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Judgment: approved by the Court for handing down (subject to editorial corrections)* | *Delivered:* **21/7/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES COURTS (NORTHERN IRELAND) ORDER1981

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BETWEEN:

PUBLIC PROSECUTION SERVICE

Complainant/Appellant

-and-

MERVYN MONTEITH

Defendant/Respondent

_____

Before Kerr LCJ, Campbell LJ and Girvan LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of Mr King, resident magistrate, sitting in the magistrates' court for the petty sessions' district of Omagh on 20 September 2007. Mr King decided that to allow the prosecution to proceed with a summons charging Mervyn Monteith with failure to comply with Regulation 97(2) of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1989 would amount to an abuse of the process of the court and breach of the principle in relation to double jeopardy.

[2] Mr Monteith had been charged with dangerous driving causing death arising from a road traffic accident on 7 December 2005. On that date he was the driver of a vehicle towing a trailer carrying a cement mixer at Kilskeery Road, Trillick, County Tyrone. The mixer became detached and fell from the trailer. It struck an oncoming car and a young boy, Shane McNabb, who was

a rear seat passenger in the car, was killed as a result. At his subsequent trial, Mr Monteith was acquitted of the charge of dangerous driving causing death. It was on the basis of this acquittal that the magistrate decided that the summons should not be allowed to proceed.

Background to the prosecution

[3] A complaint was laid before a lay magistrate on 5 May 2006 in relation to the offence contrary to Regulation 97 (2) of the 1989 Regulations. (The appellant has drawn the court's attention to the fact that the summons wrongly charged the defendant with failure to comply with Regulation 97(2) of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1989. The appropriate Regulations are the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999 (SR 1999/454) which repealed the 1989 Regulations and came into force on 1st January 2000. The correct regulation is Regulation 115(2). It was intimated that application would be made to amend the summons in the magistrates' court in the event that the appeal was allowed and the matter remitted for re-hearing).

[4] No action was taken on the summons while the prosecution service proceeded with the prosecution of the respondent in the Crown Court for causing death by driving a mechanically propelled vehicle dangerously on a road or other public place contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995. An engineer's report compiled by Mr John McGlinchey and served by the prosecution expressed the opinion that the accident 'was caused entirely as a result of the failure to properly lash the mixer to the trailer.'

[5] Following a trial before the Crown Court, on 23 February 2007 the respondent was acquitted by the jury on the charge of causing death by dangerous driving. The prosecution service then issued a summons dated 2 March 2007 on foot of the complaint of 5 May 2006.

[6] The matter came before Mr. King on 1 May of the same year at which time the respondent's counsel made a submission that the matter should be dismissed as an abuse of process and on the grounds that the prosecution was in breach of the rule against double jeopardy. The prosecution was stayed by the resident magistrate on the basis that, as the defendant had previously been acquitted of the offence of causing death by dangerous driving, (a) the prosecution was a breach of the doctrine of double jeopardy and (b) the prosecution was an abuse of process due to the manipulation of the process by virtue of the timing of the prosecution.

[7] The question posed by the resident magistrate in the case stated for the opinion of this court was: -

> 'Was I correct in law in regarding a trial for the summary offence of carrying an insecure load as giving rise to an issue of *res judicata* or double jeopardy after the defendant had been acquitted on indictment of causing death by dangerous driving, both offences arising out of the same facts?'

The relevant legislation

[8] Article 58 of the Road Traffic (Northern Ireland) Order 1995 provides: -

> "A person who-
>
> (a) contravenes any construction or use requirement other than one within Article 56 (a), 56A or 57(1)(a); or
>
> (b) uses on a road a motor vehicle or trailer which does not comply with such a requirement, or causes or permits a motor vehicle or trailer to be so used, is guilty of an offence."

This is a summary offence which cannot be tried on indictment.

[9] The relevant construction and use requirements are to be found in regulation 115 of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999: -

> "*Maintenance and use of vehicle so as not to be a danger, etc.*
>
> 115. - (1) A motor vehicle, a trailer drawn by it and all parts and accessories of such vehicle and trailer shall at all times be in such condition, and the number of passengers carried by such vehicle or trailer, the manner in which passengers are carried in or on such vehicle or trailer, and the weight, distribution, packing and adjustment of the load of such vehicle or trailer shall at all times be such, that no danger is caused or is likely to be caused to a person in or on the vehicle or trailer or on a road.
>
> (2) The load carried by a motor vehicle or trailer shall at all times be so secured, if necessary by physical restraint other than its own weight, and

be in such a position, that neither danger nor nuisance is likely to be caused to any person or property by reason of the load or part of it falling or being blown from the vehicle or by reason of any other movement of the load or part of it in relation to the vehicle.

