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**MAGISTRATES' COURTS (NORTHERN IRELAND) ORDER 1981
(Article 146;Rule 160)**

CASE STATED BY MAGISTRATES' COURT

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**On Appeal by way of Case Stated under the Magistrates' Court
(Northern Ireland) Order 1981**

BETWEEN I J CHAPMAN Complainant/Appellant

AND ALEXANDER KYLE Defendant/Respondent

**Case Stated by C P McRandal, Resident Magistrate for the County Court Division of
Fermanagh and Tyrone in respect of his adjudication at a magistrates' court sitting at
OMAGH.**

TRANSMITTED THE CASE STATED TO DEPARTMENT OF PUBLIC PROSECUTIONS
BY POST TO ROYAL COURTS OF JUSTICE, BELFAST, BT1 3NX ON 9th OCTOBER 1998.

M. S. Swarth

D/Clerk of Petty Sessions

The Defendant/Respondent was tried before me at Omagh Magistrates Court on the 2nd day of June 1998 on two charges, namely:-

(1) That he did, on 22nd December 1996, at Sedan Avenue Omagh in the County Court Division of Fermanagh and Tyrone, drive a motor vehicle on a road or other public place after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to Article 16(1)(a) of the Road Traffic Order (Northern Ireland) 1995.

and

(2) That, on 22nd December 1996, at Sedan Avenue Omagh in the County Court Division of Fermanagh and Tyrone, being the driver of a motor vehicle, he did contravene regulations made under Article 23 of the Road Traffic Order (Northern Ireland) 1995 in that he failed to wear a seat belt, contrary to Article 23(3) of the Road Traffic Order (Northern Ireland) 1995.

To the second charge the Defendant/Respondent entered a plea of guilty, and to the first charge, a plea of not guilty.

The following facts were proved or admitted:-

On 22nd December 1996 at approximately 0600h WPC Totton observed, whilst on mobile patrol in the area of Sedan Avenue Omagh, that the driver of another vehicle was not wearing a seat belt.

She stopped this vehicle to speak with the driver thereof, ascertaining him to be the Defendant/Respondent and forming the view that he had alcohol in his body. She then required the defendant to provide a preliminary specimen of

breath in the prescribed manner which he agreed to do. After some difficulty caused by the malfunctioning of the preliminary breath testing device, a fresh device was brought to the scene, the Defendant/Respondent provided a specimen of breath analysis of which indicated that the proportion of alcohol was in excess of the prescribed limit.

WPC Totton then arrested the Defendant and cautioned him before conveying him to Omagh Police Station where the Custody Sergeant (Sergeant Malcolm) authorised his detention for the purpose of obtaining an evidential sample of breath with the consent of the Defendant/Respondent.

The breath test procedure was carried out at 0646h and all relevant statutory and procedural requirements were observed.

The two samples of breath taken from the Defendant/Respondent produced readings of 066 and 074 microgrammes of alcohol in 100 millilitres of breath respectively. The specimen showing the lower reading was in excess of the prescribed limit. The readings were shown to the Defendant/Respondent, he was warned that the matter would be reported with a view to prosecution, and then released from custody. The Summons alleging the present offences was issued on 7th May 1997 for hearing on 22nd July 1997. No reason for the hearing not being held until 2nd June 1998 was advanced before me.

The device used to obtain the evidential samples of breath was an AE-D3 Alcolmeter Serial Number NI/0050 - 0161 which was issued to Omagh RUC

Station on 12th November 1996 by the Forensic Science Agency of Northern Ireland (hereinafter referred to as "FSANI")

In respect of this device two log books were maintained. The first, kept by FSANI, recorded the movement of the machine between various RUC Stations, and FSANI together with details of all repairs and recalibrations carried out to it by FSANI personnel. Where the machine was returned to FSANI for repair, the FSANI log would normally record a description of the fault which was present. It is not possible to determine from the log who provided this description - FSANI personnel as the result of their own observation, or RUC personnel giving a description of the fault which FSANI personnel then recorded.

