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Judgment: approved by the Court for handing down | *Delivered:* **07/03/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DRIVER AND VEHICLE TESTING AGENCY

(Complainant) Respondent

and

McNICHOLAS CONSTRUCTION SERVICES LIMITED

(Defendant) Appellant

Before: Carswell LCJ, Kerr and Coghlin JJ

CARSWELL LCJ

[1] This appeal is brought by way of case stated by the appellant company against its conviction of a statutory offence. The appellant was convicted by Mr CWG Redpath, sitting as a deputy resident magistrate in Banbridge Magistrates' Court on 24 September 2002, of the offence, contrary to Article 57(1) of the Road Traffic (Northern Ireland) Order 1995, of using on a road a goods vehicle which did not comply with a construction and use requirement, in that the permitted weight on the second axle was exceeded. The issues around which the appeal centred were whether the offence was one of strict liability in domestic law and, if so, whether that was consistent with the requirements of the European Convention on Human Rights.

[2] Article 57 of the 1995 Order provides:

"**57**.-(1) A person who –

(a) contravenes a construction and use requirement as to any description of weight applicable to –

(i) a goods vehicle; or
(ii) a motor vehicle or trailer adapted to carry more than eight passengers; or

(b) uses on a road a vehicle which does not comply with such a requirement, or causes or permits a vehicle to be so used,

is guilty of an offence.

(2) In any proceedings for an offence under this Article in which there is alleged a contravention of a construction and use requirement as to any description of weight applicable to a goods vehicle, it shall be a defence to prove either –

(a) that at the time when the vehicle was being used on the road –

(i) it was proceeding to a weighbridge which was the nearest available one to the place where the loading of the vehicle was completed for the purpose of being weighed, or

(ii) it was proceeding from a weighbridge after being weighed to the nearest point at which it was reasonably practicable to reduce the weight to the relevant limit, without causing an obstruction on any road, or

(b) in a case where the limit of that weight was not exceeded by more than 5 per cent –

(i) that that limit was not exceeded at the time when the loading of the

vehicle was originally completed, and

(ii) that since that time no person has made any addition to the load."

Regulation 79 of the Motor Vehicles (Construction and Use) Regulations (Northern Ireland) 1999 requires the vehicles to which it applies to be equipped with a plate attached to the vehicle showing, *inter alia*, the maximum permitted weight for each axle. Under Regulation 93(1) it is an offence to use, or cause or permit to be used, a vehicle on a road if any of the weights shown on the plate is exceeded.

[3] The magistrate found the following facts set out in paragraph 4 of the case stated:

"(i) The Defendant was at the material time the employer of the driver who was driving lorry Registration Number LAZ 3862 which was weighed by officials of the Department on 7 September 2001.

(ii) When weighed the second axle of the lorry was 2900kg overloaded being 27.6% over the permitted loading.

(iii) The Defendant provided full training for all drivers in relation to the loading of lorries including internal and external training.

(iv) The Defendant advised drivers that overloading a lorry was a serious disciplinary offence.

(v) The Defendant took steps to advise drivers of this fact by the display of notices in the workplace and by the regular distribution of pamphlets.

(vi) The Defendant carried out regular spot checks on its vehicles using a portable weighbridge."

[4] The magistrate heard the matter on 11 July 2002 and reserved his decision. In a thorough and careful written judgment given on 24 September

2002 he found the offence proved. He summarised his conclusions succinctly in paragraphs 5 to 7 of the case stated:

> "5. As a result of (iii) to (vi) above I concluded that the Defendant's actions in the case were neither reckless nor intentional. I was further of the view that it would be difficult to prove negligence on the part of the Defendant.
>
> 6. Having considered the law on the matter I concluded that the offence created by Article 57(1) of the 1995 Order creates an offence of strict liability that does not permit any defence outside the terms of Article 57 and in particular does not allow any defence of using reasonable care.
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> 7. I further concluded that the approach taken by the legislature was proportionate and that Article 57(1) is compliant with the European Convention on Human Rights and Fundamental Freedoms."

