Mag 20

Driving while disqualified; proof that an Certificate of Conviction and Disqualification referred to the Defendant before the Court for the purposes of establishing a case to answer; whether silence on the part of the Defendant in interview on the point can warrant an inference that he is the same person as the person named in the earlier Certificate

Petty Sessions District of Omagh

W J BAXTER

Complainant

PAUL McCULLAGH
7 WINDSOR ROAD
BELFAST

County Court Division of Fermanagh and Tyrone

Defendant

Ruling on Defendant's Submission of No Case to Answer

On Tuesday, 18th January 2000 the above case was listed before the court as a contest in respect of a charge against Paul McCullagh, whose address was given as 7 Windsor Road, Belfast, date of birth 1st July 1975, namely one of driving while disqualified on the Great Northern Road, Omagh on 24th September 1999, contrary to Article 167 of the Road Traffic Order (NI) 1981. I am proceeding on the basis that the Defendant is entitled to a trial on the single charge which he contests and not by reference to any extraneous considerations.

Counsel for the Defendant advised the court at the outset that the basis of the contest on the charge of driving while disqualified turned upon to a "neat point", being an issue as to whether there was proper evidence before the court of the alleged disqualification such as could amount to a case to answer.

It was apparent that counsel was reluctant to go into very great detail before the prosecuting Inspector had tendered his evidence, remarking that he felt it more appropriate to wait until the Directions stage. To that end, I was informed that counsel for the Defendant did now consent to the written evidence, of which prior notice had been duly given, being tendered, contrary to an earlier notice of objection apparently served by his instructing solicitor.

The prosecuting Inspector then rose to announce that he relied upon the Statements of which prior notice of an intention to tender them in evidence had been given to the Defendant. The Inspector also handed up a Certificate of Conviction, which certified that a Paul Edward McCullagh of 17 Kelvin Grove, Omagh, date of birth 1st July 1975, was convicted at the Magistrates' Court for the Petty Sessions District of East Tyrone on 23rd June 1999 of an offence of driving without due care and attention, for which he was fined £200 and disqualified from driving for a period of 12 months. The Inspector then confirmed that this documentary evidence together constituted the case presented against the Defendant.

Counsel for the Defendant then invited me to read through the tendered written Statements, (of Alwyn James Gurney, W J Gately, Keith Beveridge Finlayson and John Warnock), which I duly did, before he rose and proceeded with his detailed submission that there was insufficient evidence that the Defendant was a disqualified driver for the purposes of having a case to answer.

In the course of his submission, Counsel elected to confine himself to one point. This was based upon a passage from the 19th Edition of *Wilkinson's Road Traffic*, under the section entitled *Driving while Disqualified*. I trust that I have since tracked down the passage correctly as being section 11.76, insofar as it concerned the case of *R v Derwentside JJ, ex p. Heaviside* [1996] R.T.R. 384.

> There have been a number of important decisions which are declaratory of the existing law, but which have caused something of a stir in public prosecution departments and the courts. It has always been the law that the offence of driving while disqualified requires the prosecution to prove that the defendant was driving and that at the time he was disqualified. It is not disputed that the second element may sometimes cause evidential difficulties. In *R. v Derwentside JJ, ex p. Heaviside* [1996] R.T.R. 384 the applicant for judicial review had been convicted on the basis of evidence that he had been seen driving by a police officer who knew him to be disqualified. No evidence was given of the disqualification, save that an entry in the court register was produced showing that someone of the same name and with the same date of birth as the applicant had been disqualified for three years, up to and including the date of the alleged offence. The applicant applied for an order of certiorari to quash his conviction on the ground that there was no evidence before the court of an essential element of the offence of driving whilst disqualified, namely the disqualification. The Divisional Court held that the proof of a conviction, pursuant to section 73 of the Police and Criminal Evidence Act 1984, required strict proof of the identity of the person convicted, by admission, by fingerprints, or by evidence of a person present in court at the time of the conviction to identify the defendant. The mere matching of personal details of the defendant with those of the convicted person was not sufficient proof of identity. In this case, no sufficient evidence of identity had been put before the magistrates' court.

In addition, Counsel read a paragraph from the Judgement of McKinnon J., at pp. 386L-387A.

> As far as I am aware, it has never been accepted that the mere matching of personal details, whether the name, address or date of birth of a defendant with those upon a certificate of conviction is sufficient to establish or identify the defendant as the person earlier convicted. It may have been the defendant, but to avoid obvious mistakes being made, strict proof is required.

On the basis of all this, Counsel contended that there was no evidence adduced by the prosecution which was capable of proving that the person before the court was the

person disqualified, as recorded in the Certificate of Conviction. There were only three possible ways to prove that the Defendant was the person the subject of that conviction, i.e., by admission by or on behalf of the accused, by evidence of fingerprints, or by evidence of a person who was present in court when the accused was convicted.

The rest of section 11.76 in *Wilkinson*, however, which I have since had the opportunity to consider, make it apparent that things are not quite as simple as that. In particular, attention is drawn to the cases of *R v Derwentside Magistrates' Court, ex p. Swift; R. v Sunderland Magistrates' Court, ex. p. Bate* [1997] R.T.R. 89 and *DPP v Mansfield [1997]* R.T.R. 96.

