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Judgment: approved by the Court for handing down | *Delivered:* **25/11/03**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DEREK MARTIN ROBINSON

(Defendant) Appellant

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(Complainant) Respondent

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Nicholson LJ, McCollum LJ and Weir J

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Nicholson LJ

Introduction

[1] This is an appeal by way of case stated from the decision of a Resident Magistrate, Mr B P McElhone, sitting at Strabane on 1 November 2001, whereby he convicted the (Defendant) Appellant, Derek Martin Robinson (the Appellant) of three motoring offences under the Road Traffic (Northern Ireland) Order 1995 (the 1995 Order) and two motoring offences under the Road Traffic (Northern Ireland) Order 1981 (the 1981 Order). Mr Dermot Fee QC and Mr McCann appear for the Appellant; Mr Valentine appears for the Respondent.

[2] The questions stated by the Resident Magistrate for the opinion of the Court of Appeal were:

1. Given the court ruling that a verbal admission made by the Appellant was inadmissible, whether the court properly admitted evidence relating to the provision by the Appellant of preliminary and evidential breath specimen and the results thereof?

2. Whether the court properly admitted in evidence the contents of the Appellant's PACE interview conducted at Strabane RUC Station on 22 August 2000?

[3] In my opinion the first question arising out of the decision of the Resident Magistrate should have been: was the verbal admission made by the Appellant admissible in evidence? I propose to deal with this question before I deal with the questions stated by the Resident Magistrate.

The facts relevant to this question as found by the Resident Magistrate

[4](i) On Sunday 6th August 2000 Constable Brian James Miskelly was on duty and in full uniform carrying out mobile patrol duties in the Castlederg area.

(ii) At 10.47pm he attended the scene of a road traffic accident on the Castlefin Road, Castlederg, County Tyrone. One vehicle was involved, a Renault 5, registration mark ABZ 1987 and it was lying on its roof on the road. There were three persons present, two males, one of whom was the Appellant, and a female. All maintained that they were passengers in the vehicle and that the driver was a male whom they knew only as "Charlie". All of them stated that "Charlie" had headed off in the direction of Castlederg.

(iii) The three persons present were less than co-operative with Constable Miskelly and all smelt strongly of intoxicating liquor.

(iv) A taxi arrived at the scene carrying a Charlie Byrne, the brother of the other male already at the scene. The original three persons attempted to get into the taxi and leave. Constable Miskelly prevented them from doing so as he had formed the suspicion that Charlie Byrne had been present in the car involved in the road traffic collision. On speaking to Charlie Byrne Constable Miskelly determined that he had been in the vehicle, that he was 16 years old but that he denied being the driver.

(v) Other police had meanwhile traced and spoken to the last registered owner of the vehicle who maintained that he had sold the car to the Appellant.

(vi) Having received this information Constable Miskelly repeatedly questioned all four persons, seeking to ascertain the identity of the owner and driver. Constable Miskelly accepted that by that stage he had formed a clear and strong suspicion that the Appellant was lying and could indeed be the driver of the vehicle. Constable Miskelly had informed the Appellant that police were aware he had purchased the vehicle some two months ago.

Constable Miskelly continued to question the Appellant until he eventually admitted that he was the owner and driver of the vehicle. The Appellant further admitted that he was not insured to drive the vehicle and had only a provisional licence issued in the Republic of Ireland. At no stage was the Appellant cautioned.

(vii) Having detected a strong smell of intoxicating liquor from the Appellant's breath Constable Miskelly commenced the preliminary breath testing procedure and obtained a specimen which indicated the proportion of alcohol to be in excess of the prescribed limit. The Appellant was arrested and conveyed to Strabane Police Station where he provided two evidentiary breath specimens the lower of which was 46 mg of alcohol per 100 millilitres of breath, eleven in excess of the limit. The Appellant declined the option of a blood test. The Appellant was released from police custody on recognizance to appear at Strabane Police Station on the 22nd August 2000 for the purpose of being charged with driving with excess alcohol and to be interviewed in relation to other motoring offences. These findings appear to have been based on a statement of evidence by Constable Miskelly admitted in evidence by consent of the parties.

[5] The facts in this case, as McCollum LJ has pointed out in more detail in his judgment, establish that Constable Miskelly did not exercise his powers under Article 177 to obtain from the Appellant the information that he was the driver of the vehicle, because there was no finding that he alleged that he suspected a drink-driving offence to have been committed before he questioned the Appellant. If he had, it might not have been necessary to caution him: see Brown v Stott [2003] AC 681. However, it would have been necessary to take into account what Lord Bingham said at p. 705:-

> "The section does not sanction prolonged questioning about the facts alleged to give rise to criminal offences … There is in the present case no suggestion of improper coercion or oppression such as might give rise to unreliable admissions and so contribute to a miscarriage of justice …."

