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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **02/03/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF A YOUTH COURT

Between:

CHIEF CONSTABLE OF POLICE SERVICE OF NORTHERN IRELAND

Complainant/Appellant

and

KENNETH MARK CASSELLS

First Defendant/Respondent

and

TANYA ELIZABETH CASSELLS

Second Defendant/Respondent

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from the decision of a Youth Court sitting at Larne on 27 April 2006. The panel comprised Mr Robert Alcorn, resident magistrate, and Ms L Magee and Mr R McDonnell, lay magistrates. The first defendant, who is a young man now aged nineteen, having been born on 7 February 1988, had pleaded guilty to having driven a motor vehicle on a road after having consumed 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 (Northern Ireland) Order 1995. By a majority decision the court exercised its discretion under article 35 of the Road Traffic Offenders (Northern Ireland) Order 1996 not to disqualify the defendant from driving. Mr Alcorn delivered this decision although he dissented from it.

Factual background

[2] On 9 July 2005, the first defendant drove from his home in Islandmagee to the Millbay Inn at Ballycarry. He knew that he was going to be drinking alcohol there and so when he arrived at approximately 8.30pm he handed his car keys to a friend, Boyd Quiery.

[3] During the evening, an altercation developed involving three or four people called Waite and a David Bowes. In the course of this Mr Bowes was seriously assaulted. Boyd Quiery returned the car keys to the first defendant and told him to get Bowes away from the scene. As the defendant and Bowes got into the car, the Waites began to pull at the door handle, threw a beer bottle at the vehicle and kicked it, causing damage to it.

[4] The defendant drove away from the public house towards Bowes' home at Middle Road, Islandmagee. On the way he stopped to check Bowes' injuries and offered to take him to hospital, an offer which Bowes declined. He then drove Bowes to his home. When they arrived there Bowes alighted from the car and entered his house. Mr Cassells did not go into the house nor did he try to make alternative arrangements to get home. He drove off, not in the direction of his own home which was some eight miles away, but towards a relative's home which was closer to the Bowes' house.

[5] At 2.10am, the defendant's car was observed by police crossing the junction of the Ballystrudder Road and Lough Road. It was travelling at speed. The police followed the vehicle and stopped it. They activated blue warning lights on their own vehicle in order to do so. A breath test was administered at the scene and this gave a reading which indicated alcohol consumption in excess of the prescribed limit. Mr Cassells was arrested and taken to Larne Police Station. Another breath test was administered there and this disclosed the presence of 51 microgrammes of alcohol in 100 millilitres of breath. This represented a level of alcohol 16 microgrammes above the permitted maximum.

The proceedings before the Youth Court

[6] On behalf of the defendant Mr Hindley submitted to the court that his actions in transporting Mr Bowes to a place of safety constituted a reasonable reaction to an unforeseen emergency. There was no feasible alternative by which Bowes escape from his attackers could be secured. Mr Hindley invited

the court to hold that the emergency had lasted throughout the entire journey until the defendant's car had been stopped by police. He therefore applied for a finding under article 35 of the 1996 Order that there were special reasons justifying the exercise of the court's discretion not to impose disqualification from driving.

[7] Mrs McKay for the prosecution argued that the emergency, if it had existed at all, did not continue after Bowes had been deposited at his home. At that stage the defendant could have made arrangements by telephone to be collected from Bowes' home. Alternatively, he could have stayed there.

[8] The magistrates retired to consider the application. They all agreed that a genuine emergency had arisen as a result of the attack on Bowes and on the defendant's car and that he was justified in driving away from the scene. The resident magistrate, Mr Alcorn, felt bound by the decision in *DPP v Goddard* [1998] RTR 463, which involved, like the present case, a two-stage journey (to a place of safety and then to the driver's home), on the second stage of which the emergency was held no longer to exist. He explained what he considered to be the relevant legal principles to the lay magistrates. Notwithstanding this advice, the lay magistrates were not prepared to either impose a disqualification or endorse the defendant's licence with penalty points. One of the magistrates felt that the police should not have prosecuted the defendant at all.

[9] On their return to court, the resident magistrate announced the decision that the application for a finding had succeeded. He indicated that this was a majority decision and gave a dissenting opinion in which he said that he would have imposed the obligatory disqualification as in his view there was no emergency at the time of the detection of the offence.