(3) A motor vehicle or trailer shall not be used for a purpose for which it is so unsuitable as to cause or be likely to cause danger or nuisance to a person in or on the vehicle or trailer or on a road."

[10] The offence with which the respondent was charged on indictment, and on which he was acquitted, was an offence contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 which provides: –

> "A person who causes the death of, or grievous bodily injury to, another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

[11] Article 11 of the 1995 Order defines dangerous driving for the purposes of the Order. It provides: -

> "*Meaning of dangerous driving*
>
> (1) For the purposes of Articles 9 and 10 a person is to be regarded as driving dangerously if (and, subject to paragraph (2), only if) –
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver; and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (2) A person is also to be regarded as driving dangerously for the purposes of Articles 9 and 10 if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
>
> (3) In paragraphs (1) and (2) "dangerous" refers to danger either of injury to any person or of serious

> damage to property; and in determining for the purposes of those paragraphs what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
>
> (4) In determining for the purposes of paragraph (2) the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

The arguments of the defendant/respondent

[12] For the respondent, Mr Colton QC (who appeared with Mr Joseph McCann) submitted that at his trial on indictment the case against the respondent was based entirely upon alleged deficiencies in the way that the load on his vehicle was secured. His charge of causing death by dangerous driving depended on precisely the same circumstances as founded the prosecution in the magistrates' court, therefore. The degree of overlap between the two offences with which the respondent was charged was, Mr Colton argued, such that in their essential ingredients they were the same offence. The only issue on the trial on indictment was whether there was an insecure load such as would have been obvious to a careful and competent driver.

[13] Mr Colton accepted, as had been argued by Mr Gerald Simpson QC for the appellant, that the offence under article 115 of the 1999 Regulations was an absolute offence but he claimed that, in the particular circumstances of this case, the charge of dangerous driving causing death was likewise one of strict liability. He suggested that the decision in *R v Loukes* [1996] 1 Cr App R 444 established that where a load was shown to be insecure and that, judged objectively, that should have been obvious to a competent and careful driver, driving a vehicle with such a load would give rise to a strict liability offence. To allow the summary prosecution to continue, Mr Colton argued, was in effect to permit the issue of whether the load was secured to be tried again when this had already been determined by the jury.

[14] It was accepted by Mr Colton that it could not be argued that the respondent was entitled to rely on the principle of *autrefois acquit*. He submitted, however, that where a person is tried on a second occasion on facts which are essentially the same as those that grounded the first prosecution, the court should invoke its inherent jurisdiction to refuse to allow the prosecution to proceed on the grounds that it would be unfair to the

accused. The onus was on the prosecution to show that special circumstances existed which justified the trial continuing – absent such circumstances, a stay should be granted. In this regard Mr Colton relied on the decision in *R v Phipps* [2005] EWCA Crim 33 which, he said, supported the proposition that the Crown should not be permitted, save in special or exceptional circumstances, to bring a second set of proceedings arising out of the same incident as the first set of proceedings after the first set of proceedings had been concluded. The prosecution was obliged to decide at the outset what charges it wishes to bring arising out of the same incident. Any other approach was unfairly oppressive to a defendant. When it was put to Mr Colton that it was clear that in the present case that the Crown had decided at the outset which charges it wished to bring (as evidenced by its making the complaint) he submitted that it was required to alert the respondent to that fact. Here, he said, the respondent was completely unaware that a complaint had been made until the summons was served.

[15] If the prosecution had decided that this was what they proposed, they should have informed the defendant of it, Mr Colton claimed, and this would have allowed him to decide whether to apply for a stay of the proceedings. But, on an examination of this submission it quickly became clear that he also contended that a stay would have had to be granted in those circumstances and it is difficult to see how the prosecution could be criticised for failing to take a course that would have inevitably resulted (if Mr Colton was right) in the staying of the proceedings.

Did the charge of dangerous driving causing death depend on the same circumstances as grounded the charge in the magistrates' court?

[16] To prove the charge of dangerous driving causing death, the prosecution had to establish two propositions – first that the load was insecure and second that it would be obvious to a careful and competent driver that to drive the vehicle in that condition would be dangerous. Mr Colton sought vainly to argue that the jury verdict was explicable on the basis that it entertained a doubt as to whether the load was in fact secure, rather than having concluded that there was a question whether this would have been obvious to a careful and competent driver. Such an argument was plainly not viable. In the first place, no contrary evidence was called to challenge the testimony of Mr McGlinchey that that the accident 'was caused entirely as a result of the failure to properly lash the mixer to the trailer.' More fundamentally, however, the cement fixer *in fact* became detached. There could be no dispute, whatever, that the load was insecure – the fact of the detachment of the mixer established that beyond peradventure. The jury's verdict can only have been based on the existence of a reasonable doubt that this would have been obvious to a careful and competent driver.