And what Lord Steyn said at p. 710:

> "… Section 172(2) does, depending on the circumstances, in effect authorise the police officer to invite the owner to make an admission of one element in a driving offence. It would, however, be an abuse of the power under Section 172(2) for the police officer to employ improper or overbearing methods of obtaining the information. He may go no further than to ask who the driver was at the given time. If

> the police officer strays beyond his power under Section 172(2) a judge will have ample power at trial to exclude the evidence. It is therefore a relatively narrow interference with the privilege [against self-incrimination] in one area which poses widespread and serious law enforcement problems."

See also Lord Hope at p. 723, Lord Clyde at p. 7289 and the Rt Hon Ian Kirkwood at p. 731.

[6] When he was asked the question about the driver, at the roadside the Appellant stated at first that "Charlie", who had left the scene of the road traffic accident, was the driver. He was then repeatedly questioned and he was told that police were aware that he had purchased the vehicle some two months previously. Constable Miskelly continued to question the Appellant until he eventually admitted that he was the owner and driver of the vehicle. In these circumstances the Resident Magistrate correctly held that a caution should have been given and excluded the admission at the roadside. The failure to caution was in breach of paragraph 10.1 of Code C of the Codes of Practice made by the Secretary of State under Article 65 of the PACE Order and the Resident Magistrate was entitled to exclude the admission as there was a significant and substantial breach of the Code.

The breath specimens

[7] The Appellant did not challenge the admissibility of the evidence relating to the provision by the Appellant of provisional and evidential breath specimens and the results thereof.

The second question

[8] The second question raised in the case stated was: whether the contents of the Appellant's interview conducted at Strabane RUC station on 22 August 2000 were properly admitted in evidence.

[9] It was submitted to the Resident Magistrate on behalf of the Appellant that the admissions made in the formal police interview in relation to motoring offences other than the drink-driving charge should not be admitted in evidence to prove that the Appellant had been the driver of the Renault 5 on 6 August 2000. It was argued that subsequent admissions would have been "tainted" by the inadmissibility of the roadside admission and flowed directly from the initial admission. No issue was taken in relation to the conduct of the interview of 22 August 2000. Reliance was placed on three cases: R v Cross (Unreported: Belfast Crown Court, 26 February 1997 per Sheil J), R v Martin (Unreported: Belfast Crown Court, 17 June 1994) and R v Glaves [1993] Crim LR 685.

[10] It is apparent that it was agreed that this legal issue was to be determined on the witness statement of Constable Miskelly. The proper course was to decide this issue on a voire dire before the evidence given: see The Queen v Liverpool Juvenile Court, Ex parte R [1988] QB1. It is not essential to present oral evidence on the voire dire. The parties to the proceedings may agree to have the issue decided on written statements. This appears to have been done. If so, the Appellant did not give evidence on the voire dire in which he could not have been cross-examined as to the truth or otherwise of the admissions. No argument was addressed to this Court on the part of the Appellant that the procedure which was adopted was inappropriate.

The findings of the Resident Magistrate

[11] At 7.47 pm on Tuesday 22 August 2000 the Appellant was interviewed at Strabane police station in compliance with all PACE requirements. He had been offered the assistance of a solicitor at the interview but he had declined same. In the interview he admitted being the driver of the vehicle in respect of the charges which were the subject matter of that interview – driving without due care and attention, using a motor vehicle on a road without a proper policy of insurance, driving without the supervision of a qualified driver when holding a provisional licence, using on a road a vehicle the nearside front tyre of which failed to comply with the relevant regulations. No issue was taken on behalf of the Appellant about the conduct of the interview or its contents. No allegation was made of oppressive behaviour at that stage or at the roadside.

[12] The Resident Magistrate found (a) that as the formal interview was conducted in compliance with all PACE requirements and as sixteen days had elapsed between the roadside admission and the subsequent interview in which period the Appellant had ample opportunity to consult a solicitor, the subsequent interview was not "tainted" by the inadmissibility of the roadside confession, (b) that the Appellant was an adult, had sufficient opportunity to seek professional advice and make an informed and independent choice as to whether he should repeat his admission, retract or stay silent and (c) that the conduct of Constable Miskelly on 6 August was not so oppressive or malign that there must be an inevitable and continuing blight on the subsequent confessions. He made no finding that the conduct of Constable Miskelly was oppressive.

