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IN THE COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF A MAGISTRATE'S COURT

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent/(Complainant);

-and-

ROBERT HARPUR

Appellant/(Defendant).

IN THE MATTER OF THE ROAD TRAFFIC (NORTHERN IRELAND) ORDER 1995

Before Higgins, Girvan and Coghlin LJJ

HIGGINS LJ

[1] This is an appeal by way of case stated from a decision of District Judge (Magistrate's Court) McNally sitting at Strabane Magistrate's Court on 17 April 2008, whereby he found the appellant guilty of driving after consuming so much alcohol that the proportion of it in his blood exceeded the prescribed limit, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) Order 1995. The issue in the appeal relates to the procedures to be followed by the police pursuant to Article 18 (4) of the Road Traffic (Northern Ireland) Order 1995 where a specimen of blood or urine is to be provided by a driver suspected of driving under the influence of drink or drugs or driving having consumed excess alcohol.

[2] The facts, which are not in dispute, are set out in paragraph 2 of the Case Stated as follows –

> "2. (a) On 10 April 2007 at approximately 1.00 a.m. the Defendant was driving a vehicle along the Victoria Road from Strabane towards Ballymagorry.
> (b) The vehicle was being driven erratically and weaved over the central white line on a number of occasions.
> (c) There was a smell of intoxicating liquor from the Defendant who staggered and had to hold onto the door of the car when he was asked to get out of it.
> (d) The Defendant said he had too much to drink.
> (e) Con. Neill arrested the Defendant on suspicion of driving while unfit through drink or drugs. He made no reply when cautioned.
> (f) He was taken to Strabane PSNI station where he was introduced to the Custody Sergeant by Con. Mullan at 1.30 a.m.
> (g) Con. Mullan is an authorised officer under Article 18(3) of the Road Traffic (N.I.) Order 1995. He carried out the procedure on the Form PSNI DDA which he marked as Exhibit Number BM1.
> (h) The procedure commenced at 1.33 a.m. Upon being required by Con. Mullan to do so the Defendant agreed to provide two specimens of breath.
> (i) No sample was obtained. Con. Mullan noted that the mouthpiece was misted up and was of the opinion that the Defendant was making an attempt to blow into the mouthpiece.
> (j) Con, Mullan asked the Defendant if there were any medical reasons why he had not provided two specimens of breath. The Defendant replied that part' of one of his lungs was missing.
> (k) Con. Mullan concluded that a specimen of breath could not be provided for medical reasons and put a requirement to the Defendant to provide a specimen of blood or urine in the following terms:-
>
> > 'As I have reasonable cause to believe that a specimen of breath cannot be provided or should not be required, I require you to provide me with a specimen of blood or urine, which, in the case of blood, will be taken by a

Medical Practitioner or registered Health Care Professional.'

Con. Mullan asked the Defendant if there were any medical or other reasons why a specimen of blood could not or should not be taken by a Medical Practitioner. The Defendant replied "No. Tear away".

(l) Con. Mullan determined that the specimen should be of blood, and the Defendant consented to supply a specimen of blood at 2.06 a.m.

(m) The procedure was suspended at 2.07 a.m. to await the arrival of the Medical Practitioner, Dr. Burns.

(n) The procedure was resumed at 2.40 a.m. upon Dr. Burns' arrival, but had to be further suspended at 2.48 a.m. as a full medical kit was not available at the station

(o) The procedure resumed at 3.45 a.m. when Con. Mullan advised Dr. Burns that he had required the Defendant to provide a specimen of blood and he had consented.

(p) Dr. Burns took from the Defendant a history of his medical condition and medication and concluded that there was no medical reason why a specimen of blood could not be taken. The Defendant was co-operative and agreed to provide the sample of blood.

(q) The specimen of blood was provided at 3.51 am. Part of the specimen was offered to the Defendant at 3.53 am. and the specimen was sealed in the presence of the Defendant at 3.54 a.m.

(r) Dr. Burns handed the sealed specimen to Con. Mullan who gave it to Con. Neill who, in turn, forwarded it to the Forensic Laboratory. The resultant Certificate of Analysis indicated that the Defendant's specimen of blood contained not less than 219 milligrams of alcohol in 100 millilitres of blood."

[3] On these facts it was submitted by Mr Roche, the appellant's solicitor, that the Certificate of Analysis should not be admitted in evidence against the appellant and that he should be acquitted. The basis of this submission was that Constable Mullan had failed to follow the correct procedure under Article 18(4) of the Order when informing the appellant that he had reasonable grounds to believe that a specimen of breath could not be provided or should not be required, as the constable had failed to inform him of the reason which had led to that belief. Mr Roche relied on the opinions of Lord Bridge in *Warren v DPP 1993 AC 319* and Lord Hutton in *DPP v Jackson*

and DPP v Stanley 1999 1 AC 406 (hereafter referred to as *Jackson*) and on the decision in *Ankrah v DPP*, an unreported decision dated 20 February 1995. He submitted that the words used by Constable Mullan were an insufficient compliance with the formula, proposed by Lord Bridge and adopted by Lord Hutton, to be employed in such cases. In rejecting that submission the District Judge (MC) found that Constable Mullan had complied with the requirements of Article 18(4) when, adopting the wording of Article 18(4)(a), he told the appellant that "he had reasonable cause to believe that a specimen of breath could not be provided or should not be required". In his careful judgment the District Judge (MC) held –

> "(17) I conclude that when Lord Hutton directed that a police officer must state the reasons 'under the subsection' that the police officer must indicate to the Defendant whether he is requiring the specimen of blood under Article 18(4)(a), (b) or (c).
>
> He told the Defendant the reason he required blood under the terms of Article 18(4)(a) and the Defendant, who did not give evidence to the contrary, was aware of the 'reasonable cause' of Con. Mullan' s belief that a specimen of breath could not be provided."

[4] When investigating whether an offence under Articles 14, 15 or 16 of the Road Traffic (NI) Order 1995 (the Order) has been committed a constable, who is an authorised officer under Article 18(3) of the Order, may require a person suspected of such an offence, to provide certain specimens.

In April 2007 Article 18 provided –

> "(1) In the course of an investigation into whether a person has committed an offence under Article 14, 15 or 16 a constable may, subject to the following provisions of this Article and Article 20, require him-
>
> (a) to provide 2 specimens of breath for analysis by means of a device of a type approved by the Head of the Department, or
>
> (b) to provide a specimen of blood or urine for a laboratory test.
>
> (2) A requirement under paragraph (1)(a) may be made to provide the specimens of breath-

(a) at or in the vicinity of the place where the requirement is made if facilities for the specimens to be taken are available and it is practicable to take them there, or

(b) at a police station.

(3) A requirement under paragraph (1)(a) may be made only by a constable who is especially authorised by the Chief Constable to make such requirements.

(4) A requirement under paragraph (1)(b) to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless-

(a) the constable making the requirement has reasonable cause to believe that a specimen of breath cannot be provided or should not be required, or

(b) at the time the requirement is made a device or a reliable device of the type mentioned in paragraph (1)(a) is not available at the police station or it is then for any other reason not practicable to use such a device there, or

(c) the suspected offence is one under Article 14 or 15 and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug,

but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide 2 specimens of breath.

(5) If the provision of a specimen other than a specimen of breath may be required in pursuance of this Article the question whether it is to be a specimen of blood or a specimen of urine and, in the case of a

specimen of blood, the question who is to be asked to take it, shall be decided (subject to paragraph (5A)) by the constable making the requirement.

(5A) Where a constable decides for the purposes of paragraph (5) to require the provision of a specimen of blood, there shall be no requirement to provide such a specimen if

(a) the medical practitioner who is asked to take the specimen is of the opinion that, for medical reasons, it cannot or should not be taken; or

(b) the registered health care professional who is asked to take it is of that opinion and there is no contrary opinion from a medical practitioner;

and, where by virtue of this paragraph there can be no requirement to provide a specimen of blood, the constable may require a specimen of urine instead.

(6) A specimen or urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(7) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this Article is guilty of an offence.

(8) A constable must, on requiring any person to provide a specimen in pursuance of this Article, warn him that a failure to provide it may render him liable to prosecution.

(9) For the purposes of paragraph (1)(a) a device shall be treated as of a type approved by the Head of the Department where a statement that the Head of the Department has approved a device of that type is included in the Belfast Gazette."

[5] Article 19 is also important and the relevant part of the Article provided -

> "19. - (1) Subject to paragraph (2), of any 2 specimens of breath provided by any person in pursuance of Article 18, that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded.
>
> (2) If the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, the person who provided it may claim that it should be replaced by such specimen as may be required under Article 18(5) and, if he then provides such a specimen, neither specimen of breath shall be used."