[17] By contrast, proof of guilt under regulation 115 (2) of the 1999 Regulations and article 58 of the 1995 Order requires no proof that the insecurity of the load would have been obvious to a driver, whether careful, competent or otherwise. If the load is insecure, the strict liability offence is made out. It is unnecessary even that the load become detached or that the vehicle be driven. If it is insecure there is no defence to a charge under these provisions.

[18] Mr Colton argued that both charges were in respect of strict liability offences and it is true that *Loukes* appears to be authority for the proposition that where a load was shown to be insecure and that, judged objectively, that should have been obvious to a competent and careful driver, driving a vehicle with such a load would give rise to a strict liability offence. But the offence under regulation 115 (2) and article 58 is of a different species from that under article 9 of the 1995 Order. Although both offences share a common element *viz* the insecurity of the load, the latter offence had an extra ingredient – that the insecurity would have been obvious to a careful and competent driver – which was the only basis for the acquittal by the jury on that charge. The fact that both offences are strict liability offences does not therefore make them identical offences nor does the summary trial involve the re-trial of an issue which has been resolved in the respondent's favour by the acquittal. We therefore reject the argument made on behalf of the respondent that the summary prosecution would amount to a contravention of the rule in *Hunter v Chief Constable of the West Midlands* [1982] AC 529, that proceedings involving a collateral attack on a finding of fact in earlier proceedings are an abuse of process. For the reasons that we have given, no such collateral attack arises in the present circumstances.

[19] Mr Colton was entirely right not to press the argument foreshadowed in the respondent's skeleton that to try the respondent on the summary charge would involve a breach of the principle against double jeopardy based on *autrefois acquit*. For that doctrine to apply the offences charged on each occasion must be the same – not only in terms of the factual matrix on which they are based but also in the legal characteristics that they possess. This much is clear from the summary of the doctrine of *autrefois* that appears in the speech of Lord Devlin in *Connelly v DPP* [1964] AC 1254, at 1339/1340: -

> "For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law."

Does the fact that both prosecutions arise from the same incident warrant a stay of proceedings?

[20] In *R v Elrington* [1861] 121 ER 870 three charges of assault were preferred against the defendant on indictment. All three charges related to a single incident when the defendant was alleged to have assaulted the complainant, one Edward Hamilton Finney. Elrington pleaded that these charges should not be allowed to proceed because he had earlier been tried by justices of the peace on a charge of assault of Finney and this charge had been dismissed. Acceding to this application at page 873 Cockburn CJ said: -

> "We must bear in mind the well established principle of our criminal law that a series of charges should not be referred and whether a person accused of an offence is acquitted or convicted he shall not be charged again on the same facts in a more aggravated form."

[21] In *Connelly v DPP* Lord Devlin dealt with the circumstances in which a judge should exercise his discretion to stay a prosecution based on the same facts as an earlier prosecution or where the offence later charged was one of a series of offences that could have been charged on the original indictment: -

> "As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 [by which a series similar offences could be joined in the same indictment] where it can properly be used, but a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

[22] The obvious and immediate distinction with the present case, of course is that the offence under regulation 115 and article 58 could not have been

charged on the same indictment as the dangerous driving causing death charge since such an offence is only triable summarily. But Mr Colton argued that the principle has wider application, relying on dicta to that effect in *R v Beedie* [1997] 2 Cr App R 167 where it was held that the judge has a discretion to stay the proceedings where the second offence arises out of the same or substantially the same set of facts as the first and that discretion should be exercised in favour of an accused unless the prosecution establishes that there are special circumstances for not doing so. In that case, of course, the appellant had originally been charged with an offence of failing to maintain a gas fire and he was subsequently charged with the manslaughter of his tenant who had died from carbon monoxide poisoning as a result of the escape of that gas from the defective appliance.

[23] The *Beedie* case is an example of a more serious offence being charged following acquittal on a lesser charge as in *Elrington*. In *Connelly* Lord Pearce dealt with Cockburn CJ's observations on the impermissibility of such a practice in the following passage at pages 1366/7: -

> "… in general the prosecutor should join in one indictment all the charges that he wishes to prefer in respect of one incident. It would be an abuse if he could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence. In *R. v. Jones* [1918] 1 KB 416, however, the Court of Criminal Appeal laid down a rule that in cases of murder other charges should not be joined. So, too, in manslaughter (*R. v. Large* [1939] 1 All ER 753). With all respect I think that rule of procedure is inconvenient. The defendant can always apply for separate trials if any unfairness might otherwise be caused to him but he should be entitled, if he wishes, to have the whole matter dealt with. This is, however, a matter on which the court is entitled to decide its practice consistently with its principles. I agree with the general principle enunciated by Cockburn CJ, but he was dealing with an ascending scale of charges and I do not think that he was intending to hold that the cases where second prosecutions in a descending scale of charges or on different crimes had been allowed were wrongly decided. In those days when these were technical difficulties with regard to the joinder of indictments such an assertion could not be justified."