The second log, maintained by the RUC is a record of all usage of the machine - whether on a subject or for purposes of calibration and the readings obtained on each occasion. Where a fault occurs this is also recorded and sometimes a description of a particular malfunction is given, however entries vary in this regard, and on occasion it is merely noted that the machine is unreliable.

There is a material variation between the contents of the two log books described above relating to the movement of this machine.. The RUC log indicates that the machine was found to be unreliable on 24th December 1996 and again on 29th December 1996, the FSANI log indicates that the machine was received by FSANI for repair on 7th January 1997 remaining with FSANI until tested on 24th March 1997 before being re-issued to Newtownards RUC station on 25th March 1997.

However, in the RUC log an entry appears, dated 30th December 1996 which shows the machine as having been tested for reliability at Newtownards on that date and found to be reliable. There is no explanation for this entry which is, in fact, incorrect.

The machine was used on six occasions between the date of it's issue to Omagh RUC station on 12th November 1996 and it's return to FSANI for repair on 7th January 1997. It was found to be unreliable on the last three consecutive occasions on which it was used. The fault found (as recorded in the FSANI log) was "unreliable readings High and Low". It is not known who provided this description which does not appear in the RUC log.

The sample given by the Defendant/Respondent was the last sample taken before the commencement of the series of failures referred to in the preceding paragraph. In the course of the calibration checks carried out prior to the subject's sample being taken the machine produced a reading which came within one point of failure.

Upon the machine's return to FSANI for repair on 7th January 1997 no examination of it was carried out until 24th March 1997 when the entry in the FSANI log reads " Tested over a period of days.No fault found. Found to be in working order."

The machine was issued to Newtownards RUC station on 25th March 1997 where it remained until it was received by FSANI for repair on 3rd April 1997. The fault is described in both logs as "Not coming off standby". After the replacement of various components which were found to be faulty the machine was issued to Dunmurry RUC station

where it remained without repair until 10th November 1997.

For the Defendant/Respondent Mr. Turkington of Counsel (instructed by Patrick Fahy & Co.) submitted that the evidence provided by the machine used to test the Defendant/Appellant's breath should not be admitted as it could not be regarded as reliable. The burden was upon the prosecution to prove that the concentration of alcohol in the breath of the Defendant/Respondent exceeded the prescribed limit beyond all reasonable doubt. The Defendant/Respondent did not have to prove that the machine was unreliable, he had a lighter burden in that he had only to raise a reasonable doubt. This he had done and he was, therefore entitled to the benefit of it.

For the prosecution, Inspector Johnston simply relied on the fact that the machine had been found by the RUC personnel operating it, to be reliable at the time the test on the Defendant/Respondent was carried out. Once the machine got through its various checks and provided a reading that reading was effectively conclusive as to the reliability of the machine, since, if a fault had been present the machine itself would have aborted the test.

No authorities were cited to me by either defence counsel or the prosecuting Inspector.

I held that the Road Traffic Order (Northern Ireland) 1995 specified that the reading obtained by the use of an approved breath-testing device was evidence of the concentration of alcohol in the breath of the subject. It is not conclusive evidence and is, therefore, subject to any challenge which a defendant wishes to raise..

The reliability of the machine is clearly crucial - reliability being a concept which extends both to the machine itself and the readings which it produces when used. The 1995 Order recognises the fundamental importance of reliability when it provides that a requirement may be made of a subject to provide a sample of blood or urine if "(b) at the time the requirement is made, a device or a reliable device is not available at the police station....." (Road Traffic (Northern Ireland) Order 1995 Art 18(1)(4)(b))

On the basis of the facts found by me ,I was not satisfied beyond all reasonable doubt that the device used in the present matter was reliable and excluded the evidence of the concentration of alcohol in the breath of the Defendant/Respondent obtained by it's use. There being no other evidence that the proportion of alcohol in the Defendant/Respondent's breath exceeded the prescribed limit, I dismissed the first charge against him.