[13] The Resident Magistrate admitted the evidence of the interview of 22 August and convicted the Appellant on all counts.

Articles 74(2) and 76(1) of the PACE Order

[14] The onus was on the prosecution to satisfy the court beyond a reasonable doubt that the admissions (notwithstanding that they may have been or were true) were not obtained in consequence of anything said or done at the roadside or thereafter which was likely in the circumstances existing at the time to render unreliable the later admissions: see Article 74(2)(b) of the PACE Order.

[15] It was not represented on behalf of the Appellant that there was or may have been any oppression of the Appellant: see Article 74(2)(a).

[16] The Appellant was also entitled to rely on Article 76(1): I do not set out the terms of either Article, as McCollum LJ has set them out in his judgment.

[17] The purport of Article 74(2)(b) was considered in Re Proulx [2001] 1 All ER 57. Applying what was said by Mance LJ at pp 76, 77 of that case to the facts of this case the sub-paragraph requires the court to consider: (a) what was said or done at the roadside and subsequently at the police station on 6 August, (b) the circumstances existing at the time of the admissions on 22 August, (c) whether what was said or done was, in the light of such circumstances, likely to render unreliable any admission made by the Appellant and (d) whether the admissions on 22 August were in fact made in consequence of anything said or done on 6 August which was likely to render the admissions unreliable. The matters to be considered at (a), (b) and (c) are essentially factual points; (c) requires a judgment to be made on the facts as they existed at the time of the admissions on 22 August. The word `reliable' means `cannot be relied upon as being the truth': see R v Crampton (1991) 92 Cr App R 369 at 372. Whether in the light of other material or investigation the admissions may be said or shown in fact to have been true is immaterial.

In this case the court requires to be sure, for example, that the Appellant was not `covering up' for someone else, such as Charlie who was 16 years of age and should not have been driving and to be sure that the admissions were made by the free choice of the Appellant: see Lam Chi-Ming v R [1991] 2 AC 212 AT 220 per Lord Griffiths.

[18] The purport of Article 76(1) was also considered in Re Proulx at p 77 of the judgment of Mance LJ. It calls for the exercise of overall judgment or discretion he pointed out. If the prosecution fails to prove that the admissions were not obtained as stated in Article 76(2), they must be excluded. There is no room for the exercise of discretion: see R v Paris, R v Abdullahi, R v Miller (1993) 97 Cr App R 99. But the admissibility of a

confession may also fall to be consider under Article 78(1): see R v Mason [1987] 3 All ER 481 at 484. `Possible unreliability is not the sole reason for rejecting a confession which has been obtained by improper means': see Lam Chi-Ming v R [1991] 2 AC 212 at 218 per Lord Griffiths.

Under Article 76(1) the central question is one of fairness but the test is whether it appears to the court that 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. Article 76(2) preserves the common law powers of the court to disallow admissions in the exercise of its discretion to refuse to admit evidence on the grounds that it was obtained by improper or unfair means.

[19] Numerous authorities were cited to this Court on behalf of the Appellant in support of the contention that the admissions made at the interview of 22 August were tainted by the admission made in the absence of caution on 6 August. It was submitted that the admissions at interview were the direct consequence of the admission at the roadside. But the Appellant did not give evidence on the voire dire (assuming that it was held) that he would not have answered any questions at the interview if he had known that his answers to the constable at the roadside were inadmissible, nor that he did not go to a solicitor and get legal advice because he thought that "his goose was cooked", (see the commentary in the Glaves case) nor that he got erroneous legal advice which led him to make the admissions at interview on 22 August. The prosecutor could not be expected to prove that the Appellant did receive legal advice or, if he did, what legal advice he received. Nor could he provide positive evidence as to why no legal advice was sought, if that was the case. He could and did prove that the Appellant elected not to have a solicitor at interview on 22 August and established the facts which led to the findings set out at paragraphs [10] and [11] above. However I am not suggesting that the onus shifts from the prosecution under Article 74(2).

[20] It was argued that the Resident Magistrate took into account the failure of the Appellant to give evidence at the trial. But he should have decided whether the evidence of the interview of 22 August was admissible at the close of the case for the prosecution. Otherwise the Appellant was entitled to a ruling that he had no case to answer.

[21] He was criticised for finding that, had the Appellant sought and received advice from a solicitor, it was almost certain that he would have been advised not to comment at all in the interview of 22 August. I consider that this is the advice which he would almost certainly have received from a solicitor. But one cannot say with certainty that he would have acted on that advice. He might have chosen to admit the offences.