[24] One can readily see the good sense in the distinction between an ascending set of charges being brought successively and a descending order of offences being preferred but this is perhaps not as relevant as heretofore. In *Phipps* Clarke LJ framed the principle rather more widely, saying that the correct question was "whether the second set of proceedings arise out of the same or substantially the same facts as the first". He elaborated on this in paragraph 21 of his judgment as follows: -

> "21. The authorities do not consider in detail what is meant by the same or substantially the same facts but, in our view, … they essentially mean that the Crown should not be permitted, save in special or exceptional circumstances, to bring a second set of proceedings arising out of the same incident as the first set of proceedings after the first set of proceedings has been concluded. The principle (which is in essence that identified in the civil law by Wigram CJ in *Henderson v Henderson*) is that the Crown should decide at the outset, or at the latest before the conclusion of the first set of proceedings, what charges it wishes to bring arising out of the same incident. Any other approach is unfairly oppressive to a defendant. It is for that reason that the burden is on the Crown to identify special or exceptional circumstances to justify such a course. Once the Crown has identified the charges it wishes to bring, it is a matter of case management how those charges are tried. Thus it is a matter of case management where and when the trial or trials should take place.

[25] Of course in the present case the prosecution had decided in advance that a complaint should be issued that could be converted to a summons in the event of the charge of dangerous driving causing death being dismissed. To that extent it might be said that the Crown had "decided at the outset what charges it wanted to bring", although, as Mr McEvoy submitted, one may infer that, had the dangerous driving causing death charge succeeded, the lesser charge would not have been proceeded with. The circumstances in *Phipps* were, however, markedly different from those that arise in this case. There the appellant had been involved in an accident in which another motorist was injured. He was charged and pleaded guilty to a charge of driving with excess alcohol before a magistrates' court on 23 December 2003 for which he was fined and disqualified from driving. It appears that, after the appellant had been sentenced by the magistrates, the victim or her family contacted the press complaining about the level of the sentence. Perhaps as a

result of reports in the press, the prosecuting authorities considered the matter further and the appellant was summonsed in relation to dangerous driving in late January or early February 2004. It is unsurprising that the Court of Appeal concluded that this amounted to an abuse of process.

[26] The question whether the bringing of an entirely different charge of a lesser level of seriousness where a complaint has already been made in relation to the offence and where it could not have been charged on the same indictment as the offence of causing death by dangerous driving requires to be justified by the prosecution by recourse to the existence of special circumstances has not, in our opinion, been settled by the decision in *Phipps*. Although the charges in this case arose out of the same set of facts, it was not possible to prosecute them together and it would plainly have been oppressive to proceed first with the summary offence. In as much as special circumstances require to be established, however, we are entirely satisfied that they were present in this case. We do not consider, therefore, that the fact that both prosecutions arise from the same incident warrants a stay of proceedings.

Does the failure of the prosecution to inform the respondent of the issue of the summons before completion of the trial on indictment warrant a stay?

[27] In *Chief Constable Orde v McManus* [2005] NICA 49 this court held that it was not an abuse of process for the prosecution service to make a 'protective' Form 1 complaint for a summary offence and defer the issue of the summons while expert evidence was obtained in order to decide whether a more serious charge should be preferred. In the present case the PPS was justified in awaiting the verdict of the jury on the dangerous driving charge before deciding whether to proceed with charge under regulation 115 and article 58. Mr Colton did not suggest otherwise. His argument on this issue was that the appellant should have been informed of this earlier. But the only consequence of having informed the appellant in advance of his trial would have been, as Mr Colton frankly admitted, that an application for a stay of proceedings on foot of the complaint would have been made sooner.

[28] The respondent has not suffered any disadvantage as a result of the procedure that was adopted by the prosecuting authorities. He was able to make his application for a stay of proceedings. As Mr Simpson submitted, it is the public interest that persons should be tried for offences for which there is evidence of guilt. The respondent was involved in a fatal road accident. If the evidence is sufficient, it is in the public interest that he be required to face the lesser charge.

Conclusions

[29] We have concluded that the magistrate should not have granted a stay of proceedings. We therefore answer the question posed in the case stated 'No'. We have already indicated our decision at the end of the hearing of the appeal and remitted the matter to the magistrates' court with a direction that the prosecution of the respondent should proceed.