Neutral Citation no. [2006] NICA 49 | *Ref:* **CAMF5457**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **2/2/06**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEALS BY WAY OF CASE STATED FROM A DECISION OF A RESIDENT MAGISTRATE

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CHIEF CONSTABLE HUGH ORDE

Complainant/Respondent;

-and-

THOMAS O'DONOVAN

and

JANET McGONAGLE

Defendants/Appellants.

_____

Before Campbell LJ, Sheil LJ and Coghlin J

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CAMPBELL LJ

[1] These appeals by way of case stated are against decisions of the resident magistrate, Liam McNally Esq., sitting at Strabane Magistrates' Court on 16 and 21 October 2004 in the case of Mr O'Donovan and on 21 October and 18 November 2004 in the case of Ms McGonagle. Each case concerns the admissibility of verbal statements made, without a caution, by the appellants to police officers when investigating accidents to the effect that they had been

the drivers of the vehicles involved. As this issue arose in both cases the appeals were heard together.

The appeal of Thomas O'Donovan

[2] Thomas O'Donovan appeared at Strabane Magistrates' Court charged with driving a mechanically propelled vehicle, on 26 May 2003, on a road or other public place when unfit to drive through drink or drugs contrary to article 15(1) of the Road Traffic (Northern Ireland) Order 1995.

[3] The resident magistrate found the following facts proved:

(a) On 26 May 2003 at Branch Road, Strabane a Vauxhall Vectra CNZ 9015 crashed into and became embedded in a road sign.

(b) When the vehicle was discovered by Sergeant Emerson and Constable McConville the driver's door was open and the engine was still warm.

(c) The police officers went to 4 Lisnafin Park, Strabane, the home of the appellant, who was recorded as being the registered owner of the vehicle.

(d) The appellant spoke to the police officers at the door of his house and confirmed his identity and that he was the owner of the vehicle.

(e) It was obvious to the officers that the appellant was in an intoxicated state.

(f) Sergeant Emerson told the appellant that he had found a vehicle registered in his name and that it had crashed into a road sign at Safeways, Branch Road, Strabane.

(g) He then asked the appellant if he had been driving the vehicle. He did not ask him any other questions.

(h) The appellant told Constable McConville that the vehicle was his, that he had been driving it that evening and had walked home after he had been involved in a collision.

(i) On hearing his response Constable McConville formed a suspicion that the appellant had committed the offence of driving a motor vehicle while unfit through drink or drugs and arrested him.

(j) Up to this point Constable McConville was conducting an investigation into a road traffic accident and he did not have grounds to suspect that the appellant had been the driver of the vehicle.

[4] Before the resident magistrate the appellant made the case that his statement that he had been driving his vehicle should not be admitted in evidence as he had not been cautioned before making it. Once the officers had established that he was the registered owner of the vehicle since they could see that he was under the influence of alcohol they had grounds to suspect that he had committed an offence. Therefore, it was argued, he should have been cautioned before any further questions were asked.

[5] On behalf of the respondent it was argued that the first point in the line of inquiry by the police was to establish the identity of the owner of the vehicle. The appellant had confirmed that he was the owner and although he was intoxicated the police officers had no ground to suspect that he had been the driver of the vehicle. Others may have been entitled to drive the vehicle or it may have been stolen. If the appellant had not told them who was driving the vehicle the officers would have then asked him for the identity of the driver.

[6] Section 10 of Code C of the Codes of Practice issued under article 60 of the Police and Criminal Evidence (NI) Order 1989, SR 1996 No 261, provides:

> '**When a caution must be given**
>
> *(a) When there are grounds to suspect an offence*
>
> 10.1
> When there are grounds to suspect a person of an offence, and he is to be questioned regarding his involvement, or suspected involvement and if his answers …may be given in evidence to a court he must be cautioned:
>
> (i) before any questions are put to him about the offence: or
>
> (ii) before any further questions are put to him if it is his answers to previous questions that provide the grounds for suspicion.'

