

1976
June 23

[STAVRINIDES, L. LOIZOU, A. LOIZOU, JJ.]

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PANAYIOTIS
A. MOUSKOS
v.
THE DISTRICT
OFFICER
OF LARNACA

PANAYIOTIS A. MOUSKOS,

Appellant,

v.

THE DISTRICT OFFICER OF LARNACA,

Respondent.

(Criminal Appeal No. 3527).

Building—Certificate of approval—Conviction for occupying a building in respect of which no certificate of approval had been issued—Sections 10(1) and (2) and 20(1)(a) of the Streets and Buildings Regulation Law, Cap. 96—No building permit ever obtained in relation to the construction of the said building—Not possible in law to convict as aforesaid—Requirement to be issued with certificate of approval presupposes existence of a building permit—Trimikliniotis v. District Officer Limassol (1975) 2 C.L.R. 105 followed. 5

Obstruction—Wilful obstruction—Meaning of—Building of structure encroaching on the road—Structure not removed after notice given to appellant—Act of leaving structure becomes wilful on his part—Even though obstruction may have not been wilful in the first instance or it may have begun with an act for which the appellant was not responsible—Public Roads (Protection) Law, Cap. 83 section 3(k). 10 15

Public Roads (Protection) Law, Cap. 83 section 3(k)—Wording thereof particularly “in any way” applicable to cases of construction or structure.

The appellant became in 1971 the registered owner of a plot 20 of land at Aradippou village, which he purchased from a certain Stavros Ttooulos. The latter had, in September, 1969, submitted an application to the District Office of Larnaca for a permit to build a garage on the said property which application was re- 25 fused. On the 13th January, 1970 P.W. 1, a land Registry Clerk, visited Aradippou village and found that a garage, subject matter of these proceedings, was encroaching on the public road. The extent of this encroachment on the public road was 19 ft. in length and 14 ft. and 9 ft. by its sides respectively.

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5 The appropriate authority by letter dated the 23rd October, 1972, informed the appellant that it came to their knowledge that he occupied and used the said garage, which was built without a permit, and for which no certificate of approval had been issued; and on account of the fact that it encroached on the adjacent public road and the issue of a covering permit was objectionable, it was demanded of him to demolish it within one month thereafter, otherwise Court proceedings would have been instituted against him. The appellant failed to demolish it as requested and he was eventually convicted on two counts of the offences of occupying the said garage without a certificate of approval contrary to sections 10(1) and (2) and 20(1)(a) of Cap. 96 and of wilfully obstructing the free passage over the public road contrary to sections 3(k) and 5(1)(a) of Cap. 83.

15 There has been no suggestion that a permit has ever been issued by the appropriate authority for the building of the said garage; and the sole question for consideration regarding the conviction on the first count was whether an offence is committed under the said section 10 of Cap. 96 when there does not exist a building permit in respect of a building occupied without a certificate of approval.

Held, (I) with regard to the conviction on the first count:

25 It was not possible in Law to convict the appellant of occupying and using a building in respect of which no certificate of approval had been issued—because the requirement to be issued with a certificate of approval presupposes the existence of a building permit in respect of the structure concerned, the certificate of approval being issued by the authority which grants the permit on being satisfied that the conditions of such permit have been complied with. (*Trimikliniotis v. The District Officer of Limassol* (1975) 2 C.L.R. 105 followed).

30
35 *Per curiam:* We appreciate that there may arise problems in facing situations where for some reason or other the person involved in the construction itself cannot be prosecuted and, consequently, constructions built without a building permit may remain standing in contravention of the Streets and Buildings Regulation Law, Cap. 96, but this is, however, a matter for the appropriate authorities to consider and remedy by legislative clarification.

40 *Held, (II) with regard to the conviction on the second count*

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after dealing with the meaning of the words "wilfully obstructing the free passage" vide pp. 138-139 post:

(1) Though the obstruction may have begun with an act for which the appellant was not responsible and though the act may not have been on the first instance wilful, yet when it was called to the notice of the appellant and he was required to remove it and did not, it remained there by an exercise of his will in other words, leaving it there is a wilful act on his part. (See *Gully v. Smith* [1883] 12 Q.B.D. 121 at pp. 124 and 125).

(2) That it does constitute an obstruction or the continuation of an obstruction on the part of the appellant, there is no doubt both in Law and in fact as the argument that section 3(k) of Cap. 83 and in particular that the words "in any way" therein are not applicable to cases of construction or structure, cannot stand. The words "in any way" must be taken as including anything which prevents the public from using the whole of the public road.

Appeal partly allowed.

Cases referred to:

Trimikliniotis v. District Officer of Limassol (1975) 2 C.L.R. 105;
Gully v. Smith [1883] 12 Q.B.D. p. 121 at pp. 124 and 125;
Arrowsmith v. Jenkins [1963] 2 All E.R. 210 at p. 211.