The equivalent provisions in England and Wales were sections 7 and 8 of the Road Traffic Act 1988 and are in identical terms except that in Article 18(4)(a) several words were omitted. Section 7(3)(a) provides –

> "(a) the constable making the requirement has reasonable cause to believe that **for medical reasons** a specimen of breath cannot be provided or should not be required." [my emphasis]

Therefore in England and Wales, under section 7(3)(a) a constable was restricted to having reasonable cause to believe a specimen of breath could not be provided or should not be required for medical reasons only, whereas in Northern Ireland he is not so restricted.

[6] Mr Macdonald QC, who with Mr McCann, appeared on behalf of the appellant, submitted that the effect of the decisions in *Jackson* and *Warren* was that a Constable must explain to a driver the reason for his belief that a specimen of breath cannot be provided or should not be required. This requirement, it was submitted, is a mandatory condition-precedent to the admission in evidence of the certificate of analysis following the opinions expressed by Lord Bridge in *Warren* and Lord Hutton in *Jackson*.

Mr Valentine, who appeared on behalf of the respondent, submitted that the wording of Article 18(4) does not expressly stipulate that a constable must inform a driver of the reason why the constable holds the belief that a specimen of breath cannot be provided or should not be required. Furthermore, if by reason of the formula adopted by Lord Bridge (and approved with modifications by Lord Hutton) it is a mandatory requirement, then the use of the precise wording of Article 18(4)(a) was a sufficient compliance with that obligation. He relied on *DPP v Clayton* (unreported decision of a Divisional Court, 1998), to which I shall refer later in this judgment.

Mr Macdonald QC responded that if the use of the precise words of the statute was sufficient, then Lord Hutton in *Jackson* would simply have said this was all that was required.

[7] In *Warren* the issue was whether, when a driver was requested under section 7(3) of the Act to provide a specimen of blood or urine, the constable was required to ask him whether he had a preference for giving blood or urine. It was held that the Act imposed no such requirement and this was the ratio of the decision. In his opinion Lord Bridge gave some guidance as to the procedures to be followed by a police officer in a s 7(3) case (as well as a case involving section 8(2)), in particular as to what a police officer should tell or ask a driver in relation to the taking of specimens. At page 327 Lord Bridge said

> "Taking the second case first, it is clear that under s 8(2) the driver, in order that he may decide whether or not to claim that the breath specimen be replaced, should be fully informed of the nature of the option open to him and what will be involved if he exercises it. He should be told that the specimen of breath which he has given containing the lower proportion of alcohol exceeds the statutory limit but does not exceed 50 ug of alcohol in 100 ml of breath, that in these circumstances he is entitled to claim to have this specimen replaced by a specimen of blood or urine if he wishes, but that, if he does so, it will be for the constable to decide whether the replacement specimen is to be of blood or urine and that if the constable requires a specimen of blood it will be taken by a doctor unless the doctor considers that there are medical reasons for not taking blood, when urine may be given instead. I can see no ground whatever, on the face of the statute, why in a s 8(2) case the driver should be invited to state whether he prefers to give blood or urine or to state any reasons for his preference. Indeed, to invite him to do so, it seems to me, can only be misleading in suggesting that the driver is entitled to some say in the matter. The statute gives him no such say. The driver is faced with the prospect of conviction on the basis of the breath specimen which he has given containing the lower proportion of alcohol. His only chance of escape from that prospect is by opting to give and then in fact giving a replacement specimen of whichever kind the constable requires of him, subject only to his right to object to giving blood on medical grounds, and, if they are accepted by the doctor, then to give urine

> instead. Again, so far as the language of the statute is concerned, I can see no reason in principle why the constable in the course of explaining to the driver his rights under s 8(2) should not tell him, if it be the case, that he, the constable, will require the replacement specimen to be of blood. In a case where the reason for requiring a specimen of blood or urine arises under s 7(3), there is no question of the driver having any option to exercise. Hence, whatever necessity there may be to explain the position to him, the reasons why it is necessary to give such an explanation cannot be the same as those which arise under s 8(2). Again, on the face of the statute, I cannot see any reason why in this case the constable should do more than tell the driver the reason under s 7(3) why breath specimens cannot be taken or used, tell him that in these circumstances he is required to give a specimen of blood or urine but that it is for the constable to decide which, warn him that a failure to provide the specimen required may render him liable to prosecution and then, if the constable decides to require blood, ask the driver if there are any reasons why a specimen cannot or should not be taken from him by a doctor. This will certainly give the driver the opportunity to raise any objection he may have to giving blood, either on medical grounds or indeed for any other reason which might afford a "reasonable excuse" under s 7(6). Here again, provided the driver has such an opportunity, I can see nothing in the language of the statute which would justify a procedural requirement that the driver be invited to express his own preference for giving blood or urine, either before a constable indicates which specimen he will require or at all."

[8] Lord Bridge then considered a number of decided cases and returned to the question of what a police officer should say and at page 332 stated –

> "At the end of this necessarily lengthy examination of the decided cases I have found nothing which causes me to depart from the view I expressed before embarking on that examination as to the appropriate procedure to be followed under ss 7(3) and 8(2) considered simply on the basis of the statutory language. Restating those views in summary form, in a case where the necessity to require a specimen of

> blood or urine under s 7(4) arises for one of the reasons specified in s 7(3), what is required is no more and no less than the formula used in the instant case or words to the like effect. In a case where the driver's option is to be explained to him under s 8(2), the driver should be told that if he exercises the right to have a replacement specimen taken under s 7(4), it will be for the constable to decide whether that specimen is to be of blood or urine and, if the constable intends to require a specimen of blood to be taken by a medical practitioner, the driver should be told that his only right to object to giving blood and to give urine instead will be for medical reasons to be determined by the medical practitioner. In neither case is there any need to invite the driver to express his preference for giving blood or urine."

[9] The formula used by the police officer in *Warren's* case was set out by Lord Bridge at page 324

> "The approved evidential breath testing device cannot be used on this occasion because the calibration check has proved unsatisfactory. Accordingly, I require you to provide an alternative specimen, which will be submitted for laboratory analysis. The specimen may be of blood or urine, but it is for me to decide which. If you provide a specimen you will be offered part of it in a suitable container. If you fail to provide a specimen you may be liable to prosecution. Are there any reasons why a specimen of blood cannot or should not be taken by a doctor?
>
> The defendant replied, 'No.' The officer then asked him: 'Will you provide a specimen of blood?' to which the defendant replied, 'Yes.'
>
> The doctor was called and the defendant provided a specimen of blood which on analysis proved to contain a proportion of alcohol substantially exceeding the statutory limit."

[10] It had been hoped that the guidance given by Lord Bridge would provide a standard basis upon which police officers could make the requirements allowed for in the Act and also offer assistance to courts hearing contested cases involving section 7(3) or 8(2) in which specimens of blood or

urine were required to be given. This did not turn out to be so, as different approaches to Lord Bridges' approved formula developed. In *Jackson* Lord Hutton identified the difficulty which arose following *Warren*, in these terms –

> "The principal difficulty which has arisen following the judgment in Warren's case is that different approaches have been taken in two lines of cases to the question whether the requirements stated by Lord Bridge are mandatory, so that a failure to observe a requirement must lead to an acquittal, or whether a breach of a requirement is not necessarily a bar to a conviction."

[11] Lord Hutton then reviewed the two lines of cases and expressed the opinion that the approach adopted by Kennedy LJ in *DPP v Charles 1996 RTR 247,* a decision of a Divisional Court, was the correct one. Kennedy LJ held that a failure to comply in every respect with the formula approved by Lord Bridges would not necessarily lead to an acquittal. It would depend on the nature of the breach and whether it caused any unfairness or prejudice to the defendant driver. Accordingly in *Jackson* Lord Hutton at page 425 restated the guidance provided Lord Bridges, which was approved by the other members of the Appellate Committee:

> "Therefore I am of opinion that the guidance given in Warren's case should be regarded as having the following effect. The requirements stated by Lord Bridge, with three exceptions, are not to be treated as mandatory but as indicating the matters of which a driver should be aware so that, whether in a s 7(3) case or a s 8(2) case, he may know the role of a doctor in the taking of a specimen of blood and in determining any medical objections which he may raise to the giving of such a specimen. The requirements, constituting the three exceptions, which should be regarded as mandatory so that non-compliance should lead to an acquittal are: (1) in a s 7(3) case the warning as to the risk of prosecution required by s 7(7); (2) in a s 7(3) case the statement of the reason under that subsection why breath specimens cannot be taken or used; (my emphasis) and (3) in a s 8(2) case the statement that the specimen of breath which the driver has given containing the lower proportion of alcohol does not exceed 50 microgrammes of alcohol in 100 millilitres of breath.

