CARC3159 **3 March 2000**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

SUPERINTENDENT RD FLEMING

(Complainant) Appellant

and

CATHERINE MARY MAYNE

(Defendant) Respondent

CARSWELL LCJ

Introduction

This is an appeal by way of case stated from a decision of a resident magistrate, Mr Brian P McElholm, sitting at Enniskillen on 14 December 1998, whereby he decided not to order the respondent to be disqualified from driving. The respondent had pleaded guilty to driving her car on a road or other public place when unfit to drive through drink or drugs, contrary to Article 15(1) of the Road Traffic (Northern Ireland) Order 1995. Under Article 35(1) of the Road Traffic Offenders (Northern Ireland) Order 1996 the court was obliged to order the respondent to be disqualified for a period of twelve months, unless it thought fit "for special reasons" to order a shorter period of disqualification or not to order her to be disqualified. The magistrate found that such special reasons existed and the issue on appeal was the correctness in law of that conclusion, which turned on the sufficiency of the reasons put forward on behalf of the respondent.

The Facts

The facts were established by oral evidence given by the respondent at the hearing, and they do not appear to have been the subject of much challenge. The magistrate purported to set out some

findings of fact in paragraph 3 of the case, but went on in paragraph 4 to recite the evidence given by the respondent on the issue of special reasons, rather than making specific findings of fact. We would once again refer courts and tribunals which state cases for the opinion of this court to the importance of reaching definite factual conclusions and setting them out clearly in the case.

The findings which appear from the content of the case stated may be summarised as follows. On 4 April 1998 the respondent and her boyfriend travelled together in the respondent's car to Enniskillen and booked into the Fort Lodge Hotel on the outskirts of the town. During the evening the respondent consumed a certain amount of alcohol. The magistrate appears to have been satisfied that she did not then intend to drive her car at any time later that night. Her boyfriend became drunk and assaulted her, and eventually he was ejected from the hotel by the staff.

The respondent was persuaded by her boyfriend to go outside into the hotel car park at a late hour to talk matters over with him, but a further assault took place, following which the boyfriend made off and did not appear again that night. The respondent attempted to obtain admittance to the hotel, but was unable to get into the premises or to attract the attention of any member of staff. She then decided to get into her car and drive off in search of other accommodation for the night. She was upset and confused and was unfamiliar with the street layout of Enniskillen. After driving about a mile through the town she was seen by police at approximately 2.41 am while driving in the wrong direction along a one-way street and was stopped nearby. When she took a breath test the reading was 60 microgrammes of alcohol in 100 ml of breath, the legal limit being 35 microgrammes. This reading corresponds to a reading on a blood test of about 137 mg alcohol in 100 ml of blood, as against the prescribed limit of 80 mg.

The resident magistrate imposed a fine of £100 and ordered that the respondent's driving licence be endorsed with three penalty points, but decided not to disqualify her. He gave his reasons in the order in the following terms:

> "The accused had received a severe physical beating from her boyfriend. Due to his behaviour she found herself barred from the hotel and being a stranger had nowhere else to go."

The appellant requested the magistrate to state a case for the opinion of this court, and he stated and signed a case on 16 June 1999, the question posed being:

> "Whether I was correct in law to hold that on the basis of the evidence and information which I heard, there existed special reasons which entitled me to think fit not to order the Defendant/Respondent, who had pleaded guilty to an offence of driving a mechanically propelled vehicle on a road when unfit through drink or drugs, contrary to Article 15(1) of the Road Traffic (Northern Ireland) Order 1995, to be disqualified in accordance with Article 152(1) of the Road Traffic (Northern Ireland) Order 1981 as substituted by Article 96 of the Road Traffic (Northern Ireland) Order 1995."

The Governing Principles

The principles governing the exercise of the court's discretion not to disqualify for special reasons have been fairly clearly established in a series of decisions in England and Scotland, and they are equally applicable in this jurisdiction. They have been conveniently assembled in the judgment of Simon Brown LJ in *Director of Public Prosecutions v Bristow* [1998] RTR 100, in which he refers to the previous decisions, in particular the judgment of Lord Widgery CJ in *Taylor v Rajan* [1974] QB 424. We may summarise them as follows:

1. A special reason is one which is special to the facts of the case and not the offender. It was described by Andrews LCJ in the context of comparable legislation in *R (Magill) v Crossan* [1939] NI 106 at 112 as –

> "a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment."

