Crayaron Magistrates Court – 22 August 2000 Mag 15

PA Master BL, Deputy Rm.

Superintendent Chapman –v- Kenneth Maginnis

THE FACTS

On Sunday the 4th July 1999 Constable Neill of the Traffic Branch of the Royal Ulster Constabulary was carrying out "Speedscope" speed detection duties at Glenavy Road Bridge on the M1 Motorway. At 12.24 p.m. he checked the speed of a Mitsubishi Shogun travelling in the Belfast direction. He found from the equipment used, that the vehicle was travelling at 88 mph – some 18 mph in excess of the limit of 70 mph. As the vehicle was travelling away from the camera, he had no direct means of knowing who was driving at the time.

In the course of his evidence, Constable Neill produced to the court a form headed "Notice of Intended Prosecution". As the driver of the offending vehicle is not recorded by the camera, this form is sent to the registered owner and is the method by which the police perfect the chain of evidence in such cases, and identify the driver so enabling a prosecution to take place. By means of the form the police notify the registered keeper that it is intended to take proceedings against the driver

of his car for an offence of speeding. The date time and location of the offence are given. On the reverse of the form, he is offered various options by way of prepared statements, one of which he is required to complete. The form advises the recipient in bold red ink that under Article 177 he has 21 days to supply the information requested – the penalty for failure to do so being the same as for the actual offence. In other words, parliament has decided that there is no right to remain silent in the face of a question put under article 177 and consequently there is no caution required to be given advising the accused of such right.

Under Article 15 of the Road Traffic Offenders (NI) Order 1996 a statement in writing purporting to be signed by the accused that the accused was the driver on the occasion in question may be accepted by the court as evidence that he was indeed the driver.

Mr Maginnis represented himself. He wanted me to disregard the content of the form – including his answer that he was driving the vehicle in question at the relevant time. It is clear that he was unaware that the appropriate time to challenge the admissibility of evidence was before it was led. Although he did not indicate any challenge to the admissibility of the form until the close of the prosecution case, this is not a case where he was intent on an "ambush defence" of the type referred to by

MacDermott,LJ in *Cousley –v- Sweeny* 1997 NIJB 223 – it seems to have arisen entirely through ignorance. I consider that the justice of the case requires me to regard the form as not in evidence until the issue raised by the accused has been determined by me.

There were two peripheral issues raised by the accused, which I shall deal with first. Constable Neill was asked about the pre-operation check carried out on his equipment, and his having tested the "Speedscope" only against a known speed of 70 mph and not against a range of speeds. The suggestion was presumably, that the equipment might not have reliably recorded the speed of the Mitsubishi Shogun at 88 mph. I do not find any substance in this point – firstly the equipment was tested against a drive through using a calibrated police car speedometer recording 70mph and secondly, it bore a calibration mark valid until 3rd November 1999. I find that Constable Neill adequately tested the equipment, and I therefore hold that the equipment was functioning correctly and properly operated at the relevant time.

Another point concerned the fact that the camera equipment was mounted inside the rear of an unmarked police car – with no opportunity for motorists to be aware that they were being monitored, and to adjust their speed accordingly. Mr Maginnis drew an analogy with present proposals

before parliament to have the word "Police" clearly marked on all police vehicles deployed in riot type situations and suggested that I have regard to this in considering the fairness of the speed detection operation overall.

I do not find it necessary to make any comment on this point. Whatever the rights and wrongs of such covert evidence gathering operations deployed against speeding on a motorway; on a Sunday afternoon; the evidence obtained by use of the "Speedscope" device is clearly relevant and admissible and I am required by law to admit it.

The main thrust of the defence submission concerned the attempt by the prosecution to rely on the statement made by Mr Maginnis in answer to the Art. 177 compulsion, that he was the driver on the day in question.

Mr Maginnis argued that I ought to exclude this evidence under the provisions of Article 76 Police & Criminal Evidence (NI) Order 1989 ("PACE") on the grounds that there had been a breach of the defendant's Human Rights in the obtaining of that evidence – namely the accused person's right to a fair trial under Article 6 of the European Convention on Human Rights ("the Convention").