As well as complying with these three mandatory requirements police officers, in order to seek to ensure that a driver will be aware of the role of the doctor, should continue to use the formula in a s 7(3) case and the formula in a s 8(2) case set out by Lord Bridge ([1992] 4 All ER 865 at 870-871, [1993] AC 319 at 327-328) or words to the same effect (subject to two points to which I refer later). But what is necessary is that the driver should be aware (whether or not he is told by the police officer) of the role of the doctor so that he does not suffer prejudice. Therefore if the driver appreciates that a specimen of blood will be taken by a doctor and not by a police officer, the charge should not be dismissed by the justices because the police officer failed to tell the driver that the specimen would be taken by a doctor. Accordingly in relation to the Warren requirements there will be two issues for the justices to decide. The first issue is whether the matters set out in the Warren formula appropriate to a s 7(3) case or a s 8(2) case (with the respective changes to which I refer later) have been brought to the attention of the driver by the police officer. The second issue, if the answer to the first issue is No, is whether in relation to the non-mandatory requirements the police officer's failure to give the full formula deprived the driver of the opportunity to exercise the option, or caused him to exercise it in a way which he would not have done had everything been said. If the answer to the second issue is Yes then the driver should be acquitted, but if the answer is No the failure by the police officer to use the full formula should not be a reason for an acquittal.

As the second issue is directed to the question whether the driver has suffered prejudice, I consider that it would only be in exceptional cases that the justices would acquit on that ground without having heard evidence from the driver himself raising the issue that he had suffered prejudice. Both issues are issues of fact, and therefore if the justices, having heard the evidence of the driver to raise the second issue, are left with a reasonable doubt as to whether or not he was prejudiced, they should acquit. As I have indicated there are two respects in which I would word the requirements stated by Lord Bridge in a different way.

(1) I consider that there is nothing in the wording of the relevant subsections and there are no considerations of fairness which require a police officer to ask the driver if there are any non-medical reasons why a specimen of blood cannot or should not be taken. If there is some non-medical reason which would support a reasonable excuse under s 7(6) this is a matter for the justices to decide. Therefore I am of opinion that in Lord Bridge's speech ([1992] 4 All ER 865 at 871, [1993] AC 319 at 328) in relation to a s 7(3) case the words 'ask the driver if there are any reasons why a specimen cannot or should not be taken from him by a doctor' should read 'ask the driver if there are any medical reasons why a specimen cannot or should not be taken from him by a doctor'. Therefore my opinion on this point accords with the sixth observation made by the Divisional Court in Jackson's case [1998] RTR 141 at 157:

> 'While it may well be prudent for the police officer to inquire whether there are reasons other than medical ones for a sample not being given, in order to avoid the (outside) possibility of prosecutions for refusal in which the court holds that a reasonable excuse was present under section 7(6), there is in our view nothing in the Act of 1988 that justifies a *requirement* that the officer should make such inquiry, and every reason in commonsense to assume that if a driver has a reason for not giving a specimen that is sufficiently compelling to qualify under section 7(6) he will volunteer that reason of his own motion.'

(2) I also consider that in a s 8(2) case, in addition to telling the driver that a specimen of blood 'will be taken by a doctor unless the doctor considers that there are medical reasons for not taking blood', the police officer should ask the driver if there are any medical reasons why a specimen cannot or should not be taken from him by a doctor. I observe that the pro

> forma instructions of some police forces do set out this question in a s 8(2) case."

[12] Counsel on behalf of the appellant submitted that it is clear that Lord Hutton identified three requirements which are to be regarded as mandatory and that failure to observe any one of them would lead to acquittal. The second mandatory requirement he identified was that, in a section 7(3) case (that is an Article 18(4) case in Northern Ireland), the police officer must inform the driver of the reason under section 7(3) why a breath specimen cannot be taken or used. It was submitted that in this appeal Constable Mullan did not inform the appellant of the reason why a specimen of breath could not be taken. Consequently a mandatory requirement was not fulfilled and the appellant should have been acquitted.

[13] It is helpful to consider the factual situation and legal issues to which the cases of *Warren* and *Jackson* gave rise. In *Warren* the driver was stopped in his car and a roadside breath test was carried out which proved positive. He was taken to a police station where he provided two specimens of breath. It was then found that the breath test machine was not functioning correctly. The police officer said "The approved device cannot be used on this occasion because the calibration check has proved unsatisfactory. Accordingly I require you to provide an alternative specimen, which will be submitted for laboratory analysis. The specimen may be of blood or urine but it is for me to decide which. If you provide a specimen you will be offered part of it in a suitable container. If you fail to provide a specimen you may be liable to prosecution. Are there any reasons why a specimen of blood cannot or should not be taken by a doctor? He replied 'No'. He was then asked 'Will you supply a specimen of blood to which he replied yes. A doctor was called and a specimen obtained. It was submitted that the requirement that he provide a specimen of blood was not validly made in accordance with section 7(4).) It was contended that the wording used by the custody sergeant when requesting a specimen gave the defendant no opportunity to consider which sample he would give, if the choice were his. He was given no fair opportunity to say which he would prefer and why. Reliance was placed on an unreported case of *DPP v Byrne [1991] RTR 119]*. The magistrate upheld that submission. On appeal by way of case stated the magistrate posed two questions –

> "(1) whether on the facts found by me I was right to conclude that the custody officer had not given the defendant a proper opportunity to make representations as to which type of specimen he might wish to supply in exercising his option to replace the breath specimen; and

(2) whether in dismissing the charge I came to a correct determination and decision in law.'

The Divisional Court answered both questions in the affirmative. The prosecution appeal to the House of Lords was allowed and the rulings on the questions above were set aside. This was clearly a case that engaged section 7(3)(b). The driver had consented to provide specimens of breath and did so but was then required to provide a specimen of blood as the approved device was not functioning correctly. But the substance of the appeal related to what the police officer was obliged to say to the driver in making a requirement to provide a specimen other than of breath under section 7(4).

[14] The case of *Jackson* involved two separate drivers, Jackson and Stanley. Jackson was charged with the offence of failing without reasonable excuse to provide a sample of blood contrary to section 7(6) of the Road Traffic Act 1988. He was arrested on suspicion of driving whilst unfit and taken to a police station. He was examined by a doctor who informed the police sergeant that his symptoms were consistent with being under the influence of drugs. The sergeant requested him to provide a sample of blood or urine and warned him that failure to do so may make him liable to prosecution. He replied 'no'. The sergeant asked him if he had any representations to make as to whether the specimen should be blood or urine to which he said he was not giving a sample. The sergeant asked if there were any reasons why a specimen could not be taken and informed him that his only right to object to giving a blood specimen, and giving a urine specimen instead, would be for a medical reason to be determined by a doctor. He replied "I don't like needles, but I'm not giving anything anyway". He was convicted and appealed to a Divisional Court which allowed the appeal. The Court considered it was bound by the decision in *Warren* and the formula approved by Lord Bridges in which the sergeant had asked the driver – "Are there any reasons why a specimen of blood cannot or should not be taken by a doctor?" The appeal was allowed as the sergeant had failed to ask if there were any reasons other than medical reasons, why a specimen of blood could not be taken. The House of Lords allowed the appeal by the DPP holding that there was no need for the sergeant to ask whether there were non-medical reasons for a blood specimen not being given. The driver had made plain that he was not giving any specimen and thereby suffered no prejudice.

[15] The other driver *Stanley* was charged with driving a motor vehicle after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1)(a) of the Road Traffic Act 1988. He was stopped when driving the vehicle, arrested and taken to a police station where he provided two specimens of breath. The lower specimen contained 47 micrograms of alcohol in 100 millilitres of blood. As the reading was below 50 micrograms of alcohol in 100 millilitres of blood he was entitled, under section 8(2) (Article 19(2) in Northern Ireland), to claim

that it be replaced by such specimen as may be required under section 7(4). Where a specimen is provided in these circumstances neither specimen of breath shall be used. The sergeant explained the situation and asked whether he wished to replace the breath specimen with a specimen of blood or urine. He replied 'No, I don't want no needles'. The sergeant treated that as a refusal to exercise his option and did not ask why he refused nor did he ask him if there were any medical reasons why a sample of blood cannot or should not be taken by a doctor, which question was contained in the proforma the sergeant was using for the procedure. He was convicted and his appeal to the Divisional Court was allowed on the basis that the sergeant should have asked the express question whether there was any medical reason for refusing to give blood. On appeal to the House of Lords it was held that it was open to the Divisional Court to conclude that the comment 'I don't want no needles' did not amount to a medical reason for refusing and the omission to ask the 'medical reasons question' did not cause him any injustice. The medical question was implicit in the earlier statement made by the sergeant that his only right to object to provide a specimen of blood and to provide a specimen of urine instead, would be for medical reasons to determined by a doctor. Furthermore he was not deprived of the opportunity to exercise the option provided by section 8(2). Thus this case raised a similar issue under section 7(4) as was raised in *Jackson*.