Paragraph 10.3 which is also relevant states:

> 'a person need not be cautioned unless questions are put to him to obtain evidence that may be

> given in court. It is not necessary for other purposes such as obtaining identity, or ownership of, or responsibility for, any vehicle'.

[7] The resident magistrate concluded that when the police officers called at the appellant's house and he came from his bedroom, in an intoxicated state and told them that he was the owner of the vehicle, they had no grounds to suspect that he had been driving the vehicle which they had found earlier. He held that they were not in breach of the Code as they were entitled to make enquiries as to the identity of the driver.

[8] He was satisfied that there was no oppression or inducement in relation to the making of the admission and having considered the application of article 76 of the Police and Criminal Evidence Order (NI) 1989 he declined to exercise his discretion to refuse to admit the evidence as unfair.

[9] The case stated raises the question was the resident magistrate correct to admit the verbal admission by Mr O'Donovan that he had been driving his car at the time of the accident?

The appeal of Janet McGonagle

[10] Janet McGonagle appeared before the resident magistrate charged with four offences under the Road Traffic legislation. Driving a motor vehicle after consuming so much alcohol that the proportion in her breath exceeded the prescribed limit; failing to stop; failing to keep her vehicle standing at or near the place where an accident had occurred; and failing to report an accident.

[11] The resident magistrate found the following facts:

(a) On 2 March 2004 Constable Galbraith went to Lisnafin Park to investigate an accident in which a blue car, which was parked in a lay-by, had been damaged.

(b) Later he found a red Ford Escort in the driveway of 26 Ardenlee Park, Strabane. Damage to this vehicle matched damage he had seen both at Lisnafin Park and to a fence at 26 Ardenlee Park.

(c) The constable spoke to the appellant at 26 Ardenlee Park.

(d) He identified himself to her and explained the nature of his inquiries.

(e) When asked by the constable about the ownership of the Ford Escort she confirmed that she was the owner of the vehicle.

(f) Ms McGonagle was then asked by the constable if she was driving her vehicle at the time of a collision between it and another vehicle outside 69 Lisnafin Park at approximately 4.00am. She said that she was the driver of the vehicle when it was involved in a collision at Lisnafin Park at 4.00 am that morning.

(g) At this point Constable Galbraith, believing that he had grounds for suspecting that the appellant had been involved in a number of offences, cautioned her for:

(i) failing to stop at the scene of a road traffic accident,

(ii) failing to remain

(iii) failing to report,

(iv) driving without due care and attention.

and she made no response.

(h) After he had cautioned her and in the course of conversation with the appellant Constable Galbraith noticed a smell of intoxicating liquor from her breath.

(i) He reminded her that she was still under caution before asking her if she had consumed alcohol since the accident. She replied "no".

(j) The appellant was then arrested and taken to Strabane police station.

[12] In the magistrates' court it was submitted on her behalf that the question put to her as to the identity of the driver of the vehicle was in breach of article 74(2) (b) of the Police and Criminal Evidence (NI) Order 1989 and that she should have been cautioned in accordance with section 10 (1) of Code C before being asked about ownership of the vehicle and the driver as this was specifically related to the offence. On behalf of the prosecution it was submitted that as the constable did not know the identity of the owner of the vehicle or of the driver at the time of the accident his first question was designed to establish ownership. When the appellant told him that she was the owner he did not suspect that she had committed any offence. The question about the identity of the driver was described as part of a logical line of inquiry and not an interview.

[13] The resident magistrate accepted the constable's evidence that he did not suspect the appellant of being the driver when he asked her who was

driving. He accepted also his evidence that he had no actual grounds for suspecting her of having driven the vehicle. While the constable suspected that a vehicle owned by the appellant had been involved in the accident he had no grounds to suspect the appellant had committed an offence.

[14] As the resident magistrate found as a fact that the constable did not suspect the appellant of being the driver when he asked her who had been driving he held that the constable did not have any reason to caution her.

[15] Being satisfied that in the circumstances the admission of this evidence would not have an adverse effect on the fairness of the proceedings the resident magistrate admitted it. The question is was he correct to do so?