[10] On the requisition of the Chief Constable the Youth Court stated a case for the opinion of this court, the question posed being in the following terms: -

> "Whether we were correct in law to order that the first defendant should not be disqualified for special reasons pursuant to article 35 (1) of the Road Traffic Offenders (Northern Ireland) Order 1996 in circumstances where he had been convicted of an offence involving obligatory disqualification, namely driving with excess alcohol contrary to article 16 (1) (a) of the Road Traffic (Northern Ireland) Order 1995 and whether we erred in law in finding special reasons which applied to the entirety of the first defendant's journey?"

The authorities

[11] The leading case in this jurisdiction dealing with the issue of special circumstances for the purposes of article 35 (1) is that of *Fleming v Mayne* [2000] NIJB 21. Delivering the judgment of the court Carswell LCJ, having reviewed the English authorities particularly *Director of Public Prosecutions v Bristow* [1998] RTR 100 and *Taylor v Rajan* [1974] QB 424, set out a series of governing principles as follows: -

> "1. A special reason is one which is special to the facts of the case and not the offender. It was described by Andrews LCJ in the context of comparable legislation in *R (Magill) v Crossan* [1939] NI 106 at 112 as –
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> > 'a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment.'
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> 2. The burden of proving the facts upon which the plea of special reasons is based is upon the defendant, and is proof upon the balance of probabilities.
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> 3. Even if special reasons are proved that does not prevent the court from disqualifying for the statutory period; it merely allows the court to exercise a discretion in the matter either not to disqualify, or to disqualify for a lesser period.
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> 4. The court should be satisfied that the defendant had no intention to drive the vehicle at the time when he drank alcohol. There must be some unforeseen supervening circumstances, which gave rise to a strong need for him to drive notwithstanding his consumption of alcohol taking him over the legal limit.
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> 5. Such circumstances are very variable, depending on the facts of the case, and rigid categories should not be prescribed. It will normally be found, however, that they give rise to personal danger to the defendant or create an

> emergency which requires him to drive his car in order to deal with it.
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> 6. It is necessary to balance the amount of risk to the public which arose when the defendant drove his vehicle while intoxicated against the degree of danger to be avoided or the importance of the objective to be gained by his driving. Lord Widgery CJ stated in *Taylor v Rajan* at page 431 that courts should rarely, if ever, exercise the discretion in favour of a defendant where his alcohol level exceeds 100 mg in 100 ml of blood (the equivalent figure in breath being 43 microgrammes of alcohol in 100 ml of breath: Wilkinson's *Road Traffic Offences,* 19th ed, Appendix 1).
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> 7. The onus is on the defendant to establish the existence of clear and compelling circumstances justifying his decision to drive the vehicle. In practice, this will normally require in an emergency case that he shows that he could not resort to any other means of meeting the emergency.
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> 8. The test to be applied is objective, and the question which the court should ask itself is whether a sober, reasonable and responsible friend of the defendant present at the time would have advised him in the circumstances to drive or not to drive.

[12] In the present case the defendant's alcohol level exceeded that referred to in the sixth paragraph of this outline and, as Lord Widgery suggested, the discretion in favour of someone who has that level of alcohol in his system should be rarely exercised. No doubt this is because the level of risk to the public is increased where the consumption has been greater. Of course, in the present case, the magistrates were unanimous in their view that the emergency was so acute that the first stage of the defendant's journey (from the public house to Bowes' home) was justified. But we are of the opinion that the level of alcohol remains a factor of significance when one examines the justification for each stage of a driver's journey. Thus, while the initial intensity of the risk may excuse the driving notwithstanding the amount of alcohol consumed, that justification will diminish as the threat recedes.

[13] The most factually relevant of the authorities is *DPP v Goddard* to which the resident magistrate referred in his advice to the lay magistrates. In that case the defendant, having consumed alcohol, drove his car from the car park of a public house where he had been subject to assault. He drove to his sister's house but, realising that one of his assailants lived nearby, he then drove his car eight and a half miles to his own home. He was stopped by police on this leg of the journey. It was held that he had failed to consider other options while at his sister's house, and in the circumstances it was found that on the second portion of the journey there were no special reasons. Schiemann LJ said: -

> "This was not a case where, by the time the defendant arrived at his sister's house, he effectively had no sensible option save to go and drive these eight and a half miles to his own house. There were a number of options which must have been available to him, including calling the police. In those circumstances, I am satisfied that the justices were not entitled to come to the conclusion to which they did come."