[16] In *Warren* no issue arose under section 7(3)(a) as he provided specimens of breath under section 7(1). However the testing device was not functioning correctly. Those circumstances permitted the officer to require a specimen of blood or urine to be provided at a police station. Once the requirement to provide a specimen of blood or urine at the police station was made, then section 7(4) applied whereby the type of specimen to be required was to be decided by the officer. But if a doctor was of the opinion that a specimen of blood (if that was the choice of the doctor) should not or could not be taken then the specimen to be provided would be a specimen of urine. It was held that there was no obligation to give the driver the choice of whether the specimen should be of blood or urine. In *Jackson* the officer was permitted to require a specimen of blood or urine in a police station as a medical practitioner had advised that the driver's condition might be due to some drug. The officer then made the requirement under section 7(1)(b) following which section 7(4) applied. It was held that in complying with section 7(4) there was no necessity for the officer to ask the driver if there were any non-medical reasons why a specimen of blood could not be given. In *Stanley* the driver provided specimens of breath at a police station, the lower of which was below 50 micrograms of alcohol in 100 millilitres of breath. Under section 8(2) he was entitled to claim that the specimen should be replaced with a specimen of blood or urine required under section 7(4). If such a specimen of blood or urine was provided then the specimen of breath could not be used. The question raised was whether, in complying with section 7(4), the officer should have asked him whether there was any medical

reason why he could not give a specimen of blood and the House of Lords held there was no obligation to do so.

[17] Article 18(1) empowers a constable when investigating whether a person has committed an offence under Article 14, 15 or 16 of the Order, to require that person to provide two specimens of breath or a specimen of blood or urine. Article 18(2) permits breath specimens to be taken at any place where the facilities to do so are available or at a police station. By contrast a specimen of blood can only be taken at a police station and only in certain circumstances specified in Article 18(4)(a)(b) or (c). Article 18(5) provides that where a constable makes a requirement of a person to provide a specimen of blood or urine under Article 18, the question whether it should be a specimen of blood or urine shall be decided by the constable. Equally, if the constable decides the specimen should be of blood, it is his decision who should be asked to take it – whether a doctor or a registered health care professional. However, there is no requirement to provide such a specimen where a medical practitioner is of the opinion that for medical reasons it cannot or should not be provided - Article 18(5A)(a). Furthermore, there is no requirement to provide such a specimen where a registered health care professional is of the same opinion and there is no contrary opinion from a medical practitioner – Article 18(5A)(b).

[18] Article 18(4) (and section 7(3)) states that a requirement to provide a specimen of blood or urine can only be made at a police station or a hospital and that it cannot be made at police station unless one of several circumstances applies. Where the driver is at a police station and one of those circumstances is satisfied, the constable may then make the requirement under Article 18(1)(b) (section 7(1)(b)). In other words they are conditions precedent or gateways to the constable making a requirement to provide a specimen of blood or urine at a police station. If at least one of them does exist the constable can then make the requirement. Those circumstances do not sound upon the question what a constable should ask or inform a driver when he makes the requirement, which he is empowered to make under Article 18(1)(b) and (5).

[19] The decisions in *Warren* and *Jackson* establish what a constable is not obliged to say to a driver after he has made the requirement to provide a specimen of blood or urine. He is not obliged to tell him that he has no choice whether it is blood or urine which he is to provide nor need he ask whether there are any medical or non-medical reason why a specimen of blood could not be given. *Warren* established the 'formula' that should be used, based on what the sergeant said to the driver in that case. In that case the sergeant said nothing to the effect that he had reasonable cause to believe that a specimen of breath could not be provided or should not be required. Nothing to this effect was said in either *Jackson* or *Stanley*, nor was it said in any of the many other cases cited in those cases or in any other case to which attention has

been drawn. Furthermore the legislation does not of itself require the officer to so inform the driver. There is no mention of such a requirement in *Wilkinson on Road Traffic* in which this legislation is reviewed in great detail.

[20] The second exception referred to by Lord Hutton was "in a section 7(3) case the statement of the reason under that subsection why breath specimens cannot be taken or used". Lord Bridges used the same language – " I cannot see any reason why in this case the constable should do more than tell the drive the reason under section 7(3) why breath specimens cannot be taken or used". In *Warren*'s case the reason breath specimens could not be taken was because the testing device was not functioning correctly (that is, section 7(3)(b)). In neither the opinion of Lord Bridges or Lord Hutton is there any reference to the circumstances in which a requirement to provide a specimen of blood or urine can only be made at a police station or a hospital. Both opinions refer to why specimens cannot be taken or used. The circumstances in which a specimen of breath cannot be used arise under Article 19 (section 8). Article 19(1) provides that the lower of two specimens of breath provided under Article 18 shall be the used and the other disregarded. If, under Article 19(2), a person exercises the right to replace a specimen of breath which contains less than 50 micrograms of alcohol in 100 millilitres of breath (the lower specimen), with a specimen of blood or urine, then neither of the specimens of breath shall be used. It seems clear that the words 'cannot be used' refer to a situation in which a driver has provided specimens of breath, the lower of which is less than 50 micrograms, and he has elected to provide a specimen of blood or urine. In those circumstances he must be told why the specimen of breath cannot be used. In order not to be 'used' a specimen requires to have been taken.

[21] It was submitted by Mr Macdonald QC that the words "cannot be taken" encompass not just a situation in which the testing device was not functioning (Article 18(4)(b)), but also circumstances in which a specimen of breath could not be provided or should not be required under Article 18(4)(a). The word 'take' implies the physical act of taking; in other words the requirement has been made but the specimen cannot for some reason be actually taken. It is to be contrasted with 'cannot be provided' and 'should not be required'. The latter suggests that for some reason the requirement should not be made of the driver and the former that for some reason the driver is physically or mentally unable to provide a specimen, not that it cannot be taken. Both these situations would arise be at a stage earlier in the process before a specimen would be taken. Taking into account the factual situations in *Warren*, *Jackson* and *Stanley* and the wording used by both Lord Bridges and Lord Hutton, I do not consider that they had in mind the situation envisaged in Article 18(4)(a) (Section 7(3)(a). At the very least one would expect to see in their opinions some reference to the Constable's reasonable cause to believe that a specimen of breath cannot be provided or should not be required. Article 18(4)(a) provides only that a constable is empowered to make a

requirement to provide a specimen of blood or urine at a police station if he has reasonable cause to believe that a specimen of breath cannot be provided by the driver or that the driver should not be required to provide such a specimen. Therefore I do not consider that Lord Hutton in using the phrase 'the statement of the reason under that subsection why breath specimens cannot be taken or used' was referring to Article 18(4)(a) (section 7(3)(a)). Accordingly I do not think either Warren or Jackson are authority for the proposition that a constable is obliged to inform a driver of the reason why he considers he has reasonable cause to believe that a specimen of breath cannot be provided or should not be required, in order that a requirement to provide a specimen of blood or urine at a police station may be made. In order to make the requirement at a police station the constable must have reasonable cause to believe as set out in Article 18(4)(a). Whatever the cause may be, it is a question of fact which viewed objectively must be reasonable. If it is not, the constable is not empowered to make the requirement to provide a specimen of blood or urine at a police station. In England and Wales the constable must have reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required. In Northern Ireland the reasons are not restricted to medical ones. Does this make a difference ? If a constable in England and Wales is not obliged to state the medical reasons why he holds the belief, does a constable in Northern Ireland have to state a reason why he holds the same belief.

[22] The reason why guidance was offered by Lord Bridges and Lord Hutton as to the proper manner in which to administer the procedure set out in the legislation, was to ensure that the procedure was fair to the driver. As Mustill LJ observed in *Johnson v West Yorkshire Metropolitan Police 1986 RTR 167* at 175, the taking of a sample of blood is a much greater infringement of a person's ordinary liberties than merely blowing into a machine and medical issues may arise from providing such a specimen. Consequently it is important that a driver understands both the role of the constable in making the requirement and deciding which type of specimen and the role of the doctor in the taking of a blood specimen and in determining any objections which the driver may have to providing such a specimen.

