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Judgment: approved by the Court for handing down | *Delivered:* **25/11/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

DEREK MARTIN ROBINSON

Defendant/Appellant;

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Complainant/Respondent.

Before Nicholson LJ, McCollum LJ and Weir J

McCOLLUM LJ

[1] This is a case stated by Mr McElholm Resident Magistrate arising out of his conviction of the defendant on five summonses charging the following motoring offences:

> (i) Driving 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 prescribe limit.
>
> (ii) Driving a mechanically propelled vehicle on a road or other public place without due care and attention.
>
> (iii) Using a motor vehicle on a road without there being in force in relation to the user of the said vehicle by him and an appropriate policy of insurance or other security.
>
> (iv) As a holder of a provisional licence driving otherwise than under the supervision of a qualified driver, and

(v) Using a vehicle on a road the nearside front tyre of which failed to comply with the provisions of the construction and use regulations.

[2] Two questions were posed in the case stated as follows:

(i) Given the court ruling that a verbal admission made by the defendant/appellant ["appellant"] was inadmissible whether the court properly admitted evidence relating to the provision by the defendant/appellant a preliminary and evidential breath specimen and the results thereof?

(ii) Whether the court properly admitted in evidence the contents of the defendant/appellant's PACE interview conducted at Strabane RUC station on 22 August 2000.

[3] Mr Dermot Fee QC, who appeared with Mr McCann for the appellant, indicated that they would not be pursuing the first question and so the case was confined to consideration of the issue of admissibility of evidence of what was said at the interview referred to. Proof of each of the charges against the appellant depended on satisfactory evidence that he was the driver of the motorcar involved in the accident on the evening of 6 August 2000.

[4] I shall confine my outline of the facts to those relevant to the second issue.

[5] Constable Miskelly, a uniformed officer, attended the scene of a motor accident where he found a Renault 5 motorcar, registration mark ABZ 1987, overturned on the roadway. There were three persons present including the appellant and another male and a female. Each of the persons at the scene denied having been the driver of the motorcar. All appeared to be under the influence of alcohol.

[6] As a result of further information Constable Miskelly formed the suspicion that the appellant was the owner of the car and had been driving it. He told the appellant that the police were aware that he had purchased the vehicle two months earlier and continued to question the appellant until he eventually admitted that he was the owner and driver of the vehicle.

[7] The appellant was not cautioned in accordance with Article 3 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

[8] He was arrested and subjected to a breathalyser test which revealed excess alcohol.

[9] The appellant was released from police custody on recognizance to appear at Strabane police station on 22 August 2000 for the purpose of being

charged with driving with excess alcohol and to be interviewed in relation to other motoring offences.

[10] On 22 August he attended the police station without a solicitor and was interviewed by Constable Miskelly accompanied by Reserve Constable Murdock.

[11] No issue was taken in relation to the conduct of this interview but it is clear that it was conducted on the basis that the appellant acknowledged that he was the driver of the motor car at the relevant time and the magistrate acted on the basis that he had made an admission to that effect during the course of the interview.

[12] On behalf of the appellant, his solicitor Mr Oliver Roche argued that the admission made by the defendant at the scene of the accident that he was the owner and driver of the vehicle should be ruled inadmissible because it had been made before he had been cautioned but after Constable Miskelly had formed a clear suspicion that he was the owner and driver of the vehicle.

[13] During the course of argument the magistrate was referred to the case of Russell v McAdams (2001) NI 157.

[14] That case had been heard during the interval between the judgment delivered by the Scottish High Court of Justiciary on 4 February 2000 in the case of Brown v Stott and the reversal of that decision by the Privy Council on 5 December 2000 and at a time therefore when Section 172(2)(a) of the Road Traffic Act 1988 was held to be incompatible with the European Convention on Human Rights.

[15] Moreover the corresponding section in Northern Ireland Article 177 of the Road Traffic (Northern Ireland) Order 1981 had no relevance to the circumstances of that case where the identity of the defendant was ascertained by civic guards in the Republic of Ireland.

