

Mag 7

Dispatched to the applicant on
12th day of September 1997 by hand to
DPP, Omagh.

M. S. Elliott

CLERK OF PETTY SESSIONS
Dated 12th day of September 1997

**MAGISTRATES' COURTS (NORTHERN IRELAND) ORDER 1981
(ARTICLE 146: RULE 160)**

CASE STATED BY MAGISTRATES' COURT

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL BY WAY OF CASE STATED UNDER THE
MAGISTRATES' COURTS
(NORTHERN IRELAND) ORDER 1981**

**BETWEEN: SUPERINTENDENT HOOD
RUC STATION
STRABANE**

COMPLAINANT/APPELLANT

**AND: MARK LOWRY
CHURCHMASTER
BALLINDRAIT
LIFFORD
CO DONEGAL**

DEFENDANT/RESPONDENT

Case Stated by Robert Porter Esq, Resident Magistrate, in respect of his adjudication at a Magistrates' Court sitting at Strabane in the County Court Division of Fermanagh and Tyrone.

1. On the 25th day of June 1996, the Defendant/Respondent (hereinafter called the Respondent) was charged, inter alia, with the offence of driving a motor vehicle on a road or other public place to wit Woodland Road, Strabane in the County Court Division of Fermanagh and Tyrone after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to Article 16(1)(a) of the Road Traffic (Northern Ireland) 1995.

- v. Constable Nesbitt had with him an approved alcometer. He began to prepare this machine to administer the evidential test to the Respondent. As a result of a calibration test he deemed the device to be unreliable. He then informed the Respondent that he would take him to Waterside RUC Station for the purpose of carrying out the evidential test.
- vi. Constable Nesbitt took the Respondent to Waterside RUC Station where his detention was authorised by the Custody Officer.
- vii. Constable Nesbitt then administered the evidential test and found that the specimen of the Respondent's breath with the lower proportion of alcohol in the breath produced a reading of 55 microgrammes in 100 millilitres of breath, this being 20 microgrammes in excess of the prescribed limit.
- viii. When formally charged with the offence of driving with excess alcohol the Respondent made no reply.
- ix. In the course of carrying out the evidential breath test procedure Constable Nesbitt completed a Royal Ulster Constabulary Form 55/31(B) paragraph 2 of the Form he had erroneously recorded that the day of the incident was Thursday the 25th 1996 whereas that date was a Tuesday. At paragraph 8 of the Form the Constable had omitted to enter the place at which he had made the requirement to the Respondent to provide two specimens of breath for the evidential test. Also at paragraph 8 Constable Nesbitt entered that the provision of the specimens "shall be at Newbuildings PSV Centre" whereas the specimens were provided at Waterside RUC Station.
"At paragraph 11 of the Form 55/31B, it is recorded that Constable Nesbitt had asked the Respondent "If you smoke, have you smoked in the last 5 minutes/" and that the Respondent's reply

was "No". Below this reply, the following words had been added,
"No last cigarette taken 1110 Hrs."

3. At the end of the prosecution case it was contended by the Respondent that I should not take into account evidence of the proportion of alcohol in a specimen of the Respondent's breath as determined by the evidential breath test on the ground that the proper procedures had not been adhered to. In particular it was contended that the following matters affected the validity of the test:-
- i. The error in Form 55/31(B) as to the day of the week.
 - ii. The omission of the time from paragraph 8 of Form 55/31(B).
 - iii. When the Respondent was brought to Waterside RUC Station the procedures set out in the notes to Form 55/31(B) required that a new procedure form i.e. a new Form 55/31(B) should be used to record the procedure and that both the original form and the new form should be retained.
 - iv. "The evidential breath specimens were provided at Waterside RUC Station, whereon the form 55/31B it is recorded that the requirement put to the Respondent was that the specimens "shall be provided at Newbuildings PSV Centre."
 - v. "The record of the respondent's reply to the question on smoking in paragraph 11 of Form 55/31B lacks a clear meaning."
4. It was contended by the complainant/appellant that points (i) and (ii) above were merely minor errors in the recording of the procedure and were of no legal or evidential consequence and that the requirement to use a new procedure form was not made by legislation but was a police procedure which, while representing best practice, could not, in law, be regarded as mandatory. It was further contended that by virtue of Article 150(2) of the Road Traffic (Northern Ireland)

Order 1981 the court was required to take into account the proportion of alcohol in a specimen of breath provided by the Respondent and that such requirement could not be avoided by reason of the matters set out in the contention of the Respondent.

5. I was referred to the following case Moore v Fingleton (unreported) Northern Ireland Court of Appeal 5 March 1986.
6. Apart from the consideration that no evidence was adduced in relation to the Respondents' condition when originally stopped and spoken to by Constable Nesbitt (in respect of which the charge was laid) I was of the opinion that the evidence of the analysis of the Respondent's breath should not be admitted for the reasons contended by the Respondent and accordingly I dismissed the charge against the Respondent.

- Exhibits
1. Charge Sheet
 2. Preliminary Breath Test Form 55/31(A)
 3. Evidential Breath Test Form 55/31(B) completed by Constable Nesbitt and
 4. Blank Evidential Breath Test Form.

7. The question for the Court of Appeal is:-

"Whether, having regard to the provisions of Article 150(2) of the Road Traffic (Northern Ireland) Order 1981, I was correct in law to decline to take into account evidence of the proportion of alcohol in a specimen of breath provided by the Defendant in response to a requirement made to him by an authorised officer under Article 18(1)(a) of the Road Traffic (Northern Ireland) Order 1995, on the ground that the proper procedures had not been adhered to."



RESIDENT MAGISTRATE

This 10th day of September 1997