Appeal against conviction.

Appeal against conviction by Panayiotis A. Mouskos who was convicted on the 7th November, 1973 at the District Court of Larnaca (Criminal Case No. 1505/73) on one count of the offence of occupying a garage without a certificate of approval contrary to sections 10(1) and (2) and 20(1)(a) of the Streets and Buildings Regulation Law, Cap. 96 and on one count of the offence of wilfully obstructing the free passage over a public road contrary to sections 3(k) and 5(1)(a) of the Public Roads (Protection) Law, Cap. 83 and was sentenced by Artemides, D.J. to pay £5.- fine on each count and was further ordered to demolish the garage within two months.

A. Demetriou, for the appellant.

N. Charalambous, Counsel of the Republic, for the respondent.

Cur. adv. vult.

STAVRINIDES, J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

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5 A. LOIZOU, J.: The appellant has been found by the District Court of Larnaca, guilty on two counts. The first one was that he occupied a garage between the 10th March, 1971 and the 6th February, 1973 at Aradippou village without a certificate of approval first obtained from the appropriate authority contrary to sections 10(1) and (2) and 20(1)(a) of the Streets and Buildings Regulation Law, Cap. 96. The second one was
10 that at the same time and place he did, by means of the said garage, wilfully obstruct the free passage over the public road, contrary to sections 3(k) and 5(1)(a) of the Public Roads (Protection) Law, Cap. 83.

15 The grounds of appeal, as set out in the Notice thereof, are as follows:

1. As regards the conviction on count 1:

20 “(a) that there is no evidence upon which to found the said conviction *viz.* no evidence as to when the garage was built or whether the accused is using or occupying same;

(b) the section under which the accused was charged is only applicable when a permit is issued and no such allegation was made by the prosecution.”

2. As regards count 2:

25 “(a) that same is not supported or substantiated by evidence; and

(b) section 3(k) of Cap. 83 is not applicable to cases of construction or structure.”

30 The facts of the case as appearing from the judgment of the trial Court are briefly these: The appellant became in 1971 the registered owner of Plot 647/2 of Sheet Plan XL/39 of the village of Aradippou, having purchased same from a certain Stavros Ttooulos. The latter had, in September, 1969, submitted an application to the District Office of Larnaca for a permit to build a garage on the said property which application
35 was refused. On the 13th January, 1970 Eleftherios Koumandaris (P.W. 1), a Land Registry clerk, visited Aradippou village and found that the garage, subject matter of these charges, was encroaching on the public road; this road was registered as such

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in the books of the Land Registry since 1919 when the general survey took place. The extent of this encroachment on the public road was 19 ft. in length and 14 ft. and 9 ft. by its sides respectively.

The appropriate authority by letter dated the 23rd October, 1972, *exhibit* 3, informed the appellant that it came to their knowledge that he occupied and used the said garage built without a permit and for which no certificate of approval had been issued and on account of the fact that it encroached on the adjacent public road and the issue of a covering permit was objectionable, it was demanded of him to demolish it within one month thereafter, otherwise Court proceedings would have been instituted against him without further notice.

On the strength of the evidence before it the trial Court concluded that the appellant was, during the material time referred to in the charge, in occupation of the said garage without a certificate of approval first obtained from the appropriate authority. Furthermore, there has been no suggestion that there was a permit issued by the appropriate authority for the building of the said garage and the question arises whether an offence is committed under section 10 of the Streets and Buildings Regulation Law, Cap. 96, when there does not exist a building permit in respect of a building occupied without a certificate of approval.

Since the hearing of this Appeal section 10 of Cap. 96 was judicially considered in the case of *Trimikliniotis v. The District Officer of Limassol* (1975) 2 C.L.R. 105, where the appellant never obtained a building permit in relation to the construction of the building, subject matter in those proceedings. It was held that it was not possible in law to convict him—under section 10 of the Streets and Buildings Regulation Law, Cap. 96, of occupying and using a building in respect of which no certificate of approval had been issued—because the requirement to be issued with a certificate of approval presupposes the existence of a building permit in respect of the structure concerned, the certificate of approval being issued by the authority which grants the permit on being satisfied that the conditions of such permit have been complied with. The contention of counsel for the respondent in the aforesaid appeal that subsection (1) of section 10 of Cap. 96 created on its own an independent offence unconnected with the previous existence of a building permit, was not

accepted by the Court, in the absence of clear language to that effect.

5 In the light of the aforesaid, and the factual basis upon which the conviction on the first count was based by the trial Court, the appeal should succeed in respect thereof and the conviction and sentence on count 1 be and is hereby quashed.