[16] Accordingly Article 177 was not opened to the court at that hearing.

[17] The Lord Chief Justice on behalf of the court indicated, in relation to the admission made in that case to the officers of having been driver of a motor vehicle, "we have no doubt accordingly that if the admission had been made to RUC officers in Northern Ireland the provisions at paragraph 10(1) of Code C would have been applicable".

[18] Following those dicta, the magistrate exercised his discretion to exclude the admission.

[19] It is necessary, in the light of the decision in Brown v Stott to consider the effect of Article 177 in relation to ascertaining the identity of the driver of a motor car suspected of having been involved in an offence.

[20] The article provides as follows:

> "177. Where the driver of a vehicle is alleged to be guilty of an offence under any provision of this Order, or any order, regulation or bye-law made under any such provision or under any provision of any local Act or bye-law in force under a local act with respect to road traffic –
>
> (*a*) the driver of the vehicle shall on demand give to a constable his correct name and address and where the driver is not the owner of the vehicle, that of the owner and any other information concerning the vehicle (including the names and addresses of any passengers carried in or on the vehicle at the time of the alleged offence) which it is in his power to give and, if he fails to do so, he shall be guilty of an offence under this Order;
>
> (*b*) the owner of the vehicle shall give such information as he may be required by a constable to give as to the identity of the driver, and, if he fails to do so, he shall be guilty of an offence under this Order, unless he shows to the satisfied of the court that he did not know and could not with reasonable diligence have ascertained who the driver was; and
>
> (*c*) any other person shall, if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver or owner of the vehicle, and, if he fails to do so, he shall be guilty of an offence under this Order."

[21] The wording of this article is to be contrasted with that of Article 178 and 179 which provides as follows:

> "178. A constable may require any pedal cyclist who appears to him to have committed an offence under Article 162 to give his correct name and address, and if that person fails to do so he shall be guilty of an offence under this Order.

> 179.-(1) If a constable has reasonable cause to believe that any pedestrian has committed any offence under this Order or any regulations made under this Order, he may require him to give his name and address.
>
> (2) Any person who fails to give his name and address as required by paragraph (1) shall be guilty of an offence under this Order."

[22] Clearly Parliament had a purpose in choosing a different formula for describing the conditions in which those concerned with a motorcar have a duty to identify the likely culprit.

[23] In my view it is clear from the wording of Article 177 that a pre-condition of the requirement to give information is that the driver of a vehicle should be alleged to be guilty of an offence. To my mind "allegation" necessarily requires an accusation either orally or in writing.

[24] It is perfectly understandable that the owner of a motor vehicle should not be required to give information about the driver unless he knows the matter to which the question relates. There is a very wide variety of offences, varying greatly in seriousness, covered by Article 177. Moreover the law does not require the owner of a motorcar, on demand by a police officer, to identify the driver of his vehicle on any particular occasion if the provisions of Article 177 do not apply. If the owner of the vehicle is not appraised of the allegation against the driver then he will not know whether he is by law required to identify the driver or not.

[25] I am satisfied therefore that it is a condition precedent before the Article applies that an allegation be made and its substance conveyed to the owner of the motor vehicle before he is required to comply with Article 177.

[26] In those circumstances the question may be asked but, if the owner is suspected to be the driver and to have been guilty of an offence, a caution should be given.

[27] It is not sufficient to activate Article 177 that the officer suspects an offence.

[28] There is no fact contained in the case stated to show that an allegation was made to the appellant that an offence had been committed and in those circumstances there was material upon which the magistrate could properly exercise his discretion to exclude the admission.

[29] There is no finding in the case to suggest that the magistrate found that Constable Miskelly conduct on 6 August was oppressive.

[30] He based his exclusion of the evidence on the absence of a caution.

[31] In those circumstances he made the following finding:

> "Whilst good faith on the part of the police is not strictly relevant I did not consider Constable Miskelly's conduct on 6 August 2000 to be so oppressive or malign that there must be an inevitable and continuing blight on the subsequent confessions given the defendant/appellant's refusal to give evidence it is entirely possible that he made an informed and independent choice to repeat his admissions."