A Magistrates court is required to think very carefully before acceding to such a request. Three relevant judgements were given in the Court of Appeal on this subject in 1997. *DHSS –v- Rodgers & McMenamin* [1997] NI 101; *Clinton –v- Zdenkovic* (unreported 2.10.97) and *Hood –v- Lowry* (unreported 15.10.97). In those cases the Court of Appeal made it plain that it will be a rare case where a Magistrate finds it possible to make use of Article 76.

In *Zdenkovic* a case on appeal from a Magistrates court, the Lord Chief Justice said at page 9

"Most of the decided cases concern the obtaining of confessions by means which the courts regard as unfair. In such cases there is a clear causal link between the impugned actions and the obtaining of the evidence, and this may generally be seen in other cases decided under the section. In our opinion this is an important factor in the exercise of a court's discretion under Article 76".

This is the type of situation Mr Maginnis says applies in his case. Because he was induced into incriminating himself by completing this form, on pain of prosecution should he fail to do so, he argues that it would be unfair to admit that evidence in this case. My first observation must be that since the content of the form sought to be admitted amounts to a "confession" within the definition of confession given by article 70

PACE that the provisions of article 74 must be complied with. Although not specifically relied upon by Mr Maginnis - again, since he was unrepresented, I have considered the prosecution duty under Article 74 and I am satisfied beyond doubt that the obtaining of the evidence was not in contravention of article 74 – and in particular, that the compulsion under Art 177 to provide the information demanded cannot in law amount to "oppression" under Article 74.

I then turn to consider the more general provisions of Article 76 of PACE. I should start by reminding myself that since the Human Rights Act 1998, which incorporates most of the Convention into our domestic law, is not yet in force, I am bound to apply the law as it presently stands and not as it will be after 1st October 2000. As Lord Steyn said in R –v- DPP ex p. Kebilene [1999] 3 W.L.R. @ 981

"It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3(1), the courts may not disapply the legislation. The court may merely issue a declaration of incompatibility which then gives rise to a power to take remedial action: see section 10"

Of course, it is beyond the competence of a Magistrate's court even to make such a declaration – that is reserved in our jurisdiction to the High Court or Court of Appeal. For reasons that will become plain later, this is an important factor in this case.

The use to which the provisions of the European Convention may be put in decisions on section 78 PACE 1984, (the English equivalent to our Art 76) was considered in R –v- Khan [1997] A.C. 558. In light of the decision in *Amesh Chauhan & Hollingsworth* referred to below I think it important to refer to the speech of Lord Nolan.

In *Khan*, Lord Nolan stated :

"I am prepared to accept that if evidence has been obtained in circumstances which involve an apparent breach of article 8 [of the Convention] or for that matter an apparent breach of the law of a foreign country, that is a matter which may be relevant to the exercise of the section 78 power. This does not mean that the trial judge is obliged to decide whether or not there has been a breach of the Convention or of the foreign law. This is not his function and it would be inappropriate for him to do so … But if the behaviour of the police in the particular case amounts to an apparent or probable breach of some relevant law or convention, common sense dictates that this is a consideration which may be taken into account for what it is worth. Its significance however, will normally be determined, not so much by its apparent unlawfulness or upon its irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings."

Thus I have to look not at whether there has been a breach of the Convention but at whether the admission of the impugned evidence makes the proceedings unfair. This was considered in *Staines & Morrisey*, [1997] 2 Cr. App. R. 426.

In that case the accused each made the case that the admission into evidence of answers obtained from them by inspectors from the Department of Trade & Industry, exercising coercive powers of interrogation, affected the fairness of the proceedings so adversely that the answers should have been excluded. They relied on a ruling in the European Court of Justice in the *Saunders* case.

Section 177 of the Financial Services Act 1986 empowers the inspectors to demand from any person whom the inspector believes may have information, such assistance as they can reasonably give, and empowers him to examine such person on oath.
Subsection 6 states:

"A statement made by a person in compliance with a requirement imposed by virtue of this section may be used in evidence against him".

Lord Bingham highlighted the problem which the accused in that case faced, in seeking to use Art 78 to exclude material which section 177(6) expressly stipulates may be used in evidence against a defendant.

He held that there exists what amounts almost to a statutory presumption that what might otherwise be regarded as unfair is in the context of the case, to be treated as fair. To decide otherwise would

"amount to a repeal, or a substantial repeal, of an English statutory provision which remains in force in deference to a ruling [the ECJ in *Saunders*] which does not have direct effect and which, as a matter of strict law, is irrelevant."