[23] An investigation into a drink driving offence involves a number of steps to be taken by the investigating officer which must be adequately recorded. The events usually begin at the roadside when breath specimens are provided following which the driver is brought to a police station or he is brought directly to a police station. There the constable must decide whether further specimens and if so, which, are required. In the instant case the appellant was brought directly to Strabane Police Station. He was required to provide two specimens of breath under Article 18(1) and (2). Constable Mullan was satisfied that he was making an attempt to blow into the mouthpiece. Constable Mullan asked if there was any medical reason why he had not provided two specimens of breath and the appellant replied that part

of one of his lungs was missing. Constable Mullan then stated to the appellant 'As I have reasonable cause to believe that a specimen of breath cannot be provided or should not be required I require you to provide me with a specimen of blood or urine, which in the case of blood will be taken by a medical practitioner or a registered health care professional'. Constable Mullan then asked if there was any medical or other reason why a specimen of blood could not or should not be taken and the appellant replied 'No, tear away'.

[24] It is clear from this exchange that, viewed objectively, the constable had reasonable cause to believe that a specimen of breath could not be provided or should not be required. The appellant can have been in no doubt why he was required to provide a sample of blood or urine. It was sufficient in those circumstances for the constable to say what he said. In most instances, if not all, in which a driver is required to provide a specimen of breath in a police station and then for a reason under article 18(4)(a) is required to provide a specimen of blood or urine, there will have been an exchange between the driver and the constable which leads to the change in approach adopted by the police. In those circumstances the use of the wording of Article 18(4)(a) to inform the driver of the constable's reasonable belief which brings about the new requirement to provide blood or urine, is in my view justified and sufficient. As the District Judge (Magistrate's Court) observed *Jackson* does not require the constable to go beyond the language of the statute. Furthermore this procedure and sequence and what he was told later by the constable created no unfairness or prejudice to the appellant, nor has any been suggested. The appellant was given the opportunity to state any medical or other reason why he should not provide a specimen of blood or urine and was examined later by a doctor, one of whose functions was to determine whether there was any medical reason why he could not or should not provide a specimen of blood.

[25] In Clayton v DPP (unreported decision of Bingham LCJ in October 1998) the appellant was taken to a police station after providing a specimen of breath which proved positive. At the police station he was asked to provide two specimens of breath and it was explained that the lower specimen would be used and the other disregarded. He agreed to provide the specimens. The sergeant then discovered that the testing device was not working. He told the appellant that the device was not working and that specimens of breath "could not be taken or used because an instrument was not available". He then required the appellant to provide a specimen of blood or urine and the appellant consented to provide blood and the usual procedure was followed. The simple point taken on behalf of the appellant was that the sergeant had failed to give him sufficient and detailed information as to the reason why the testing device was not working and was unavailable. Lord Bingham identified the second mandatory requirement referred to by Lord Hutton as being the relevant one – that is 'the statement of the reason why breath

specimens cannot be taken or used'. Lord Bingham observed that Lord Hutton in Jackson had refined the reasoning in Warren and continued –

> "Lord Hutton has defined as a mandatory requirement in the present context only that there should be a statement of the reason under the subsection why breath specimens cannot be taken or used (in addition, of course, to the prosecution warning). As already explained, one of the reasons is that a reliable device of the type mentioned is not available and that is precisely what the officer told the appellant It would seem to me to be a regrettable and retrogressive step to read into what Lord Hutton has said something which he did not say. Had the appellant wished to explore the reasons why the machine was not available then it may be that the officer would have given further detail."

It seems to me that the submission made on behalf of the appellant in the instant case requires reading into what Lord Hutton said in *Jackson* something which he did not say. I am satisfied that what the constable said to the appellant relating to his reasonable belief why a specimen of breath could not be provided or should not be required was sufficient in the circumstances and that there was no necessity for the constable to elaborate on why that was the case.

[26] Constable Mullan first required the appellant to provide two specimens of breath. He was unable to do so and the Constable asked if there was any medical reason why he was unable to do so. The appellant replied that part of his lung was missing. At that point Constable Mullan had to make up his mind whether he was entitled to proceed to make a requirement that the appellant provide a specimen of blood or urine under Article 18(5). He decided that he was so entitled. He was right, because clearly, viewed objectively, he had reasonable cause to believe, at least, that a specimen of breath could not be provided and probably should not be provided as well. He proceeded to make the further requirement and in doing so he adhered to the *Warren* formula. In telling the appellant that he had reasonable cause to believe 'that a specimen of breath cannot be provided or should not be required' he was making a statement of fact in response to what had occurred and what the appellant had said. A specimen could not in fact be provided by the appellant or should not be required of him. There was no need to elaborate further. The explanation about his lung given by the appellant provided the Constable with reasonable cause to believe that a specimen of breath could not be provided or should not be required and informed the Constable why he should not persist further in attempting to obtain specimens of breath. It is for the Constable to decide whether to proceed to

make the requirement for the provision of blood or urine samples. The driver has no choice in the matter and no option to exercise in relation to it. Whether the Constable elaborates on why he has reasonable cause to believe that a specimen of breath cannot be provided or should not be required, will make no difference provided there is sufficient material, viewed objectively, to justify the decision made by the Constable as to his belief. If in Northern Ireland a Constable is obliged to inform a driver why he has reasonable cause to believe that a specimen of breath cannot be provided or should not be required, then one would expect that in England and Wales the driver should be informed of the medical reason why the officer has formed the same belief. In *Steadman v DPP 1988 RTR 156* a driver was required to provide two specimens of breath at a police station. Three attempts were made to comply with the requirement following which the police officer was informed by the driver that he had asthma and a heavy cold and could not blow properly into the machine. The police officer formed the view that he had reasonable cause to believe (within section 8(3)(a)) that for medical reasons a specimen of breath could not be provided. However the officer personally thought that a specimen of breath could have been provided by the driver. The officer then required the driver to provide a specimen of blood which revealed a blood-alcohol proportion above the prescribed limit. The driver was convicted and appealed on the ground that the police officer had no reasonable cause to believe that for medical reasons a specimen of breath could not be provided in circumstances in which he did not actually believe that a specimen of breath could not be provided. The appeal was heard by Bingham LJ and Mann J and dismissed. Mann J gave the judgment and at page 162 said –

> "The position as it seems to me is this: first, what is or is not a reasonable cause to believe is a question of fact to be objectively determined by justices. *Horrocks v Binns* (Note) [1986] RTR 202 is an example of the matter being treated as a question of fact. Second, if there is objectively determined as a matter of fact a reasonable cause to believe, put into the possession of the police constable, it is in my judgment immaterial whether the police constable actually believes, is dubious, sceptical, or, as here, disbelieving.

The magistrate's findings of fact included the following -

> "Sergeant Torrance told the defendant " I have reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required."

It is evident that the officer used the precise words as they appeared in section 8 of the Road Traffic Act 1972 as amended, the predecessor of section 7of the Road Traffic Act 1988, which uses the same terminology. He did not specify what the medical reason was and no objection was taken to this form of words in a case in which the officer did not believe what he was being told. It would be strange indeed if he was obliged to tell the driver 'I have reasonable cause to believe that you are unable to blow into the machine etc ' if he did not believe that the driver was so incapable.

[27] In *Warren* Lord Hutton said that it was considerations of fairness to the driver which led Lord Bridge to specify what a driver should be told. I do not consider that any considerations of fairness require a Constable to state anything further than what Constable Mullan said in this case. In other words it was sufficient for Constable Mullan to inform the appellant that 'As I have reasonable cause to believe that a specimen of breath cannot be provided or should not be required I require you to provide me with a specimen of blood or urine, which in the case of blood will be taken by a medical practitioner or a registered health care professional'. The question of unfairness envisaged in *Warren* and *Jackson* and other similar cases related to the requirement to provide a specimen of blood or urine and to the role of the doctor. It is important that a driver knows if a specimen of blood is to be provided that it will be taken by a doctor or a registered health care professional. Furthermore the driver should know that the choice of specimen to be provided is that of the constable and not the driver and that if he has an objection to the taking of a blood specimen it will be the doctor who decides whether there are medical reasons why it should not be provided. Constable Mullan told the appellant that he required him to provide a specimen of blood or urine and that if it was to be blood that it would be taken by a doctor or a registered health care professional. He then asked the appellant if there were any medical or other reasons why a specimen of blood could not or should be taken. The appellant replied 'No'. Constable Mullan determined that the specimen should be blood and the appellant consented to the specimen being taken. The doctor took a history from the appellant and concluded there was no medical reason why a specimen of blood could not be taken. The appellant was co-operative and provided a specimen of blood. No question of unfairness is alleged or could arise from that procedure in relation to the provision of the specimen of blood. The appellant was correctly advised and informed at all times. If Constable Mullan was obliged to tell the appellant that a breath specimen could not be taken or should not be required because he was unable sufficiently to blow into the mouthpiece of the device, it would have made no difference to the procedure to be followed. Nor would the absence of such information mislead or confuse the appellant as to his options and what was required of him. All he needed to know was that Constable Mullan had suspended the breath test procedure because he had reasonable cause to believe that a specimen of breath could not be provided by the appellant or that he should not be required to provide a breath

specimen in the circumstances which had just unfolded. It is evident that no unfairness was caused to the appellant in the circumstances of this case. Accordingly I would hold that the certificate of analysis was admitted into evidence correctly on either basis.