The case stated posed two questions for the opinion of this court:

> "(i) Was I correct in holding that Article 57(1) of the Road Traffic (Northern Ireland) Order 1995 insofar as it does not require proof of recklessness, negligence or intention, or, in the alternative, does not afford a defence of using reasonable care, is nonetheless consistent with Article 6 of the European Convention on Human Rights and Fundamental Freedoms?
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> (ii) Was I correct in holding that Article 57(1) of the Road Traffic (Northern Ireland) Order 1995 insofar as it creates an offence of strict liability places no impermissible burden on the Defendant and is not contrary to Article 8 of the European Convention on Human Rights and Fundamental Freedoms and Article 1 of the First Protocol taken together with Article 6?"

[5] Mr Larkin QC on behalf of the appellant presented his arguments under three heads:

(a) The presumption that proof of *mens rea* is required has not been rebutted by sufficiently cogent reasons why the offence should be regarded as one of strict liability.

(b) If the offence is to be regarded as one of strict liability, the appellant should be able to establish a defence that it had taken reasonable care.

(c) To impose strict liability would be in breach of the appellant's Convention rights.

[6] In order to determine whether an offence is one of strict liability, in which it is not necessary for the prosecution to prove *mens rea* on the part of the defendant, it is necessary to consider several factors. We observe in passing that in proper terminology strict liability differs from absolute liability (though at times the terms have been used without distinction) in that the defence of honest and reasonable mistake of fact is allowed in answer to a charge of strict liability but not to one of absolute liability. In *Gammon Ltd v Attorney General of Hong Kong* [1985] 1 AC 1 at 14 Lord Scarman, giving the opinion of the Board, laid down five tests:

> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellant's counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be guilty of a criminal offence (2) the presumption is particularly strong where the offence is truly criminal in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

[7] Common features of offences of strict liability are that it may be difficult to establish guilt if the prosecution is required to prove *mens rea* and that there

is a substantial public interest which the strict liability is designed to safeguard. In the case of overloading it would frequently be very difficult to prove that the managers of the company knew when drivers in different locations throughout the country were overloading vehicles, and even recklessness might be hard to prove. On the other side of the scale, there is a considerable public interest in stopping the overloading of vehicles. Foremost among the undesirable consequences in which it may result are the excessive strain which it throws on the suspension and braking system of the vehicles and the adverse effect on the steering and braking distance: cf Wilkinson, *Road Traffic Offences,* 20th ed, para 8.139. One may add to this the damage to road surfaces effected by vehicles of excessive weight, and it is not difficult to find clear justification for regarding the offence as one of strict liability. We bear in mind the observation of Lord Nicholls of Birkenhead in *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 463-4, when he said, referring to the Indecency with Children Act 1960:

> "In section 1(1) of the Act of 1960 Parliament has not expressly negatived the need for a mental element in respect of the age element of the offence. The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. "Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

[8] A factor of some significance is that in some classes of case the imposition of strict liability may tend to induce the persons whose acts are in question to keep themselves and their organisations up to the mark. Against this view Mr Larkin for the appellant cited the remark of Hunt CJ at CL in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120:

> "I do not understand how the sale of adulterated food is going to be prevented simply by imposing an absolute liability … An absolute liability will not assist in preventing the sale of adulterated food where the seller honestly believes upon reasonable grounds that it is unadulterated. All the imposition of such a liability will do is to obtain convictions for conduct which is manifestly

> not criminal in nature by any recognised standards of justice."

This dictum should in our opinion be taken in its context. If the offence is one where the person charged may hold an honest belief that he has not committed it, then it may have some validity. Where that is not likely to occur, such as in an offence of overloading, the imposition of strict liability will in our view furnish a definite incentive to users of heavy vehicles to ensure that they carry only the permitted loads. We consider that the necessary implication referred to by Lord Nicholls of Birkenhead has been established in the present case and that Parliament intended that the offence charged should be one of strict liability.

[9] We are fortified in reaching this conclusion by the fact that in *James & Son Ltd v Smee* [1955] 1 QB 78 a Divisional Court of five judges held that where use and construction regulations contained the phrase "uses or causes or permits to be used", the offence of using was one of strict liability, while the majority held that those of causing or permitting use required proof of guilty knowledge. Parliament, in repeating the phrase in Article 57 of the 1995 Order, must on ordinary principles be taken to have been aware of the distinction so adopted, which may be regarded as an indication that it regarded the distinction as valid.

