

In re Kevin O'Kelly

(1974) 108 I.L.T.R. 97 (30 July 1974)

THE COURT OF CRIMINAL APPEAL

**Walsh J,
Murnaghan J,
Gannon J.**

JUDGMENT of Walsh J. (Murnaghan and Gannon JJ. concurring) delivered on the 30th day of July 1974

1. On November 25th, 1972, the Special Criminal Court convicted the applicant for contempt of court in the face of the court and sentenced him to imprisonment for a period of three months from the date. Having been refused a certificate for appeal by the Special Criminal Court, the appellant applied to this Court pursuant to the provisions of [section 41\(1\)](#) of the Offences Against the State Act, 1939, for leave to appeal against the sentence and on the 27th November, 1972, this Court granted the application for leave to appeal and admitted the appellant to bail pending the determination of his appeal to this Court. On that occasion this Court also ordered that in the event of the appeal being dismissed the appellant should serve the remainder of the sentence imposed by the Special Criminal Court without any remission in respect of the period of bail allowed. The appellant's appeal has now been heard by this Court.

2. The contempt arose during the course of the trial at the Special Criminal Court on the date in question of Mr. Seán Mac Stíofáin in which he stood indicted of being a member of an illegal organisation contrary to the Offences Against the State Act, 1939. One of the witnesses called on behalf of the prosecution was the present appellant and in the course of his evidence he refused to answer a question put to him by the Court. This refusal was adjudged contempt of court in the face of the court.

3. The appellant is a well-known journalist employed by Radio Telefís Éireann. He had been called to give evidence about an interview he had had with the accused and upon which the State was apparently relying as evidence of an admission by the accused of membership of an illegal organisation or of an admission of facts from which that conclusion might be legitimately inferred. In the course of his evidence Mr. O'Kelly stated that he had had an interview with somebody, who was a man, on the night of the 18th or the morning of the 19th of November, 1972, and that he had made a tape-recording of the interview and had given it to Mr. Desmond Fisher, the Deputy Head of News of Radio Telefís Éireann. He stated that he had not interfered in any way with the tape before it was handed to Mr. Fisher. The tape-recording in question was identified in court partly on the evidence of Mr. Desmond Fisher and partly on the evidence of Mr. O'Kelly who also stated in his evidence

that the tape-recording before the Court was an accurate and authentic one and “that he was satisfied the remarks on it by Mr. Seán Mac Stíofáin were authentic.” When asked the direct question who was the man he interviewed, he refused to answer. He indicated that this was a problem of conscience for him and that while recognising his duty to the Court as a citizen to co-operate with it in the furthering of justice he stated “I also appear here as a journalist and, as a journalist, I do in conscience feel bound to respect confidences given to me in that capacity, so as to answer the question put to me properly” he did not feel free to disclose the information. The witness also at a later stage said that it appeared to him that the question being put to him amounted to asking him to say that he was “present physically when the statements were being made by the man on the tape were in fact made and my position is to disclose the circumstances under which the statements on the tape were made available to me would be a breach of confidence between me and a client which I feel, were I to breach that confidence, I would be not only putting my own exercise as a journalist into jeopardy, I would make it very difficult adequately to promote the public good by making it difficult for any journalist all over Ireland to promote the public good by fostering the free exchange of public opinion.”

4. The Court is quite satisfied that Mr. O’Kelly genuinely believed that he would be acting in breach of his journalistic ethics if he were to answer the question but the Court is not satisfied that he was entitled to refuse to answer it. Furthermore, it appears to the Court that there was a considerable amount of confusion in Mr. O’Kelly’s mind on this matter, though this may be explicable by the fact that Mr. O’Kelly found himself in an environment and a position quite unusual for him. It appears to the Court that what Mr. O’Kelly had already said in evidence amounted to evidence to the effect that the man he had interviewed was Mr. Seán Mac Stíofáin and that the voice on the tape-recording was that of Mr. Seán Mac Stíofáin and that the interview on it was the interview in question and that the tape had not been tampered with.