[28] The question posed in the case stated is whether the District Judge (Magistrate's Court) was correct in admitting in evidence the certificate of the authorised analyst. Without hesitation I would answer that question 'Yes'.

Neutral Citation No.: [2009] NICA 11 | *Ref:* **GIR7382**

Judgment: approved by the Court for handing down | *Delivered:* **24/02/09**

(subject to editorial corrections)

IN THE COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF A MAGISTRATE'S COURT

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent/(Complainant);

-and-

ROBERT HARPUR

Appellant/(Defendant).

IN THE MATTER OF THE ROAD TRAFFIC (NORTHERN IRELAND) ORDER 1995

GIRVAN LJ

Facts

[29] The District Judge sets out his findings of fact in paragraph 2 of the case stated. These establish that the defendant was seen on 10 April 2007 about 1.00am driving erratically on Victoria Road leading from Strabane to Ballymagorry and weaving across the central white line. When stopped by the police he was observed to be smelling of alcohol and when he got out of the car he staggered and had to hold unto the car. He said that he had had too much to drink. He was arrested and taken to Strabane Police Station. PC Mullan, an authorised officer under Article 18(3) of the Road Traffic (Northern Ireland) Order 1995, ("the 1995 Order") carried out the statutory procedure applicable in a case of suspected drunken driving. The defendant at that stage denied having consumed alcohol. He was required to provide two specimens of breath for analysis by means of an approved device, a Lion

Intoxilyzer 6000 which was available and practicable for use. He was informed that the specimen with the lower proportion of alcohol might be used in evidence and that the other would be disregarded. He was warned that a failure to provide either of the specimens might render him liable to prosecution. The defendant agreed to provide the specimens. An attempt was made at 1.47 to take breath specimens but without success. PC Mullan noted that the mouthpiece was misted over and he was of the opinion the defendant was making an attempt to blow into the mouthpiece. He asked the defendant if there were any medical reasons why he had not been able to provide two specimens. The defendants reply was "I have part of my lungs missing". Following that PC Mullan stated:

> "As I have reasonable cause to believe that a specimen of breath cannot be provided or should not be required, I require you to provide me with a specimen of blood or urine, which, in the case of blood, will be taken by a Medical Practitioner or Registered Health Care Professional. It is for me to decide which it will be unless a Medical Practitioner or Registered Health Care Professional is of the opinion that for medical reasons a specimen of blood cannot or should not be taken, in which case it will be of urine. You may inform the Medical Practitioner or Registered Health Care Professional of medical reasons why a specimen of blood cannot be taken by them, but the matter will be for the Medical Practitioner or Registered Health Care professional to determine. You will be supplied with part of the specimen if you so require. The other part will be sent to a forensic laboratory for analysis. I warn you that failure to provide a specimen may render you liable to prosecution. Before I decide whether the specimen shall be a blood or urine, are there any medical or other reasons why a specimen of blood cannot or should not be taken by a Medical Practitioner or Registered Health Care Professional?"

The appellant's reply to that was "No, tear away". The constable then proceeded to say:

> "I have decided the specimen shall be of blood and require you to provide a specimen. Failure to provide a specimen may render you liable to prosecution. Do you consent to provide a specimen of blood, which will be taken by a

Medical Practitioner or Registered Health Care Professional?"

To which the defendant replied:

"Yes, yes."

The time of this requirement was 2.06am on 10 April 2007. Dr Burns, a medical practitioner, attended. His attempt to take a specimen of blood had to be suspended at 2.48am as a full medical kit was not available at the station. The procedure continued at 3.45am. The doctor took a medical history and concluded that there was no medical reason why a specimen of blood could not be taken. The defendant was cooperative and agreed to provide a sample. This was provided at 3.51am. Part of the specimen was offered to the defendant at 3.53am. The rest of the specimen was sealed in the presence of the defendant at 3.54am and was duly forwarded to the forensic laboratory. The resultant certificate of analysis indicated that the defendant's specimen contained 219mg of alcohol per 100ml of blood, considerably in excess of the prescribed limit.

The Charge

[30] The defendant was charged with an offence contrary to Article 16(1)(a) of the 1995 Order, that is to say driving a motor vehicle on a road after consuming so much alcohol that the proportion of alcohol in his blood exceeded the prescribed limit of 80mg per 100ml. (See Article 13(2) of the 1995 Order). For the prosecution to succeed it was incumbent on it to prove that the correct procedures were followed to render the certificate of analysis admissible.

The Appellant's Challenge

[31] Both before the District Judge and this court it was argued on behalf of the defendant/appellant that the certificate of analysis should not have been admitted in evidence. Relying on the House of Lords decisions in DPP v Warren [1993] AC 319 and DPP v Jackson and Stanley [1998] 3 WLR 514 Mr Macdonald QC on behalf of the appellant contended that PC Mullan had failed to explain the reason why breath specimens could not be taken. He argued that the House of Lords decisions specifically require the police officer to indicate the particular reason why blood or urine is required and that this requirement is mandatory and if not properly satisfied the appellant must be acquitted.

[32] The District Judge incorporated in his case stated paragraphs 6-18 of his judgment which set out his reasons for concluding that the certificate of analysis was admissible. He concluded that nothing in the House of Lords

decision in Jackson required the Constable to go beyond the language of the statute. He concluded that once PC Mullan had not only formed the belief that the specimen of breath could not be provided but had also specifically told the defendant that he required a specimen of blood or urine for that very reason, particularly in the context where they had just been discussing the defective state of the defendant's lung he had complied with the terms of Article 18(4)(c) and that this met the obligations of fairness to the driver and achieved the purpose of the legislation. The defendant was fully aware why PC Mullan was acting as he was and was in a position to validly and effectively exercise his options. In these circumstances it would be contrary to a proper interpretation of Article 18(4) to hold that it had been breached.

The Relevant Statutory Provisions

[33] Article 16 provides that it is an offence to drive a vehicle on a public road after consuming so much alcohol that the proportion of it in his breath or blood or urine exceeds the prescribed limit. Article 18 contains provisions relating to the procedure to be followed in obtaining samples. So far as material Article 18 provides as follows:

> "18.(1) In the course of an investigation into whether a person has committed an offence under Article 14, 15 or 16 a constable may, subject to the following provisions of this Article and Article 20, require him
>
> > (a) to provide 2 specimens of breath for analysis by means of a device of a type approved by the Head of the Department, or
> >
> > (b) to provide a specimen of blood or urine for a laboratory test.
>
> (2) A requirement under paragraph (1)(a) may be made to provide the specimens of breath.
>
> > (a) at or in the vicinity of the place where the requirement is made if facilities for the specimens to be taken are available and it is practicable to take them there, or
> >
> > (b) at a police station.
>
> (3) A requirement under paragraph (1)(a) may be made only by a constable who is especially

authorised by the Chief Constable to make such requirements.

(4) A requirement under paragraph (1)(b) to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless.

> (a) the constable making the requirement has reasonable cause to believe that a specimen of breath cannot be provided or should not be required, or
>
> (b) at the time the requirement is made a device or a reliable device of the type mentioned in paragraph (1)(a) is not available at the police station or it is then for any other reason not practicable to use such a device there, or
>
> (c) the suspected offence is one under Article 14 or 15 and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug,

but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide 2 specimens of breath.

(5) If the provision of a specimen other than a specimen of breath may be required in pursuance of this Article the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.

(5A) Where a constable decides for the purposes of paragraph (5) to require the provision of a specimen of blood, there shall be no requirement to provide such a specimen if

(a) the medical practitioner who is asked to take the specimen is of the opinion that, for medical reasons, it cannot or should not be taken; or
(b) the registered health carer professional who is asked to take it is of that opinion and there is no contrary opinion from a medical practitioner:

and, where by virtue of this paragraph there can be no requirement to provide a specimen of blood, the constable may require a specimen of urine instead.