The arguments advanced on the appeal

[16] Mr Dermot Fee QC, who appeared with Mr Fahy for Ms McGonagle, accepted that, as paragraph 10.3 of the Code makes clear, there was no requirement for a caution to be given before the appellant was asked if she was the owner of the vehicle. Contrary to the view expressed by the resident magistrate the facts did however, in his submission, make it sufficiently clear that after she had answered this question the constable had grounds to suspect her of an offence.

[17] Her vehicle, with damage consistent with the accident, was parked in the driveway leading to the house where she lived and this coupled with similar damage to the fence adjoining the driveway to her house provided grounds for the constable to suspect her of an offence. She should therefore have been cautioned before being asked if she was the driver at the time of the accident. The grounds for suspicion may have fallen short of a *prima facie* case but this was irrelevant as all that was necessary was grounds for suspicion. For such grounds to exist it was not necessary to rule out the possibility that someone else may have been driving.

[18] Mr McCann, who appeared for Mr O'Donovan, said that the resident magistrate had erred in finding that there were no grounds for the police officers to suspect that his client was the driver of his own car when it collided with the sign. Mr O' Donovan was on record as the registered owner of the vehicle found at the scene and when the officers called at his house he confirmed this. The resident magistrate found as a fact that it was obvious to the officers that he was intoxicated. Mr McCann submitted that these facts taken in combination with the vehicle being found embedded in a sign with the engine still warm, provided ample grounds for suspecting that Mr O'Donovan had committed an offence.

[19] Mr Valentine, who appeared for the Chief Constable, countered this by saying that it was open to the resident magistrate to conclude that the officers who called with the appellants did not have grounds to suspect them of an offence until they admitted that they had been driving. The question was whether to make such a finding was perverse or irrational.

[20] Where the driver of a vehicle is alleged to be guilty of an offence under any provision of the Road Traffic (NI) Order 1981 the owner of the vehicle is obliged to give such information as he may be required by a constable to give as to the identity of the driver. If he fails to do so he is guilty of an offence, unless he shows, to the satisfaction of the court, that he did not know and could not with reasonable diligence have ascertained the identity of the driver. (Article 177 (b)).

[21] Mr Valentine relied on this provision and on *Brown v Stott* [2003] 1 AC 681 in support of the proposition that the officers were not required to administer a caution before asking the appellants if they had been driving.

[22] In response Mr Fee and Mr McCann referred to the absence of any evidence from the officers that they had exercised powers under article 177(b) of the Order and to the failure of the prosecution to make this case before the resident magistrate. It was, they suggested, being introduced as an afterthought. They relied on a passage in the judgment of McCollum LJ in *Robinson v Chief Constable* [2003] NICA 46(2) where he said that it was clear from the wording of article 177 that it is a pre-condition to making such a request that the owner be informed that the driver was alleged to be guilty of an offence. We were referred also to *Pulton v Leader* [1949] 2 All ER, a decision under section 113 (3) of the Road Traffic Act 1930.

[23] If this court was not persuaded that the police officers were exercising their powers under article 177(b) Mr Valentine continued to have recourse to this article to support his contention that the court should not refuse to allow the evidence under article 76 of the Police and Criminal Evidence Order. The evidence obtained by the police officers, without a caution, was identical to that which could have been obtained under article 177(b). If the evidence had no adverse effect on the proceedings if obtained under article 177(b) he suggested it could have no different effect when obtained in this way.

Conclusion

[24] Whether there are grounds to suspect a person of an offence is to be decided objectively. As Otton LJ said in *Nelson and Rose* [1998] 2 Crim App R 399 at 404C:

> 'The appropriate time to administer the caution in a situation such as this is when, on an objective test,

> there are grounds for suspicion, falling short of evidence which would support a prima facie case of guilt, not simply that an offence has been committed, but been committed by the person who is being questioned.'