10 We appreciate that there may arise problems in facing situations where for some reason or other the person involved in the construction itself cannot be prosecuted and, consequently, constructions built without a building permit may remain standing in contravention of the Streets and Buildings Regulation Law, Cap. 96, but, this is, however, a matter for the appropriate authorities to consider and remedy by legislative clarification.

15 Having arrived at this conclusion, the examination of the other leg of the first ground of appeal relied upon by the appellant, becomes unnecessary.

20 We turn now to count 2. It was the conclusion of the learned trial Judge that the garage in question encroached on the public road in a substantial way, the extent of which in feet has been given earlier in this judgment—and it therefore obstructed the free passage onto it. He then went on to say that, “although the particulars of the offence are not very well described, in that it is mentioned that accused erected the building, yet, I do not think that for these reasons the charge is not sustained. Ac-
25 cused, by suffering the building to remain as it is and being the owner thereof, falls under section 3 of the Law.”

Section 3(k) of the Public Roads (Protection) Law, Cap. 83, reads:

30 “3. A person shall be guilty of an offence under this Law who does or causes to be done any of the following acts in, upon or over any public road, that is to say –

.....
.....

(k) in any way wilfully obstructs the free passage.”

35 The material words in the aforesaid section are the words “wilfully obstructs”. This section corresponds to section 72 of the Highway Act of 1835 which says “who shall in any way wilfully obstruct the free passage of any such highway” and

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which case under judicial consideration in the case of *Gully v. Smith* [1883] 12 Q.B.D. p. 121 where at p. 124 Lord Coleridge, C.J. says:

“ The only question intended to be asked, and the only one we are entitled to answer, is—whether the fact of the appellant failing to remove this obstruction without having done any positive and wilful act whereby such obstruction was caused, and after the notices given him by the respondent to remove the same, amounted to a wilful obstruction, and was an offence under the Act. There is something said in the case about the original making of the wall and about its present ownership, but no question is asked us except that which I have stated”.

And further down in answering this question he says:

“ There are a number of cases in which an obstruction may not be in the first instance wilful, but yet when it is called to the notice of the owner of the property, and he is required to remove it and does not, it remains there by an exercise of his will; in other words, leaving it there is a wilful act on his part.”

He proceeds then to deal with a number of cases and concludes at page 125 –

“ To my mind it is clear that, though obstruction may have begun with an act for which the appellant was not responsible, yet if he ought to have removed that which caused the obstruction, and after notice did not do so, the act of leaving it becomes wilful on his part.”

The meaning of the words “wilfully obstructing the free passage” is also to be found in the Highway Act of 1959, section 121(1) which provision was considered in the case of *Arrow-smith v. Jenkins* [1963] 2 All E.R. p. 210 at p. 211 Lord Parker, had this to say:—

“ For my part, I am quite satisfied that this provision on its true construction is providing that if a person without lawful authority or excuse intentionally, as opposed to accidentally, that is by an exercise of his or her free will, does something or omits to do something which will cause an obstruction or the continuance of an obstruction, he or she is guilty of an offence. Counsel for the appellant has sought to argue that if a person acts in the genuine belief

that he or she has lawful authority to do what he or she is doing, then if an obstruction results he or she cannot be said to have wilfully obstructed.

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5 Quite frankly, I do not fully understand that submission. It is difficult certainly to apply it here. I imagine it can be put in this way, that there must be some mens rea in the sense that a person will be guilty only if he knowingly does a wrongful act. For my part, I am quite satisfied that the consideration cannot possibly be imported into the words
10 'wilfully obstructs' in this enactment. If anybody by an exercise of free will does something which causes an obstruction, then I think that an offence is committed; there is no doubt that the appellant did that in this case."

15 The aforesaid interpretation of the words "wilfully obstructs" apply with equal force to the corresponding provision of our law. We have already referred to the factual aspect of the case and in our view, the most relevant factor regarding this count is the letter of the 23rd October, 1972 (*exhibit 3*) whereby the appellant was asked in an explicit way to demolish the said garage, in view
20 of its encroachment on the road, threatening him thereby to be prosecuted in case of failure to comply with that letter. Although the obstruction may have begun with an act for which the appellant was not responsible, yet, he ought to have removed it, as it did cause an obstruction. After being given the said
25 notice he did not remove it and by leaving it, there is a wilful act on his part, though by way of an omission to exercise his free will which he had a duty, in the circumstances, to do. That it does constitute a wilful obstruction or the continuation of one on the part of the appellant, there is no doubt both in law and
30 in fact, as the argument that this provision of the law and in particular that the words "in any way" in paragraph 3(k) thereof are not applicable to cases of construction or structure, cannot stand. The words "in any way" must be taken as including anything which prevents the public from using the whole of the
35 public road.

In the result the appeal as against count 2 fails and is hereby dismissed.

Appeal partly allowed.