Neutral Citation no. [2005] NICA 3 | *Ref:* **CAMF5170**

Judgment: approved by the Court for handing down | *Delivered:* **18/1/05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(Complainant) Respondent;

-and-

SEAMUS CURRAN

-and-

TERENCE GALLAGHER

(Defendants) Appellants.

CAMPBELL LJ

[1] At Strabane Magistrates' Court on 24 April 2004 Seamus Curran was convicted of the offence of driving a mechanically propelled vehicle on a road or public place when unfit to drive through drink or drugs, contrary to article 15(1) of the Road Traffic (Northern Ireland) Order 1995.

[2] On 18 March 2004 at the same court, Terence Gallagher was convicted of the offence of failing to provide a specimen of breath when required to do so without reasonable excuse, in the course of an investigation into whether he had committed an offence of driving a motor vehicle in contravention of article 16(1)(a) of the Order.

[3] Both defendants being dissatisfied with the decision of the Resident Magistrate they asked him to state a case on a point of law for the opinion of this court.

[4] The question of law, common to both of the cases stated, is whether the requirement in article 18(8) of the Road Traffic (Northern Ireland) Order 1995 that :

> "A constable must, on requiring any person to provide a specimen in pursuance of this Article, warn him that a failure to provide it may render him liable to prosecution,"

is satisfied if a constable when requiring a person to provide a specimen informs him that failure to do so *will* render him liable to prosecution, and does not follow the wording in the Order by giving a warning that failure to provide a specimen *may* render him liable to prosecution?

[5] An additional question raised in the case of the appellant Gallagher was not pursued in this court.

[6] The resident magistrate set out his findings of fact in the case of Seamus Curran as follows:

a. The Appellant was driving a motor vehicle on Barnhill Road, Strabane on 3 November 2003;

b. His vehicle swerved over the middle of the road on at least four occasions;

c. He attempted to enter Glenside Road and in correcting his position almost collided with a traffic island;

d. He entered Woodend Road entirely on the wrong side of the road;

e. His eyes were glazed, his breath smelt of alcohol, his speech was slurred and he was unsteady on his feet;

f. He was arrested for driving a motor vehicle whilst unfit through drink or drugs;

g. He provided two specimens of breath following upon the completion of the pro-forma DD/A Exhibit IRD1, the lower reading of which was 95 microgrammes of alcohol in 100 millilitres of breath.

[7] The resident magistrate's findings of fact in the case of Terence Gallagher were:

(a) At 11.15am on the 4th October 2002 (sic) the defendant was driving a van at Victoria Road, Strabane;

(b) The van was stopped by Constable Scott who had reasonable cause to suspect that the defendant had alcohol in his body;

(c) Constable Scott requested the defendant to provide a preliminary breath test but he failed on five occasions to do so;

(d) The defendant was arrested by Constable Scott and taken to Strabane police station ;

(e) On 5th October 2003 at 00.09 hours Sergeant Morton commenced the procedure for taking a breath sample with the assistance of the police pro-forma form DD/A;

(f) Having been required to provide two specimens of breath for analysis by means of an approved device, the defendant was warned by Sergeant Morton that failure to provide a specimen of breath would render him liable to prosecution;

(g) The defendant did not have a reasonable excuse for his failure to provide a specimen.

[8] In both cases the authorised officer who gave the warning under article 18(8) of the Order used the following wording, which is contained in a pro-forma DD/A issued by the Police Service of Northern Ireland;

> "I am an Authorised Constable under Article 18 (3) of the Road Traffic (NI) Order 1995. I require you to provide two specimens of breath for analysis by means of an approved device. The specimen with the lower proportion of alcohol in your breath may be used as evidence and the other will be disregarded. I warn you that failure to provide either of these specimens will render you liable to prosecution. Do you agree to provide two specimens of breath for analysis?"

[9] The appellants contend that as this wording does not comply with the requirement of article 8(8) of the Order no offence was committed by them and both charges ought to have been dismissed. Counsel relied on *Simpson v*

Spalding [1987] RTR 221 and *Murray v DPP* [1993] RTR 209 in support of the proposition that a requirement to give such warning is mandatory. In those cases as the motorist had not been given any warning the question of the adequacy of the warning did not arise.

[10] It did arise in *Chief Constable of Avon and Somerset Constabulary v Singh* [1988] RTR 107. The defendant who understood only simple English was asked by a police officer to provide a sample of breath for a breath test in accordance with section 7(1) of the Road Traffic Act 1972. Although the correct warning under section 8(8) was given the justices were not satisfied that the defendant understood the consequence of failing to provide a specimen when requested to do so and dismissed the information. An appeal against the dismissal was dismissed by a Divisional Court on the ground that it is implicit in the requirement for the warning to be given that an alleged warning must have been capable of informing the person to whom it was given of the possible consequences of a failure to comply. If the alleged warning was not understood as a warning by the person to whom it was given, it was not a warning within the section.

[11] In his judgment in *Singh* at page 116, May LJ said of the section in question:

> "It is implicit in the requirement that a warning has to be given about a particular point, that what is said to have been a warning on the facts of a given case must at least have been capable of informing the person to whom the warning is given of the possible consequences of a failure to comply."

Simon Brown J said at page 117:

> "…in my judgment, it follows as the night follows the day, that any failure to bring home to a driver the section 8(8) warning in such language and in such manner that he may truly be found to have understood it, will produce an acquittal…"

[12] Under article 18(8) the relevant person must be made aware of the legal consequences which can flow from a failure to provide a specimen without reasonable excuse, that is to say that he will be guilty of an offence. Any person who is guilty of an offence is liable to be prosecuted. This is the purpose behind the statutory requirement to warn. The warning given in these two cases fulfilled the statutory requirement to make clear to the drivers that a failure without reasonable excuse was an offence that could lead to prosecution. We do not consider that the wording used could in any way

have misled the appellants as to the legal consequences flowing from a failure to provide a specimen without reasonable excuse.

[13] We would echo the comment of the resident magistrate that it is preferable that the wording of pro forma issued for the use of police officers should follow the wording of the legislation if only to remove the possibility of points such as this being taken.

[14] The court answers in the affirmative the question raised by the resident magistrate in both cases "Was I correct in finding that the use of the word *"will"* as opposed to the use of the word "*may"* was sufficient in order to comply with the provisions of article 18 of the Road Traffic (NI) Order 1995 when issuing a warning to the applicant of the consequences of failure to provide a specimen?".