(6) A specimen or urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(7) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this Article is guilty of an offence.

(8) A constable must, on requiring any person to provide a specimen in pursuance of this Article, warn him that a failure to provide it may render him liable to prosecution.

(9) For the purposes of paragraph (1)(a) a device shall be treated as of a type approved by the Head of the Department where a statement that the Head of the Department has approved a device of that type is included in the Belfast Gazette."

[34] It is apparent from Article 18 that where a defendant is suspected of driving with excess alcohol in his blood, breath or urine and he is taken to a police station he can be subjected to a breath test to provide two specimens of breath for analysis. He can only be required to undergo a blood or urine test if certain preconditions are satisfied, namely one or other of the preconditions set out in Article 18(4)(a), (b) or (c). Subjecting a person to a breath test is less invasive than requiring him to be subjected to a blood or urine test. It is presumably for this reason that the legislature decided to impose conditions on a requirement for a blood or urine sample at a police station. The legislative intent shows that unless there is some justifiable reason why a

breath test is not appropriate a person should not be subjected to a blood or urine sample requirement. Article 18(4) does not on the face of it require the constable to do other than satisfy himself that one of the conditions in paragraphs (a) to (c) is satisfied. Case law, however has established that the defendant should be made aware of the reason why he has been required to undergo a blood or urine sample test. The duty to give reasons arises in this instance because the situation is one where the interests of the defendant are so highly regarded that fairness requires reasons to be given as of right. Lord Bridge in Lloyd v McMahon [1987] AC 625 at 702 stated the following principle:

> "It is well established that when a statute has conferred on any body the power to make decisions affecting individuals the court will not only require the procedure prescribed by statute to be followed but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

There are a number of reasons why fairness requires the giving of reasons under Article 18(4). What is being demanded of the defendant is that he be subjected to an invasive and intimate procedure involving his bodily integrity and autonomy. Accordingly he is entitled to know why he is being required to be subjected to an invasion of his privacy. In R v Burton Upon Trent Justices ex parte Woolley [1995] RTR 138 Buxton J at 150 provides further reasons for the requirement to give reasons:

> "I now turn to the alleged requirement that the constable should tell the driver why a specimen of breath cannot be taken. It is obvious why in an ordinary Section 7(4) case Lord Bridge in Director of Public Prosecutions v Warren [1993] AC 319 requires such a statement to be made. Section 7(3) sets out a series of different factual grounds and the driver has a clear right to know on which of them the constable is relying. He may wish to contradict the constable on a factual point; or, at least, be properly informed of the purposes for future legal proceedings."

This appeal raises the question of how the defendant should be given the reasons why a blood or urine sample was required.

[35] In DPP v Warren [1993] AC 319 the House of Lords considered the equivalent provisions of Section 7 of the Road Traffic Act 1988. Section 7(3) is

closely analogous though by no means identical to Article 18(4) of the 1995 Order. Section 7(3) provides:

> "A requirement under this Section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless –
>
> (a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required, or
>
> (b) at the time the requirement is made a device or a reliable device of the type mentioned in sub-section (1)(a) above not available at the police or it is then for any other reason not practicable to use such a device there, or
>
> (c) the suspected offence is one under Section 3A or 4 of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug; but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath."

In Warren the defendant had been taken to the police station to be breathalysed but the equipment was found to be malfunctioning and the custody officer informed the defendant that an alternative specimen of blood or urine should be required. The defendant was not invited to express a preference for giving blood or urine and he was asked to provide blood. The Divisional Court concluded that he should have been given an opportunity to express a preference for giving a sample of blood or urine. The House of Lords rejected this proposition. It was for the constable to decide that question and there was no requirement to invite the driver to express a preference. The driver was to be given the right to object on medical grounds to be determined by a medical practitioner. This had happened. The relevance of Warren in the present context lies in the views expressed by Lord Bridge on what a defendant should be told when the constable is exercising powers under Section 7(3) (the equivalent of our Article 18(4)). In that case the defendant was told:

> "The approved evidential breath testing device cannot be used on this occasion because the calibration check has proved unsatisfactory. Accordingly I require you to provide an alternative sample."

Lord Bridge considered that whether the necessity to require a specimen of blood or urine under Section 7(4) or Article 18(5) arose "what is required is no more and no less than the formula used in the instant case or words to the like effect."

[36] Lord Bridge's statement did not in practice make clear to courts in other cases precisely what was required and this led to conflicting decisions and fine distinctions. The matter was revisited by the House of Lords in DPP v Jackson and Stanley [1999] 1 AC 406 in which Lord Hutton sought to clarify the law. The case of Jackson raised somewhat different issues from those present in this appeal. It dealt with the question of what information, if any, should have given when the defendant has a right to claim that a breath specimen should be replaced by a blood sample under Section 8(2) (our Article 19). The decision does not provide direct guidance on a case such as the present one where a defendant is unable to provide breath samples in the first place. Lord Hutton, however, sought to give general guidance on the statutory requirements imposed on constables exercising powers including those under Section 7(3) (and Article 18(4)). Thus at 425 he stated:

> "I am of the opinion that the guidance given in Warren's case should be regarded as having the following effect. The requirement stated by Lord Bridge, with three exceptions, are not to be treated as mandatory but as indicating the matters of which a driver should be aware so that, whether in a Section 7(3) case or a Section 8(2) case, he may know the role of a doctor in the taking of a specimen of blood and in determining any medical objections which he may raise to the giving of such a specimen. The requirements, constituting the three exceptions, which should be regarded as mandatory so that non-compliance should lead to an acquittal are:
>
> (1) in a Section 7(3) case the warning as to the risk of prosecution required by Section 7(7);
>
> (2) in a Section 7(3) case the statement of the reason under that sub-section why breath specimens cannot be taken or used; and

> (3) in a Section 8(2) the statement that the specimen of breath which the driver has given containing the lower proportion of alcohol does not exceed 50 mgms of alcohol in 100ml of breaths."

[37] The question which arises in this appeal is what is meant by Lord Hutton's reference to a statement of the reason "under Section 7(3) (Article 18(4) why breath specimens cannot be taken or used. The English Section 7(3) contains four statutory reasons (medical reasons, unavailability of equipment, lack of reliable equipment or suspicion that the defendant had driven under the influence of drugs). The question arises as to whether Lord Hutton meant that the constable should effectively state simply on which of the statutory sub-provisions he is relying or whether he is required to give more detailed information. In Clayton v DPP [CO2633-97] Lord Bingham considered that the constable had satisfied Section 7(3) when informing the defendant that reliable equipment was not available. He did not consider that the constable needed to go further to give a more detailed reason as to why the machine was not available or to give a justification as to why it was not available or not working properly. Under Section 7(3) it is to be noted that there are limited and clearly expressed grounds on which a constable can rely to justify demanding a blood sample in place of a breath sample at a police station. Under Article 18(4)(a), however, the constable may decide to require a blood sample for undefined reasons going beyond simply medical grounds. A statement by the officer that he has reasonable cause to believe that a specimen of breath cannot be provided or should not be required satisfies one of the underlying reasons behind the requirement for a reason why a blood sample is being required because it shows on which statutory basis upon which the constable purports to be acting. However, such a statement would not, without further provide the defendant with any factual basis for the constable's belief that he could contradict. If, for example, the constable believed that for some reason the defendant could not medically provide a breath sample, unless he informed the defendant that that was the basis of his decision the defendant would not know the reason underlying the constable's decisions and would not have the opportunity to point out that he was perfectly capable of providing a breath sample. If the constable decided to require a blood sample because he is not an officer authorised under Article 18(3) to take a breath sample the defendant would not be in a position to ascertain whether there was at the station an other officer who was so authorised. Having regard to the underlying principles that require the defendant to be properly informed as to why he is to be subjected to a blood or urine sample fairness requires that the constable must inform the defendant of the reason why he believes that a specimen of breath cannot be provided or should not be required.

[38] Lord Hutton's proposition that a "statement of the reason" why a specimen of breath cannot be taken is mandatory is a judicial statement. It does not fall to be treated as the words of a statute to be analysed as such. Lord Hutton in Jackson at 422 stressed that there are disadvantages if particular formulae are stated by an appellate court for use by the police based on the need for fairness to the driver but not required by the express wording of the statute or mandatory requirements. He approved what Curtis J said in Baldwin v Director of Public Prosecutions [1996] RTR 238 at 246:

> "So long as the option given by the statute is explained fairly and properly so that the driver can make an informed decision, the requirement of justice and the efficacy of the driver's options are ensured."