[10] It was submitted nevertheless on behalf of the appellant that the climate of judicial opinion is moving away from strict liability and towards requiring proof of guilty intention wherever appropriate and that the courts are increasingly reluctant to find the presumption in favour of *mens rea* rebutted. In support of this thesis Mr Larkin pointed to the decisions of the House of Lords in *R v K* [2002] 1 AC 462 and *B (a minor) v Director of Public Prosecutions* [2002] 2 AC 428. He advanced the suggestion that if it is not regarded as justified to require proof of *mens rea* in the full sense in a statutory offence such as that of overloading a vehicle, the court should be ready to adopt the "halfway house" of permitting the defendant to establish a defence by proving (on the balance of probabilities) that he took reasonable care to avoid committing the offence. This approach has been adopted in some other common law jurisdictions, notably in Canada and New Zealand (see Smith & Hogan, *Criminal Law,* 10th ed, pp 136-7 and Lord Cooke of Thorndon's discussion of the issue in his Hamlyn Lecture, *Turning Points of the Common Law* (1997) at pages 41 to 47). The approach is supported in Smith & Hogan, *op cit* at page 137, where the learned author says:

> " … just as the judges invented the presumption in favour of *mens rea*, they could have invented a presumption of a negligence requirement in particular types of case."

He goes on, however, to state that they chose not to do so: the opportunity was there in *B (a minor) v DPP,* but the House of Lords declined it in favour of a requirement of full *mens rea.* It is right to say, however, that that appeal was decided on the first ground, that proof of *mens rea* was required, and accordingly the House did not need to address the possibility of adopting the halfway house approach. Nevertheless we do not think that we should be justified, sitting in the Court of Appeal, to adopt this approach to offences of strict liability, attractive though it may be, and we consider that if such a defence is to be afforded, it should be done by legislation.

[11] It was argued on behalf of the appellant that to convict a defendant of the offence in question as one of strict liability, without proof of *mens rea,* was inconsistent with Article 6 of the Convention and Article 1 of the First Protocol. The appellant's counsel did not argue that Article 8 was engaged, though we did not understand him to concede the point, and we have not considered it. Article 6 provides, so far as material:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing …
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It was contended that if the offence is to be regarded as one of strict liability it places an impermissible burden on the defendant and is not a proportionate response to the need for road safety. The prosecution should be required to prove intention or recklessness or, in the alternative, the defendant should be able to establish a defence that he took reasonable care in the circumstances to

avoid the vehicle being overloaded. In accordance with the requirements of section 3 of the Human Rights Act 1998, Article 57 of the 1995 Order should be construed so as to be given effect in a way which is compatible with the appellant's Convention rights. If this cannot be done, then Article 57 should be held to be incompatible with the Convention.

[12] The European Court of Human Rights recognised in *Salabiaku v France* (1988) 13 EHRR 379 that it is permissible to apply criminal sanctions without requiring proof of criminal intent. That decision concerned a presumption of criminal liability made by French law where a person was found in possession of prohibited goods, in the instant case narcotics. The Court stated at paragraph 27 of its judgment:

> "… in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (*Engel and others* judgment of 8 June 1976, Series A no. 22, p.34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."

Mr Larkin pointed to a subsequent passage in paragraph 28 of the Court's judgment in the same case:

> "Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

The ECtHR affirmed this view in *Janosevic v Sweden* (Application no 34619/97), when it referred to *Salabiaku v France* and said at paragraph 101 of its judgment:

> "Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably

> proportionate to the legitimate aim sought to be achieved."

That this balancing has to be done by specific reference to the individual case appears with clarity from a passage in the opinion of Lord Bingham of Cornhill in *Brown v Stott* [2001] 2 All ER 97 at 115:

> "The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within art 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the convention (see *Sporrong v Sweden* (1982) 5 EHRR 35 at 52-53 (para 69), *Sheffield v UK* (1998) 5 BHRC 83 at 94 (para 52)."

We would refer also to the extended discussion of the principle in Lord Clyde's opinion in *R v Lambert* [2002] 2 AC 545 at paragraphs 150-154.

[13] It was argued for the respondent that the imposition of strict liability under Article 57 for using an overloaded vehicle was so proportionate, whereas the appellant contended that it could only be so if the defence of having taken reasonable care was available to a defendant. In the course of argument we were referred to a number of cases, both in domestic courts and the ECtHR, from which we derived varying degrees of assistance. It is no reflection on the industry of counsel if we discuss only three of them.