The Question for the opinion of the Court of Appeal is:-

Whether I was correct in law to exclude the evidence of the result of the analysis of specimens of breath provided by the Defendant in

fulfillment of a requirement made under Article 18 of the Road Traffic (Northern Ireland) Order 1995 on the ground that the approved testing device by means of which the analysis had been made may have been unreliable

Dated this 1st day of October 1998



C.P. McRandal
Resident Magistrate

Attached Copy Summons
Copy Application to State a Case

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SUMMONS TO DEFENDANT TO ANSWER COMPLAINT

(M) 19 Aug 97

OMAGH

Petty Sessions District of

I J CHAPMAN, ESQ Complainant

ALEXANDER KYLE
6 LAMMY DRIVE
OMAGH
COUNTY TYRONE

J. Kyle
Defendant

County Court Division of Fermanagh and Tyrone

(C) 25. 11. 97.

*BL - reliability of advice
of feeling disoriented
from glasses. By this we should not pay*

Whereas a complaint has been made before me that on the 22nd December 1996 at Sedan Avenue, Omagh in the said county court division, you, the said defendant, drove a motor vehicle on a road or other public place after consuming so much alcohol that the proportion of it in your breath exceeded the prescribed limit, Contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995.

Whereas a complaint has been made before me that on the 22nd December 1996 at Sedan Avenue, Omagh in the said county court division, you, the said defendant, when being the driver of a motor vehicle, contravened regulations made under Article 23 of the Road Traffic (Northern Ireland) Order 1995 in that you failed to wear a seat belt, Contrary to Article 23(3) of the Road Traffic (Northern Ireland) Order 1995.

THIS IS TO COMMAND YOU to appear as a defendant on the hearing of the said complaint at OMAGH on Tuesday the 22nd day of July 1997 at 10.30 o'clock in the forenoon, before a Magistrates' Court of the said County Court Division.

Dated this 7th day of May 1997

T. F. Wainwright
Justice of the Peace
[Clerk of Petty Sessions]

To the said Defendant

11/11/98

APPEAL BY WAY OF CASE STATED TO COURT OF APPEAL

FORM 101

MAGISTRATES' COURTS (NORTHERN IRELAND) ORDER 1981

(ARTICLE 146 RULE 158)

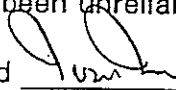
Application to Court to State a Case

To Paul McRandal Esq, Resident Magistrate, who sat as a Magistrates' Court for the Petty Sessions District of Omagh on the 23rd day of June 1998.

In the matter of a complaint wherein I J Chapman was Complainant and Alexander Kyle, was Defendant heard and determined by the said Magistrates' Court sitting at Omagh on the 2nd day of June 1998.

Being dissatisfied with the decision of the Court on a point of law involved in the determination of the said Court as being wrong in law, I hereby, pursuant to Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 make application to you to state a case for the opinion of the Court of Appeal on the following point of law -

"Whether I was correct in law to exclude the evidence of the result of the analysis of specimens of breath provided by the defendant in fulfillment of a requirement made under Article 18 of the Road Traffic (Northern Ireland) Order 1995 on the ground that the approved testing device by means of which the analysis had been made and which had functioned correctly in accordance with operating procedures while performing the analysis, may have been unreliable".

Signed 
Solicitor for Appellant
Department of the Director
of Public Prosecutions
Royal Courts of Justice
BELFAST BT1 3NX

THIS 8th day of June 1998

TO: [Defendant] - 6 Lammy Drive, Omagh, County Tyrone

Clerk of Petty Sessions, Courthouse, Omagh, County Tyrone

[Solicitors for Defendant] - Patrick Fahy & Co, Solicitors
4 John Street, Omagh, County Tryone