Against the background of the constable's obligation to inform the defendant as to why it has been decided to move from a requirement to provide a breath specimen to a requirement to provide a blood or urine sample and bearing in mind that the imparting of this necessary information does not require any particular formula of words, the question in the present case is whether the constable did effectively provide the defendant with the requisite information as to why he was being required to provide a blood sample. The imparting of that information is what is required as the procedural requirement necessary to ensure fairness to the defendant.

[39] Mr Macdonald argued by reliance on the case of Ankrah v DPP [1998] RTR 169 that the constable was obliged to explain why breath specimens could not be taken and used even if the reason for that was self-evident. In that case the defendant was asked if there was any medical reason he was unable to provide a sample of breath to which he replied "I suffer from asthma". He was then asked to provide a sample of blood. Counsel argued that even if it had been self-evident to the defendant in the present case that the reason why the constable was requiring a blood sample was because of his lung condition it was still incumbent on the constable to state in clear terms that that was the reason relied on him under Article 18(4)(a). Mr MacDonald went on to further argue that even if the defendant said that he could not supply a breath sample because of his lung condition and the constable said, "In view of that, I have reasonable cause to believe that a specimen of breath cannot be provided …" that would not satisfy the requirements of Article 18(4)(a).

[40] In the present case the sequence of events and statements is important. The defendant tried to breath into the breathalyser but was unsuccessful. Accordingly he did not provide a specimen of breath sufficient to enable an analysis to be carried out and thus did not provide a breath sample (see Article 13(3) of the 1995 Order). He explained that the reason that he had not

provided two specimens of breath (which he would otherwise have been required to do) was because he had part of one of his lungs missing. The constable shortly after that stated that "As I have reasonable cause to believe that a specimen of breath cannot be provided or should not be required I require you to provide me with a specimen of blood or urine …" The sequence of the defendants statement and the constable's statement, with the latter being introduced by the word "as" made it abundantly clear to the defendant that the reason why the constable considered that the defendant could not or should not be required to supply a breath specimen was because of his lung condition. The combined effect of the communications between the defendant and the constable imparted the necessary information to make clear the reason why the constable considered it reasonable to believe that a breath sample could not be supplied. This satisfied the dictates of fairness which demand that the defendant should know the reason why a blood or urine sample was being required. There is no formula of words prescribed under the statutory requirements which must be satisfied when the Article 18(4) power is exercised. The defendant in the present case seeks to elevate Lord Hutton's reference to a "statement of reason" to the level of a statutory formula. This argument misses the underlying rationale behind the requirement that the relevant information is imparted to the defendant. The case of Ankrah was decided before R v Jackson and must be reviewed in the light of Lord Hutton's approach. In any event in Ankrah it is not apparent that the constable made clear that he was relying on the powers contained in the Section 7(3)(a). There is nothing in Ankrah, a first instance decision, which impels different conclusion from the one which I have reached.

[41] Accordingly I would answer in the affirmative the question posed by the District Judge in the case stated. He was correct to admit in evidence the certificate of the authorised analyst.

Ref:	**COG7400**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**24/02/09**

COGHLIN LJ

[42] I have carefully read and gratefully adopt the helpful and clear accounts of the background facts and relevant legislation set out in the judgments in Higgins LJ and Girvan LJ. I agree with both judgments that the question stated by the District Judge (Magistrates' Court) should be answered in the affirmative and that the appeal should be dismissed.

[43] However, in reaching their ultimate conclusions, with which I respectfully agree, Higgins LJ and Girvan LJ have each proceeded by way of somewhat differing paths of reasoning. After a careful analysis of the primary authorities relied upon by the parties, namely, Warren v DPP [1993] AC 319, DPP v Jackson and Stanley [1999] 1 AC 406 and Clayton v DPP (CO/2633/96) Higgins LJ has concluded that the Resident Magistrate was correct in holding that article 18(4)(*a*) of the Road Traffic (Northern Ireland) Order 1995 ("the 1995 Order") did not require Constable Mullan to go beyond the words of article when informing the appellant that he had reasonable cause to believe that a specimen of breath could not be provided or should not be required. However, Girvan LJ has expressed the opinion that such a statement would not, without further, provide a defendant with any factual basis for the constable's belief that the defendant might wish to contradict should he be in a position to do so. In his view fairness required the information upon which the constable's reasonable belief was grounded to be imparted to the defendant.

[44] I am persuaded that the reasoning set out in the judgment of Girvan LJ is correct and accords both with principle and the circumstances of this particular appeal.

[45] As both Higgins LJ and Girvan LJ have pointed out, whilst it is very similar in structure, article 18 of the 1995 Order does not precisely mirror the structure and content of the equivalent legislation in England and Wales, namely, section 7 of the Road Traffic Act 1988. It was the latter legislation that fell to be considered by the House of Lords and the Divisional Court in Warren, Jackson and Stanley and Clayton. In my view the differences are significant in the context of the requirements of procedural fairness.

[46] At paragraph [9] of his judgment Girvan LJ has recorded that section 7(3) refers to limited and clearly expressed grounds upon which a constable may rely to justify demanding a blood sample in place of a breath sample at a

police station and that, in particular, 7(3)(*a*) restricts the grounds upon which the constable may reasonably believe that a specimen of breath cannot be provided or should not be required for medical reasons. By contrast article 18(4)(*a*) of the 1995 Order does not qualify in any way the grounds upon which a constable can properly hold a similar reasonable belief. As Girvan LJ as pointed out, simply repeating the words of Article 18(4)(*a*) would not provide a suspect with any indication of the factual basis which might have led the constable to entertain the requisite reasonable belief. For example, by reason of his observations and/or some form of verbal exchange with the defendant the constable might entertain a genuine but wholly mistaken belief based on his reasonable understanding of a medical condition which could be easily explained if communicated to the defendant. A requirement by a constable expressed solely in the statutory wording of section 7(3)(a) should immediately alert a defendant to the fact that the former's belief is grounded upon medical reasons, thereby enabling the latter to make an appropriate response or further enquiry, while the same would not be the case with a requirement restricted to the words of article 18(4)(a).

[47] The trend of the law towards an increased recognition of the duty upon decision-makers of many kinds to give reasons has been recognised in a series of familiar decisions – see, by way of example, R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531 and R v Higher Education Funding Council, ex parte Institute of Dental Surgery[1994] 1 WLR 242 at page 256-7 in England and Wales and, in this court in Re Jordan [2004] NIJB 42 and Re McColgan, McCallion and McNeill [2005] NICA 21. It is generally a matter of context as to whether procedural fairness requires the giving of reasons and, if so, the extent of detail necessary. The relevant subsection in this jurisdiction, article 18, under which the constable proposes to require a sample of blood/urine should be identified to the defendant and, if reliance is being placed upon article 18(4)(a) sufficient information should be imparted to make clear the ground upon which the constable has reached the relevant belief. The statute does not require any specific verbal formula to be adopted and no useful attempt could be made to develop a form of words suitable for all occasions given the breadth of the subsection. I agree with Higgins LJ that in most instances in which the constable proceeds in accordance with article 18(4)(*a*) there would have been an exchange between the defendant and the constable that will have clarified the basis for the latter's reasonable belief. However, as both Higgins LJ and Girvan LJ have observed the defendant is being informed that a breath test cannot be taken and that, accordingly, he is to be compelled to undergo a more invasive and intimate procedure involving his bodily integrity and an invasion of his privacy. In such circumstances, in my opinion, the defendant is entitled to such information as will make it clear to the defendant why the more invasive procedure is to be adopted.

[48] While I agree with Higgins LJ that neither Lord Bridge nor Lord Hutton appear to have had in mind specifically the sort of factual situation that would have attracted section 7 (3)(a) (article 18(4)(a) in this jurisdiction), I do not consider that Clayton v DPP is clear authority for the proposition that merely repeating the words of article 18(4)(a) would be adequate. In the course of what appears to have been an extempore judgment Lord Bingham LCJ described how the officer had inspected the approved device but found that it was not working. He then proceeded to issue a requirement in accordance with section 7(3)(b). Lord Bingham then went on to specifically note that the case concerned only the availability of a reliable device and said:

> "Having found that it was not working he told the defendant that breath specimens could not be taken or used because an instrument was not available."

Later in the judgment Lord Bingham observed:

> "As already explained, one of the reasons is that a reliable device of the type mentioned is not available and that is precisely what the officer told the appellant."

That was a more accurate description of the factual situation and, as the LCJ observed, if the appellant had wished to explore the reason while a reliable machine was not available the officer would have provided further detail. In the circumstances of that case that was not necessary since the appellant was extremely co-operative and accepted what the constable told him without question.

[49] Accordingly, for the reasons set out above, I would dismiss the appeal.