unlike Devlin, this Appellant was subject to s.21 of the 2007 Act which made it a specific offence not to provide the details that were sought by the constable. The issue which therefore arises for determination is what offence

can the Appellant be lawfully prosecuted for when he fails to provide the requested information? Counsel for the Appellant referred us to Dr Glanville Williams' *Textbook of Criminal Law* 2nd Ed, at page 202 where he suggests that in Rice v Connolly the Divisional Court:

> "Reached an impeccable conclusion for a reason that was slightly flawed but substantially sound. The impeccable conclusion was that a citizen who refuses to answer the questions of the police is not guilty of wilfully obstructing them in the execution of their duty. The slightly peccable reason, contained in the leading judgment delivered by Lord Parker CJ, was that the offence requires wilfulness, which implies an absence of lawful excuse; and the citizen has a lawful excuse for not answering questions, presumably because of his "right of silence". The objection to this line of argument is, first, that questions of excuse have nothing to do with the mental state of wilfulness. Secondly, 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." (Emphasis added)

[16] In Devlin the Court of Appeal addressed the interaction between s. 21 of the 2007 Act and the offence of obstructing a police officer under s. 66(1) of the 1998 Act:

> "[18]… Under a number of provisions (for example s.21 of the Justice and Security (NI) Act 2007 and its precursor s.89 of the Terrorism Act 2000) failure to provide identity is made an offence. However, Parliament did not make it an offence under Article 27 of the Police and Criminal Evidence Order (or Article 10 of the Criminal Justice (Children) (Northern Ireland) Order 1998) and we do not accept that either provision by implication imposes a reciprocal duty on the citizen to provide his identity. As Professor Smith observed at (1993) Crim LR 535 "Liability

> for omissions is exceptional in the criminal law. It exists only when the law imposes a duty to act."

[17] In R v Rimmington [2005] UKHL 63 at Paragraph [30], Lord Bingham stated:

> "Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited … It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise."

[18] Liability for omissions is exceptional in the criminal law. It exists only when the law imposes a duty to act. Without s.21 (3)(b) of the 2007 Act (making refusal to answer a question addressed to him under the Act a criminal offence) the failure to provide details of his movements, without more, could not independently constitute the offence of obstruction under s.66 of 1998 Act. Whilst the Court in that case acknowledged that the refusal to provide his name and address made it more difficult for the police constable to perform his duty, he could not be guilty of an offence under s.66 as he was not obliged by common law or statute to give the constable the information requested.

[19] Parliament has intervened to provide a bespoke and carefully calibrated statutory regime defining the scope of the powers of the questioning Constable and the mode of trial and penalty for non-compliance. By s.21(3) of the 2007 Act a person commits an offence, *inter alia*, if he refuses to answer a question addressed to him under the Section. This Section therefore criminalised conduct which would not of itself have been otherwise criminal. Further, the mode of trial (summary only) and

the maximum penalty (fine) are expressly stated in s.21(4). As Lord Bingham said in Rimmington when Parliament has defined the ingredients of an offence and has prescribed the mode of trial and the maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for that statutory offence and not for a common law offence, which may or may not provide the same defences and for which the potential penalty is unlimited. In the present case, however, the offence of obstruction is now on a statutory footing, the penalty is not unlimited, and arguably a person prosecuted under s.66 has an additional defence if the officer was not acting in the execution of his duty. This Appellant was in fact dealt with before a court of summary jurisdiction and a fine of £50 was imposed.

[20] If the refusal to answer the questions posed under s.21(3)(b) of the 2007 Act were not independently an offence under s.66 of the 1998 Act the enactment of a specific offence under the 2007 Act prescribing the mode of trial and the maximum penalty cannot in our view thereby extend the reach of s.66 to create an offence triable on indictment, with a maximum penalty of 2 years' imprisonment and free of the 6 month time limit applicable to purely summary offences under art 19(1)(a) of the Magistrates' Courts (NI) Order 1981. To hold otherwise would defeat the intention of Parliament which must have carefully weighed up the competing interests and constructed a bespoke offence triable only summarily and with the maximum penalty being a fine. If Parliament had wanted to make the offence triable on indictment and/or subject to a potential penalty of imprisonment, it could easily have so provided. It conspicuously did not so provide. If the PPS were correct, undesirable consequences could follow, introducing unfortunate and unnecessary scope for inconsistent charging and sentencing approaches. Prosecutors could bypass the 6 month time limit by charging the hybrid offence under s.66; some prosecutors could elect to charge under s.66 rather than s.21; defendants could find themselves exposed to trial on indictment and facing a maximum of 6 months in prison; a risk of differential and inconsistent sentencing between cases tried under s.21 and s.66 where the former can only attract at most a fine whereas the latter can attract a maximum of 6 months' prison.

[21] In circumstances where the proper offence was summary only, with a maximum penalty of a fine, the Appellant was then prosecuted for, and convicted of, a different statutory offence which was capable of being tried on indictment, without any time limits for prosecution, and which carried a potential penalty of imprisonment. We do not consider that such an approach can be regarded as lawful and is inconsistent with the intention of Parliament.

[22] We further observe that the Appellant was informed by the Constable that it was an offence *under the Justice and Security Act 2007* not to provide the required information. The Appellant therefore had at least constructive knowledge of the penalty to which he would be exposed for *that* offence when he made his decision refusing to provide the information sought, namely a fine.

[23] Where a person fails to provide required details under s. 21 of the 2007 Act, he can only be prosecuted for that statutory offence and dealt with by the punishment contained in that statute. It is not an option to prosecute for obstructing a police officer under s. 66 of the 1998 Act, as there is no duty to provide the requested details outside of that contained in the 2007 Act.

[24] In light of what we have said above the question posed in the case stated must be answered 'no'. Accordingly, the appeal is allowed and the conviction set aside.