[14] It seems to us sensible that where there are stages in a journey prompted by the need to escape in emergency conditions, an examination of the continued justification for driving at the various stages of the journey should be conducted. But Mr Hindley drew our attention to the Scottish case of *Hamilton v Neizer* [1993] SC (JC) 63 which, he suggested, was authority for the proposition that a journey should not be divided into chapters, but treated as whole. In that case the appellant and his passenger had been drinking and were sitting in the motor vehicle in a lane where they intended to spend the night when they were attacked by a number of youths. After the attack the appellant drove to a hospital. When he and his passenger had been discharged, they returned to the car in a shaken and nervous state. They still intended to spend the night in the car but, hearing the sounds of disturbances nearby, the appellant felt compelled to get out of the area and drove away. After he had driven for more than half a mile an accident occurred in which the car hit a road sign on a roundabout. The appellant thereafter reversed the car off the roundabout and drove about 250 yards before stopping. The sheriff disqualified the appellant from driving for a period of 12 months and the appellant thereafter appealed to the High Court of Justiciary, *inter alia*, on the ground that there were special reasons for not so disqualifying him. Dismissing the appeal the court said: -

> "It is not appropriate in these cases where the question of special reasons is in issue to divide up what was really a single piece of driving into separate chapters in order to see at what point the

> driving ceased to have been necessary. Necessity is not the test and a reasonable latitude is to be given to the driver once an explanation amounting to special reasons has been given as to why he started to drive the car. But in the present case the accident on the roundabout can properly be seen as interrupting the course of driving, so that a fresh explanation required to be given for the fact that the appellant decided to drive the car again at this stage. In our opinion, his course of driving from the roundabout to the entrance to the restaurant cannot be attributed to his desire to escape from the lane and there were no special reasons in regard to this part of his journey for him not to be disqualified."

[15] The important qualification to the proposition in this passage that it is not appropriate to divide the driving into separate chapters is, of course, that it be 'a single piece of driving'. In the present case, as in the *Hamilton* case, there was not a single piece of driving but two quite separate episodes – the first away from the public house to Bowes' home and the second to the defendant's relatives' house.

[16] While we would not dissent from the sentiment that a certain latitude should be given to the driver once an explanation amounting to special reasons has been given as to why he started to drive the car, we would not agree that a single journey of whatever length would necessarily continue to be covered by those reasons where the fraught circumstances in which it was begun have dissipated. Thus, for instance, we do not believe that it could seriously be suggested that the defendant would have been justified in driving twenty miles from the public house. As was said in *Fleming* the court should ask itself whether a sober, reasonable and responsible friend of the defendant present at the time would have advised him in the circumstances to drive or not to drive. Such a friend might advise driving as a means of escape but once the danger had been successfully avoided, prudence would demand that the need to continue driving should be reviewed.

[17] In any event, the stop at Bowes' house provided the occasion for consideration of the options and reflection on the wisdom of continuing to drive. At that stage, a number of obvious alternatives were open to the defendant. He could have asked to be allowed to stay the night, a request that could hardly be denied since he had rescued Mr Bowes from an extremely nasty situation. He could have summoned help from relatives or he could have contacted the police. This was not a case where, to borrow the language of Schiemann LJ in *Goddard* he had "effectively no sensible option save to go and drive" the extra leg of his journey.

Conclusions

[18] We are satisfied that the conclusion that the lay magistrates reached was not one that was reasonably open to them. The emergency that had prompted the defendant's flight from the scene had unquestionably ceased to exist by the time that he arrived at Bowes' house. A number of obvious alternatives were then available to him. There was no evidence that he considered any of these and no basis on which they could reasonably have been rejected. In those circumstances, any special reasons that had been present at the start of his journey from the scene of the assault no longer obtained. We will therefore answer the question posed in the case stated "No" and allow the appeal. The case will be remitted to the Youth Court to be dealt with on the basis that there are no special reasons that could justify the exercise of the court's discretion under article 35 (1) of the 1996 Order.

[19] It remains only to make some observations on the decision of the lay magistrates not to accept the advice given by the resident magistrate on the application of the correct legal principles in this case. In *Director of Public Prosecutions v MC* [2006] NICA 14 this court said that on issues of law lay magistrates will normally accept the advice and direction of the resident magistrate although they are not bound to do so. On a purely legal issue we would expect lay magistrates to pay close attention to the views of the resident magistrate and while of course they must hold true to their own judgment, unless they can discern a clear reason for not accepting the view of the resident magistrate on the applicable law, they should follow the advice given to them. We consider that this is a case in which the lay members should have accepted the advice and guidance provided by Mr Alcorn.