It is clear that there is no distinction capable of being drawn between section 177(6) of the Financial Services Act 1986 as discussed *in Staines & Morrisey,* and Article 15 of the Road Traffic Offenders (NI) Order 1996 as is relevant in this case.

In our own Court of Appeal the Lord Chief Justice in *Clinton –v- Bradley* (N.I. 2000 - judgement 12 April 2000) dismissed an appeal by an accused who had argued that by virtue of the Convention right against self-incrimination he had a "reasonable excuse" under para 5(1) of Schedule 2 of the Proceeds of Crime (NI) Order 1996 to refuse to answer questions from a financial investigator.

Although the Proceeds of Crime Order contains restrictions on the use of such answers in evidence and is therefore on different ground to this case, the Lord Chief Justice nevertheless approving *Staines & Morrisey* observed, that the statutory purpose of the Proceeds of Crime Order would be stultified if an accused could refuse to answer on self-incrimination grounds.

Mr Maginnis referred me to two cases decided under the equivalent U.K. Road Traffic legislation, to our Art 177 Road Traffic (NI) Order1981, the accused having in each case, been placed under compulsion to answer, by virtue of section 172 of the Road Traffic Act 1988 in circumstances where the compulsion led to self-incrimination as here, both of which cases resulted in a decision favourable to the accused.

In the Scottish case of *Brown –v- Procurator Fiscal (Dunfermline)* a High Court of Justiciary case in which Opinions were delivered on 4th February 2000 it was held that the use by police at a criminal trial, of an admission made by the accused following a requirement put to her under the equivalent U.K. statute amounted to a breach of Article 6(1) of the European Convention on Human Rights. *Brown* was decided on a different factual basis (she was clearly a "suspect") but a more vital

distinction between the Scottish situation and that in which I find myself, is that by virtue of the provisions of section 57 of the Scotland Act 1998 the Scottish Court was required to consider the Convention rights as incorporated in the Human Rights Act 1998 and to interpret the Road Traffic Act 1988 so far as possible to be compatible with the Convention.

As I have said, the Human Rights Act does not come into force until October 2000 and I am obliged to give effect to the law as it presently stands – as laid down in *Staines & Morrisey*.

The other case relied on, is the English case of *R –v- Amesh Chauhan & Dean Hollingsworth* a decision in the Crown Court in Birmingham given on 13th July 2000.

I have given very careful consideration to that case, particularly since the situation this court faces is more akin to that Judge Crawford faced than the Scottish situation – in that the Birmingham court was also obliged to apply the law as it is now, before the Human Rights Act is in force.

Again although there are factual differences – highlighted by the learned Judge – the court was faced with the decision whether the clear in-road on the privilege against self-incrimination made by the English equivalent

to out Art 177 meant that the evidence obtained thereby ought to be excluded under PACE as unfair.

It would appear that the decision of the English Court of Appeal in *Staines & Morrisey* was not cited to the learned judge and there is no discussion in his judgement on how to deal with Lord Bingham's finding that there exists what amounts almost to a statutory presumption of fairness in the use of the information at trial.

It is clear that I must follow the authority of *Staines & Morrisey* rather than a decision of a Crown Court in Birmingham..

Doing so, it seems to me that I am bound to hold that since parliament has specifically provided that the answer obtained under the Art 177 compulsion may be admitted in evidence, parliament is to be taken as almost presuming fairness in the procedure under Art 15 of the 1996 Road Traffic Offenders (NI) Order; consequently the admission of that evidence would not have such an adverse effect on the fairness of these proceedings that I ought not to admit it.

This case comes before the court at a time of change. Within a few weeks the law will be different, and statutory interpretation will never be the

same again. Until such time I must apply the law as it is. To quote Lord Bingham @ p 186 in the Court of Appeal decision in *Kebilene* – approved by Lord Steyn in his opinion, in the Lords,

"The Convention, despite its recent advance towards incorporation, has not crossed the Rubicon which separates prospective law from binding law. Prospective law cannot override binding law ..."

I am compelled therefore to reject the defence application to exclude the form in question, and in light of Mr Maginnis's acceptance that he was indeed the driver of the Mitsubishi Shogun found to be travelling at 88 mph in a 70 mph speed limit I have no alternative but to convict the accused.