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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/01/08**

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) ORDER 1981

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Between:

Chief Constable of the Police Service for Northern Ireland

Complainant/Appellant

and

Joseph Michael Mullan

Defendant/Respondent

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Ex tempore judgment

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Before Kerr LCJ, Campbell LJ and Higgins LJ

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KERR LCJ

[1] This is an appeal by way of case stated by the Chief Constable of the Police Service from a decision of Mr Desmond Perry, a Resident Magistrate, given on the 14 November 2006 at Magherafelt Magistrates' Court. On that date Mr Perry heard a complaint against the defendant (who is the respondent in this appeal), Joseph Michael Mullan, that he had contravened Article 16 paragraph 1(a) of the Road Traffic (Northern Ireland) Order 1995 in that on the 28th May 2006 he drove a motor vehicle on a road after consuming

so much alcohol that the proportion of it in his breath exceeded the prescribed limited.

[2] The background to the case is that the respondent was stopped at a police check while he was driving his motor car on the morning of the 28 May 2006. This occurred near the town of Toomebridge. Although the case stated avers that the time at which he was stopped was "before 9.00 am in the morning", it was in fact 7.58 am. A breathalyser test was administered after the police officer who had stopped the vehicle detected a smell of alcohol on the respondent's breath. The sample of breath obtained was subsequently analysed and this disclosed a reading of 51 micrograms of alcohol, that being 16 micrograms of excess of the limit imposed by legislation.

[3] The reason offered by the respondent for driving his motor vehicle on that morning reflects the tragic background in his family circumstances. He gave evidence that he is virtually the sole carer for his father who suffers from a significant mobility problem as a result of a serious neck fracture which was sustained some two years before May 2006. Sadly his mother suffers from osteoporosis and is unable to render significant physical assistance to her husband.

[4] On the evening before the detection the respondent had travelled with his girlfriend to Letterkenny, County Donegal and both had consumed a significant quantity of alcohol. It was, he testified, his intention not to return home until the effects of the alcohol had dissipated but about 6.00 am on the morning of the 28 May he received a telephone call from his mother indicating that his father had experienced difficulties. I need not dilate on these. It is sufficient to say that as a result of these, his father was clearly in need of urgent attention and assistance. In any event, it is claimed on the respondent's behalf that, after considering the various alternatives open to him, he decided that he had no option but to drive to his home. As I have said his car was stopped at 7.58 am and it seems clear that he would have already been travelling for approximately two hours before he was stopped.

[5] It is beyond doubt that the metabolising effect that would have occurred during the time that he set off until he was required to give a sample of breath would have reduced the level of alcohol in his blood. It is to be concluded that the level of alcohol in his system at the time that he set of would have been somewhat higher than it was effectively.

[6] The question whether a defendant can escape the mandatory penalty of disqualification for a minimum period of twelve months because of special reasons pursuant to Article 35 of the Road Traffic Offenders (Northern Ireland) Order 1996 has been considered by this court on a number of occasions most recently in the case of *Chief Constable v Cassells* [2007] NICA 12. In that case this court cited a well known passage from an earlier decision of

this court of *Fleming v Mayne* [2000] NIJB 21 and applied the principles outlined by Carswell LCJ in the earlier case. So far as is relevant to this case those principles are: -

> "1. A special reason is one which is special to the facts of the case and not the offender. It was described by Andrews LCJ in the context of comparable legislation in *R (Magill) v Crossan* [1939] NI 106 at 112 as –
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> > 'a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment.'
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> 2. The burden of proving the facts upon which the plea of special reasons is based is upon the defendant, and is proof upon the balance of probabilities.
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> 3. Even if special reasons are proved that does not prevent the court from disqualifying for the statutory period; it merely allows the court to exercise a discretion in the matter either not to disqualify, or to disqualify for a lesser period.
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> 4. The court should be satisfied that the defendant had no intention to drive the vehicle at the time when he drank alcohol. There must be some unforeseen supervening circumstances, which gave rise to a strong need for him to drive notwithstanding his consumption of alcohol taking him over the legal limit.

[7] In *Fleming v Mayne* the court recognised that such circumstances were very variable but it observed that it will normally be required to show that there was personal danger to the defendant or an emergency which requires him to drive his car in order to deal with it.

[8] It is important also to remember that in *Fleming v Mayne* this court expressly espoused the statement of principle by Lord Widgery C J in *Taylor v Rajan* [1974] QB 424 a court should rarely, if ever, exercise the discretion in favour of the defendant where his alcohol level exceeds 100 milligrams of 100

millimetres of blood, the equivalent figure in breath being 43 micrograms in 100 millimetres of breath.

[9] The second principle pronounced by the court in *Fleming* was that the onus was on the defendant to establish the existence of clear and compelling circumstances justifying his decision to drive the vehicle. In practice this would broadly require him to show that there was an emergency of a nature that prevented resort to any other means of dealing with the emergency. In the particular circumstances of this case that is an extremely important principle. It is for the defendant to show that he could not resort to any other means of meeting the emergency. Evidence falling short of proof of that requirement will not suffice to qualify a defendant for the exemption contained in article 35.

[10] The final principle enunciated in *Fleming* was that the test to be applied is objective and the question which the court should ask itself is whether a sober, reasonable and responsible friend of the family present at the time would have advised him in the circumstances to drive or not to drive. Applying this, we conclude that no determination was open to the learned resident magistrate other than that test was not fulfilled. We say that for a number of reasons, firstly, the emergency which prompted the defendant's mother's telephone call to him could not be dealt with by him for at least two or more probably two and a half hours. He had to drive a considerable distance from County Donegal to his home. Secondly, a number of obvious alternatives were open to him. Some of these were no doubt fraught with difficulty and inconvenience but it is not less than essential that it be shown that they were not only inconvenient but simply non feasible. The reason for that is clear. Because of the danger that those who consume alcohol present to other road users in driving vehicles, Parliament has decreed that only the most exceptional circumstances should the mandatory penalty be avoided.

[11] In this case there were several options which were open to the defendant. First, he could have engaged a taxi, secondly, he could have telephoned a neighbour, social services, or a general practitioner, thirdly, he could have contacted one of his siblings; and fourthly, he could have at least explored the possibility of obtaining emergency assistance for his father. One way of looking at this is that if one was to suppose that the defendant was simply unable to drive his car either because of indisposition on his part or because of a mechanical breakdown, it cannot be said that there was no alternative to his provision of assistance to his father. Viewed in that way, the only conclusion available to the tribunal of fact in this case is that there were obvious alternatives that could have been explored and followed.

[12] Therefore, while we have great sympathy with the respondent in this appeal, particularly in light of the tragic circumstances of his family, we are left with no alternative but to conclude that there was no evidence on which

the resident magistrate could have concluded as he did. We have been told by Mr McStay (who appeared for the respondent) that various alternatives were explored by the prosecuting police inspector and he has asked us to accept that these were fully taken into account by the resident magistrate. It is unfortunate perhaps that they do not feature in the case stated but while accepting, of course, what Mr McStay has told us about the conduct of the hearing, we have concluded that, even if these were considered, no conclusion other than the one which we have expressed was open to the learned resident magistrate. We will therefore quash his decision and remit the matter to him with a direction that he should impose the disqualification required by law.