It is apparent that to maintain that there are only those three permissible ways to prove that the accused is the person who was previously convicted is quite wrong. In his obiter in the *Mansfield* case, Staughton, L.J. makes that much clear. Thus, at p. 100D;

> None of those three possible ways was used in the present case. The justices seem to have taken the view that they were exclusive. I say that because in paragraph 7, of the case they state that they –
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> > "… were of the opinion that the facts of the present case were distinguishable from those in *R v Derwentside Justices, ex p. Heaviside*; however, even so they could not assume the identity of the driver without proof as set out in *Derwentside*, and accordingly the prosecutor offered no further evidence and the information was dismissed."
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> If in so far as the justices were saying that the three methods in *Derwentside* were the only available methods, they were making an error of law, in my judgement.

There, it was held that the evidence which had been before the justices, though not within any of McKinnon J.'s 3 categories, was, as a matter of law, nonetheless capable of being sufficient. Whether it proved to be sufficient as a matter of fact was for the justices to decide and the case was remitted to them with a direction to continue the hearing.

Staughton, L.J. also indicated, at page 101B, the kind of evidence which was capable of bringing the case beyond the threshold of one to answer, if the justices so determined –

> There is here more than a coincidence of names. The name in the certificate is the same as the man who appeared charged with driving with whilst disqualified, and so also was the date of the offence. It was proved that he was driving a car on the same day when the offence for which the disqualification was imposed was committed. It was proved that he was arrested by Constable Curtis on the day in respect of which, for the offence, disqualification was imposed.

I must therefore consider what is the evidence before the court that the accused, Paul McCullagh, was the same person as the one named Paul Edward McCullagh with the same date of birth who was disqualified from driving on 23rd June 1999. This in fact boils down to 2 remarks in the tendered Statement of Sergeant Alwyn James Gurney. At

lines 9 and 10 of page 1, he states that "Paul McCullagh … is currently disqualified from driving." And at page 2, line 6, he states that the person he saw driving on 24th September 1999 "…was indeed Paul McCullagh." Putting these together, we have a statement from the arresting Police officer that the person he found driving was a person currently disqualified from driving.

This amounts to nothing more than the bare assertion that the accused is a disqualified driver. I do not know the basis upon which Sergeant Gurney believes this to be the case. In contrast to the facts in *Mansfield*, no evidence is adduced to the effect that the Police witness has any direct knowledge of the conviction, that he was involved in any way in the apprehension of Mr. Paul Edward McCullagh which led to such conviction, nor can I know whether the Sergeant is referring to the conviction and disqualification of Paul Edward McCullagh on 23rd June 1999, or to the conviction and disqualification of Paul McCullagh on some other date. There is no evidence linking the Sergeant's assertion with the certificate of conviction handed in to the court. The Sergeant could be referring to a different offence and a different conviction to that which is the subject of the certificate before this court. Basically, there is no evidence before me to substantiate or test the bare assertion by the Sergeant that Paul McCullagh is a disqualified driver.

Staughton, L.J. would appear to have accepted the proposition that the *ratio* in *Derwentside* could be applied to the facts of the individual case. In *Derwentside* the Police witness was able to go somewhat further than Sergeant Gurney did in his Statement here; and still that was not enough.

In his concurring judgement in *Mansfield*, Rougier J. opined that these problems would evaporate with the coming into force of the Criminal Justice and Public Order Act 1994 "…because the evidence which was adduced by the prosecution would certainly, on any view, have been enough to raise a prima facie case on this particular point of identity against the Defendant, that if the Defendant did not choose to give evidence the justices would be entitled to draw conclusions adverse to him on this particular aspect." (I may say in passing that I do not take Rougier J. to be suggesting that the evidence in *Derwentside* had been enough to raise a prima facie case).

The equivalent in this jurisdiction to the English Act of 1994 is The Criminal Evidence (NI) Order 1988. I am of course here considering whether there is a case to answer, within the terms of Art. 3(2)(a). Again, it is the Statement of Sergeant Gurney which records the only points at which it might be contended that the accused failed to mention any material fact with regard to the matter of allegedly driving while disqualified. The subject was not put to him in the formal interview, which was taken up entirely with the vocabulary used by Mr McCullagh to Police officers. It was however put to him at the scene that he was suspected of being a disqualified driver and he was thereupon cautioned, but his only direct reply throughout was crude abuse. However, the immediate context to his first quoted remark after that was a reference to his alleged failure to stop earlier. More directly, the Sergeant's evidence is that after the charge of Driving Whilst Disqualified was formally put to him at the Station, Mr. McCullagh made no reply. It is not apparent that it was being put to Mr. McCullagh that he was the person convicted and disqualified on 23rd June 1999.

The case of *R v Condron* [1997] Crim L.R. indicates that the relevant test is whether the failure to mention a material fact (such as that the Defendant was not in fact disqualified) could only sensibly be attributed to the accused having no made answer, or none that would stand up to cross-examination. In that event, an adverse inference could be drawn pursuant to statute.

I do not feel it is appropriate for me to draw any adverse inference from the accused's failure to mention any material fact on the subject of his alleged driving while disqualified, whether at the scene or upon the charge being put to him. In those circumstances, it is not necessary for me to consider the impact of the Human Rights Act 1998, section 3, upon the interpretation and application of Article 3 of The Criminal Evidence (NI) Order 1988.

In any event, Article 2(4) of the 1988 Order provides that a person shall not have a case to answer solely on such adverse inference. There must be other evidence as well.

In summary, I rule that the prosecution have failed to adduce evidence to identify this Defendant with the person who was the subject of the conviction and disqualification on 23rd June 1999.

22nd February 2000

John Meehan, Deputy Resident Magistrate.