[24] In Ms McGonagle's case the resident magistrate found that the facts did not make it sufficiently clear that the constable had grounds to suspect her of an offence. He went on to find as a fact that the constable did not suspect her of having driven the vehicle when he asked her about the driver of the vehicle. The resident magistrate found in the case of Mr O'Donovan that the constable did not have grounds to suspect that the appellant was the driver of the vehicle before the appellant told him that he had been driving the vehicle.

[25] The reluctance of an appellate court to interfere with the finding of a lower court that viewed objectively there was no ground to suspect a person of an offence is illustrated by the decision of a Divisional Court in *Ortega v Director of Public Prosecutions* [2001] EWHC Admin 143, referred to by the resident magistrate. A Ministry of Defence police officer was told that a heavily intoxicated male was about to drive a car out of an RAF base and the officer was provided with the registration number and make of the car. Having established the address of the owner on the national computer base the constable went there. A car that answered the description was parked outside the house and the engine was still warm. The appellant came to the door and having introduced himself the officer asked him if he was the owner of the car and he replied in the affirmative. He then asked him if he had just driven from the RAF base and he replied "yes." Whereupon the officer asked him if he had been drinking alcohol and he answered "yes" and went on to say that he had his last alcoholic drink about twenty minutes earlier. The Divisional Court, was asked in a case stated if the finding that the officer had no grounds to suspect the appellant of an offence contrary to section 4 or 5 of the Road Traffic Act 1988 before asking him if he had just driven from the RAF base, was a finding which no reasonable court could have made.

[26] Delivering the judgment of the court Rose LJ said that in light of the evidence before the Crown Court the finding of the justices that the constable did not have grounds to suspect the appellant of the offence prior to asking him if he had just driven from the RAF base was a conclusion that they were entitled to reach. He added:

> 'It is neither here not there that a different court might have reached a different conclusion.'

[27] The question is whether the facts found in the present appeals are such that no person acting judicially and properly instructed as to the relevant law could have decided that there were no grounds to suspect either of the appellants of an offence after they had admitted ownership of the vehicles and before they were asked if they had been driving. In *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36 Lord Radcliffe having stated this test went on to prefer the description of this state of affairs as;

> 'one in which the true and only reasonable conclusion contradicts the determination.'

[28] We consider that on the facts found by the resident magistrate the one reasonable conclusion was that there were grounds to suspect Mr O'Donovan of an offence. He was the owner of the vehicle that was found in Strabane embedded in a road sign and with the engine still warm. When the officers called at his house, in the town, it was obvious to them that he was in an intoxicated condition. These facts combined to provide strong grounds to suspect him of an offence if not a *prima facie* case against him.

[29] A court may have regarded Ms McGonagle's ownership of the vehicle parked at her house, where she was spoken to by the police officers, and the fact that the damage to her vehicle matched that found to the car parked in the lay by and to the fence at her house when taken together as sufficient for a constable to suspect her of an offence. However, we do not consider that this was the only reasonable conclusion that a court could have reached.

[30] The failure of the police officers to make any reference to article 177(b) of the Road Traffic (NI) Order 1981 at any stage makes it clear that they were not seeking to rely on powers given to them under this legislation. Had they done so we would have regarded Sergeant Emerson's reference to having found a vehicle registered in the name of Mr O'Donovan which had crashed into a road sign at Safeways, Branch Road, Strabane as sufficient to satisfy any requirement that may exist under article 177 to indicate that the driver was guilty of an offence. The resident magistrate found that Constable Galbraith explained the nature of his enquires to Ms McGonagle and while it is possible that this would have been sufficient in her case we would have required more evidence of what was said to her to be satisfied of compliance with article 177.

[31] The fact that under article 177 (b) of the Road Traffic Order a constable can require the owner of a vehicle to give information, without a caution, as to the identity of the driver of a vehicle is not, in our view, a reason for admitting in evidence such information where the constable did not seek to obtain it in the exercise of this power.

[32] We answer the question "Was I correct in admitting in evidence the verbal admission made by the appellant?" in the appeal of Mr O'Donovan "no" and in the appeal of Mrs McGonagle "yes."