[32] I would not have any difficulty in holding against the appellant on the question of whether there was ample grounds for the magistrate to refuse to exercise his discretion to exclude the acknowledgement of being the driver during the second interview under Article (76)(1) of the Police and Criminal Evidence [Northern Ireland] Order 1989, ["the PACE Order"]

[33] This article places the decision as to admissibility firmly within the discretion of the court of trial. It provides as follows:

> "76.(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[34] A number of matters existed which would have provided ample justification for the admission of the full contents of that interview.

(i) The failure to give a caution at the earlier interview had been remedied by the giving of a caution at the later interview;

(ii) The period of 16 days had passed giving the defendant ample time for reflection and the opportunity to consult a solicitor if he so wished;

(iii) By the time of the second interview an allegation had been made that the driver of the vehicle was guilty of an offence and the officers would have been entitled to rely on Article 177 of the Road Traffic Order (Northern Ireland) 1981 to require the defendant as owner to identify the driver at any time during the interview; [See Hawkes v Hinckley(noted at 120 J.P.Jo. 642)]

(iv) The identity of the driver of the vehicle was not raised as a live issue at the hearing.

(v) The appellant did not give evidence alleging that he felt under any compulsion to admit being driver of the vehicle at the second interview as the result of what had occurred at the roadside discussion.

[35] It is not necessary for this court to conclude that the magistrate was required by law to admit in evidence the acknowledgement by the appellant at the second interview of the driver of the car. It is sufficient that there was material sufficient to justify the magistrate in declining to exercise his discretion to exclude the statement. Nor in my view is it necessary for the magistrate to express all the matters which he could properly take into account, provided he has some sufficient grounds on which to base his decision and that exercise of his discretion can be seen to be justified on consideration by this court of all the relevant factors.

[36] The magistrate correctly identified the significance of the passage of time between the two interviews, the opportunity which the appellant had to consult a solicitor, the fact that the appellant is an adult with sufficient knowledge and understanding to consult a solicitor and to make an informed choice as to what he should say at the interview, the fact that the defendant was offered the services of a solicitor at the interview and the fact that no complaint was made about the conduct of the interview.

[37] This court would only interfere with the exercise by the magistrate of his discretion if satisfied that there was no basis on which he could have exercised his discretion or that he exercised it on improper grounds or failed to give due regard to a relevant factor. I am satisfied that none of those considerations applies in this case

[38] However it is open to interpretation that the appellant's solicitor had raised an issue in the hearing under Art. 74(2)(b} of the PACE Order, in which case the magistrate would have been required to adopt a different approach to the issue of admissibility of the later acknowledgement.

[39] Article 74 provides as follows:

"[74].-(1) In any criminal proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this Article.

(2) If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid. "

[40] It is not immediately apparent that a representation specifically based on Article 74[2] was made to the court but a submission directed to the exclusion of the acknowledgement of driving, based on the alleged effect of what had occurred at the roadside discussion would appear to me to be properly dealt with under that Article, as it appeared to be part of the contention on behalf of the appellant that the effect of the roadside admission robbed him of the opportunity of declining to admit that he was the driver during the course of the second interview. It does not appear to me from the terms of the case stated that a case of oppression at either interview was seriously advanced.

[41] In that case the magistrate should have considered whether he was satisfied beyond a reasonable doubt that the later acknowledgement was not rendered unreliable as the result of what had transpired at the roadside discussion.

[42] It does not appear that he was asked to address that issue directly or to apply that standard, as distinct from exercising his discretion, and in those circumstances I agree with Nicholson LJ that the case should be remitted to him to consider, in the light of Art 76(2)(b) of the PACE Order whether he is satisfied that the acknowledgement of driving made at the second interview was not obtained in consequence of anything said or done during the roadside encounter which was likely, in the circumstances, to render that acknowledgement unreliable.

[43] As Mr Fee for the appellant did not pursue the argument on the first question I would therefore answer it 'Yes'.