[14] The decision to which most attention was devoted before the magistrate was *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, which concerned the imposition of a reverse onus under legislation penalising carriers if clandestine entrants were found concealed in their vehicles. The Court of Appeal held by a majority that the legislative scheme was repugnant to Convention rights in that (a) it was to be regarded as criminal rather than civil and its features deprived the carriers of a fair trial, contrary to Article 6 (b) the scale and inflexibility of the penalty (a fixed penalty of £2000 per clandestine entrant and seizure of the vehicle for a potentially long period without compensation) were such as to impose an excessive burden upon them, and were thus disproportionate and in breach of Article 1 of the First Protocol. Simon Brown LJ at paragraph 47 of his judgment expressed the view, however, that it was the size of the fixed penalty, without possibility of mitigation, which impelled him to hold that the scheme was unfair, rather than the reversed burden of proof. To that extent accordingly the decision is not in favour of the appellant and, as the magistrate remarked, may be said to reinforce the respondent's case.

[15] *Sliney v London Borough of Havering* [2002] EWCA Crim 2558 also concerned the reversal of the onus of proof. The appellant was prosecuted under section 92 of the Trade Marks Act 1994 for unauthorised use of a trade mark. Under subsection (5) he could show by way of defence that he believed on reasonable grounds that the use of the sign was not an infringement of the registered trade mark. The Court of Appeal held that there were compelling reasons, having regard not only to the interests of the accused, but also to the public interest, why the imposition of the legal burden on the accused was necessary, justified and proportionate. Rose LJ said in the course of his judgment that there was a heavy burden on the prosecuting authorities to justify the burden, but that it had been discharged. It was defined within reasonable limits and it was proportionate, a proper balance being struck between the interests of the public and the interests of the accused. Again, this decision, turning on the burden of proof, is not directly material, but it serves as another example of the approach of the courts to proportionality in this field.

[16] The case which came closest in its subject matter to the present appeal was *Anklagemyndigheden v Hansen & S n I/S* (Case no C-326/88). The defendants were prosecuted under Danish legislation for infringing regulations concerning driving times and rest periods, which in domestic law were offences of strict liability. The matter was referred by the Vestre Landsret to the European Court of Justice under Article 177 of the EEC Treaty. The Court in its decision applied Community law, and in particular a regulation on the harmonisation of social legislation relating to road transport, but its approach is another helpful analogy. It held that the

legislation was not inconsistent with the regulation or with general principles of Community law. It stated at paragraph 19 of its judgment:

> "Furthermore, it is necessary to bear in mind, in the first place, that a system of strict liability may prompt the employer to organize the work of his employees in such a way as to ensure compliance with the regulation and, secondly, that road safety, which, according to the third and ninth recitals in the preamble to Regulation No 543/69, is one of the objectives of that regulation, is a matter of public interest which may justify the imposition of a fine on the employer for infringements committed by his employees and a system of strict criminal liability."

[17] Mr Larkin argued that the features of the present case made it disproportionate to impose strict liability for an offence the commission of which the vehicle owner could not always readily prevent. He submitted that only if the defence of establishing lack of negligence were permitted could it be made compatible with the requirements of the Convention. We are not prepared to accept this argument. Parliament has provided for a penalty for the offence of a fine on level 5, a maximum of £5000 – and the actual fine imposed was only £250 – knowing that on the basis of established case-law the offence of using would be classed as one of strict liability. It is entitled to the benefit of the "discretionary area of judgment" referred to by Lord Hope of Craighead in his opinion in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 327 at 380-1 and described by Lord Bingham of Cornhill in *Brown v Stott* [2001] 2 All ER 97 at 114 in the following terms:

> "Judicial recognition and assertion of the human rights defined in the convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies."

We consider that the public interest in ensuring that vehicle owners see that their vehicles are not overloaded is substantial. Under Article 57 there are specific defences available, and while the offence of suing is one of strict liability if none of those applies, the penalty is of reasonable amount. All of these factors were taken into account by the magistrate in reaching his

conclusion that the legislation was proportionate and was compliant with the requirements of the Convention. We consider that he was correct in so holding.

[18] We accordingly shall answer both questions in the affirmative and dismiss the appeal.