2. The burden of proving the facts upon which the plea of special reasons is based is upon the defendant, and is proof upon the balance of probabilities.

3. Even if special reasons are proved that does not prevent the court from disqualifying for the statutory period; it merely allows the court to exercise a discretion in the matter either not to disqualify, or to disqualify for a lesser period.

4. The court should be satisfied that the defendant had no intention to drive the vehicle at the time when he drank alcohol. There must be some unforeseen supervening circumstances, which gave rise to a strong need for him to drive notwithstanding his consumption of alcohol taking him over the legal limit.

5. Such circumstances are very variable, depending on the facts of the case, and rigid categories should not be prescribed. It will normally be found, however, that they give rise to personal danger to the defendant or create an emergency which requires him to drive his car in order to deal with it.

6. It is necessary to balance the amount of risk to the public which arose when the defendant drove his vehicle while intoxicated against the degree of danger to be avoided or the importance of the objective to be gained by his driving. Lord Widgery CJ stated in *Taylor v Rajan* at page 431 that courts should rarely, if ever, exercise the discretion in favour of a defendant where his alcohol level exceeds 100 mg in 100 ml of blood (the equivalent figure in breath being 43 microgrammes of alcohol in 100 ml of breath: Wilkinson's *Road Traffic Offences,* 19th ed, Appendix 1).

7. The onus is on the defendant to establish the existence of clear and compelling circumstances justifying his decision to drive the vehicle. In practice, this will normally require in an emergency case that he shows that he could not resort to any other means of meeting the emergency.

8. The test to be applied is objective, and the question which the court should ask itself is whether a sober, reasonable and responsible friend of the defendant present at the time would have advised him in the circumstances to drive or not to drive.

Conclusions

We turn then to apply these principles to the facts of the present case. The reasons set out by the resident magistrate in his order are in themselves quite inadequate to justify a decision not to

disqualify, but we shall examine the circumstances to see whether they could be regarded as sufficient for a court properly to exercise its discretion in this way.

The respondent found herself locked out of her hotel, somewhere about 2 am, and she did not succeed in attracting the attention of any member of staff, though the case does not set out what attempts she made to do so. There does not appear to have been anyone about to direct her to another hotel or to a telephone from which she could have aroused someone in her own hotel, arranged accommodation elsewhere or summoned a taxi. She does not seem to have attempted to make any exploration of the area on foot to see whether she could have found either accommodation or a telephone nearby, and there is no indication in the case stated whether it was reasonable for her to decide against taking such a step. Nor is there any indication whether she considered sitting in her car in the car park, or whether it would have been safe for her to do so, but one might reasonably suppose that she was apprehensive that her boyfriend might return and assault her again. No facts are set out from which the court could have concluded that she did not pass any other accommodation, taxi depot or public telephone on the route which she took before she was stopped by the police. The level of alcohol on the breath test was such that the respondent was clearly unfit to drive safely on the public road, though one may suppose that at that hour in a country town the roads would contain very little traffic. She was, however, seen to drive the wrong way along a one-way street, which is capable of giving rise to a danger to other road users.

Although the respondent had been through a very distressing experience and her plight must attract a good deal of sympathy, we are unable to hold that she has made out any case for the necessity to drive her car in the circumstances. She has not established that she had no real alternative open to her, a burden which is quite substantial in light of the degree of her intoxication. The hypothetical friendly bystander would in our judgment have been bound to advise her not to drive her car but to find some other means of dealing with her predicament. The resident magistrate

did not in our opinion have sufficient material upon which he could properly exercise his discretion not to disqualify the respondent from driving, and he was in error in so deciding.

The question posed should be amended by substituting for the last three lines the words "in accordance with Article 35 of the Road Traffic Offenders (Northern Ireland) Order 1996". We answer the amended question in the negative, allow the appeal and remit the case to the resident magistrate with a direction to impose the disqualification required by statute.

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JUDGMENT

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