[22] In view of this finding the Resident Magistrate appears to have considered that it was extremely likely that he did not consult a solicitor. He

was offered the opportunity to seek the advice of a solicitor at interview but said that he did not wish to have one. This would have reinforced that view. If so, he had to decide whether the Appellant did not seek advice because of what was said and done at the roadside and the police station on 6 August or whether the Appellant freely chose not to seek advice.

[23] The Resident Magistrate was criticised for misunderstanding the decision in Glaves [1993] Crim LR 685. At the time of his first interview Glaves was 16 years of age and a representative from his solicitors was present at that interview but there was no appropriate adult. He received no assistance from the solicitors' representative. This interview and a second interview were ruled out by the trial judge but he admitted evidence of a third interview. The Court of Appeal considered that that which had led him to make admissions at his first interview continued until his third interview eight days later when there was no appropriate adult present and his legal representative did not give him assistance. They quashed his conviction on the grounds that the third interview was tainted by what happened at the first interview. The crucial matters were (a) the age of Glaves and (b) the fact that he did not get proper legal advice and (c) there was no one to give the equivalent of parental support as "an appropriate adult" at the third interview. I do not consider that the Resident Magistrate, when he briefly referred to Glaves, showed that he misunderstood it.

[24] He was criticised for stating: "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". This is clumsily expressed, given that he had earlier made a finding that the interview of 22 August was not "tainted" by the inadmissibility of the roadside admission and that the Appellant had sufficient opportunity to seek professional legal advice and make an informed and independent choice as to whether he should repeat, retract or stay silent and as a consequence the Resident Magistrate had, I assume, admitted the contents of the interview in evidence. The Appellant, having decided not to give evidence on the voire dire, assuming that it was held, could have given evidence on his own behalf, explaining why he did or did not consult a solicitor and he was entitled to decline to answer the question whether he was the driver. If, as a result of his evidence, the Resident Magistrate decided that it was not safe to act on the admissions at the interview of 22 August he could not have convicted the Appellant of driving the vehicle solely on the ground that he refused to answer the question whether he was the driver. Several explanations for this refusal were possible and the refusal itself was not enough to justify a conviction.

[25] In the present case the Appellant was an adult. There was no evidence that he was mentally subnormal. He did have the opportunity of obtaining proper legal advice after his roadside admission that he was the driver. There was no evidence before the Resident Magistrate that he did not seek legal

advice because of what happened at the roadside. But I repeat that the onus of proof under Article 74(2)(b) remained on the prosecution.

[26] Not merely had the Appellant 16 days to consult a solicitor but he was offered the services of a solicitor at the interview on 22 August. In my view the Resident Magistrate was entitled to conclude that the Appellant had sufficient opportunity to exercise an informed and independent choice as to whether he should repeat or retract what he said in the excluded `interview' at the roadside or say nothing.

[27] He was open to criticism for finding that the conduct of Constable Miskelly was "not so oppressive or malign that there must be an inevitable and continuing blight on the subsequent confessions." But this finding is based on language to be found in judgments such as Glaves.

[28] My concern is that he may not have considered Article 74(2)(b). If he did do so and applied the appropriate standard of proof, then the convictions should stand. If he did not, he should reconsider the case in the light of Article 74(2)(b).

[29] I do not propose, therefore to answer Question 2 of the case stated. Question 1 must be answered `Yes' but proof that the Appellant was the driver is required before he can be convicted of the drink-driving offence.

[30] Matters which give me cause for concern include:-

(1) Article 76(1) is the only paragraph of any Article referred to in the Case Stated.
(2) The finding that had the Appellant consulted a solicitor it is almost certain that he would have been advised not to comment at all in the subsequent interview (my undertaking).
(3) The possibility that there was no voire dire, although no objection was taken to the procedure in this court and the parties may agree to a less formal procedure – for example, by making submission at the close of the whole case.
(4) The finding that it is "entirely possible" that he made an informed and independent choice to repeat his admissions as distinct from a finding that he did make an informed and independent choice.
(5) The possibility that the admissions were ruled in at the end of the case rather than at the close of the case for the prosecution. If so, the Appellant arguably would have been entitled to a ruling that he had no case to answer at the close of the case for the prosecution. The court has a duty (under Article 6(1) of the Convention as incorporated by the Human Rights Act) to act fairly, even if it gets no assistance from legal representatives. But see (3).

[31] The appropriate course is to remit the case to the Resident Magistrate to consider whether he is satisfied beyond a reasonable doubt that the admissions, especially the admission that he was the driver of the Renault 5 on 6 August, made by the appellant in the course of the interview of 22 August 2000 were voluntary and reliable, having regard to the provisions of Article 74(2)(b) of the PACE Order.