5. During the hearing in the Special Criminal Court and during the hearing of the appeal here it was never made clear what was the confidence which Mr. O’Kelly felt that he was being asked to break. The interview in question was one made for public broadcast and one of the essential features of the publication was the fact that the identity of the person interviewed was Mr. Seán Mac Stíofáin. In fact the whole value of the publication of the interview from Mr. O’Kelly’s point of view depended upon the fact that the persons to whom the interview would be published would be made aware that the person interviewed was Mr. Seán Mac Stíofáin. Mr. O’Kelly’s references to the difficulty which might be placed in the way of promoting the public good by fostering the free exchange of public opinion appears to add further confusion to the matter because the object of the interview was the publication of it. The Court is aware that in general journalists claim the right to refuse to reveal confidences or disclose sources of confidential information. The Constitution, in Article 40 section 6, states that the State shall endeavour to ensure that the organs of public opinion, such as the radio and the press, while preserving their right of liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. Subject to these restrictions, a journalist has the right to publish news and that right carries with it, of course, as a corollary the right to gather news. No official or governmental approval or consent is required for the gathering of news or the publishing of news. It is also understandable that newsmen may require informants

to gather news. It is also obvious that not every newsgathering relationship from the journalist's point of view requires confidentiality. But even where it does journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege. As was pointed out by the Supreme Court in *Murphy v. The Dublin Corporation and the Minister for Local Government* [1972] I.R. 215; (1973) 107 I.L.T.R. 65, it would be impossible for the judicial power under the Constitution in the proper exercise of its functions to permit any other body or power to decide for it whether or not certain evidence would be disclosed or produced. In the last resort the decision lies with the courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses and the production of evidence and, *a fortiori*, the answering of questions by witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent. As was pointed out in that case, there may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege. The obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct does not constitute a harassment of journalists or other newsmen. If a journalist were to be invited to witness the commission of a crime in his capacity as a journalist and received the invitation only because of that capacity, the courts could not for a moment entertain a claim that he should be privileged from giving evidence of what he had witnessed simply because of the fact that he was there as a journalist. In the present state of the criminal law, in such a case a journalist concealing such knowledge, like any other person in a similar position, might well find himself guilty of misprision of felony where a felony was concerned. In the present case Mr. O'Kelly was in effect being asked to identify the speaker of words which were claimed to constitute an admission of membership of an illegal organisation and therefore the commission of an offence, namely, the offence of being such a member. Even if the question of confidence arose here, which it clearly did not because, for the reasons already stated, the identity of the person being interviewed was an essential part of the publication, the claim of privilege to refuse to answer the question was unsustainable in law although made in good faith. However, Mr. O'Kelly persisted in his attitude when the Court had very patiently explained the position to him. He was, in the opinion of this Court, rightly convicted of contempt of court and in fact has not appealed against that conviction.

While this appeal is simply against the sentence imposed, the Court has thought it necessary to go into the position in some detail as it appears that Mr. O'Kelly was somewhat confused about the legal situation generally and the views expressed by the Court may be of assistance to journalists and courts dealing with this matter in the future. In reviewing the sentence the Court has regard, of course, to the fact that Mr. O'Kelly sought to be as helpful as he could, subject to the privilege which he claimed, but must also bear in mind the fact

that he persisted in maintaining this attitude when the position had been fully explained to him and he had been given every opportunity to reconsider his position. The Court also takes into account the fact that Mr. O'Kelly's refusal to answer the question in issue, while perhaps adding some little extra difficulty to the case, did not effectively impede the presentation of the prosecution's case. In all the circumstances the Court thinks that the sentence of imprisonment should be quashed and in lieu thereof a fine should be imposed. The order of the Court, therefore, will be that Mr. O'Kelly will pay a fine of £250 and in default of payment of this fine by Mr. O'Kelly into the office of this Court on or before the 30th day of September he will serve a sentence of three months imprisonment, but in such event the time already spent by Mr. O'Kelly in serving the sentence imposed on him by the Special Criminal Court will be taken into account.

The order of the Court will therefore be that the appeal is allowed in the terms already stated.