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Judgment: approved by the Court for handing down | *Delivered:* **07.04.03**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

W McCLENAGHAN

(Complainant) Appellant

and

COLIN WOODS

(Defendant) Respondent

Before: Carswell LCJ, Campbell LJ and Kerr J

CARSWELL LCJ

[1] This is an appeal by way of case stated from a decision of a resident magistrate Mr John Fyffe, sitting in Bangor Magistrates' Court on 16 August 2002, whereby he dismissed a complaint brought by the appellant, a chief inspector of police, against the respondent, a police officer, of driving a motor vehicle at a speed which exceeded the specified speed limit of 40 miles per hour, contrary to Article 43 of the Road Traffic Regulation (Northern Ireland) Order 1997 (the 1997 Order). The magistrate found that the respondent was entitled to rely on the exemption provided for by Article 42(1) of the 1997 Order for vehicles being used for police purposes in certain circumstances. The issue before this court was whether the magistrate was entitled in law to conclude that he was so entitled to rely on the exemption.

[2] It was not in dispute that the stretch of road concerned, the Holywood by-pass, was subject to a speed limit of 40 miles per hour, that it is an offence,

subject to the exemption to which we shall refer, to contravene that limit and that the respondent had driven a vehicle at 63 miles per hour at the material time. The exemption is contained in Article 42(1) of the 1997 Order, which provides:

> "**42.**-(1) No enactment imposing a speed limit on motor vehicles shall apply to any vehicle on an occasion when it is being used for fire brigade, ambulance, police, military or customs purposes, if compliance with that provision would be likely to hinder the use of the vehicle on that occasion for any of those purposes."

[3] **T**he vehicle was at the material time being driven by the respondent on close protection duty. The magistrate found at paragraph 3 of the case stated:

> "3. The defendant gave evidence and from his evidence I found as fact:
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> a) The defendant was on Close Protection Duty at the time of detection escorting a VIP passenger.
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> b) As part of his training for Close Protection Duty consisted of driving at speeds different from that of surrounding traffic so better to detect whether or not his vehicle was being tailed by other traffic.
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> c) At the time of detection he was exercising his discretion in the manner of his training for the better protection of his passenger."

He set out his conclusion in paragraph 5 of the case:

> "5. I held that at the time of the detection the vehicle was being used for police purposes and to have driven in compliance with the speed limit in force at the time would on the balance of probability be likely to hinder the use of the vehicle on that occasion in the purposes of close protection duty and dismissed the summons accordingly."

The question posed for the opinion of this court was as follows:

> "Whether I was correct in law to hold that the defendant, a police officer driving a vehicle on close protection duties, was entitled to rely on the exemption provided by Article 42 of the Road Traffic Regulation (NI) Order 1997 from the requirement to comply with any enactment imposing a speed limit on motor vehicles on the grounds only that he had been trained always to drive faster than the rest of the traffic as in this way he could tell if his car was being following and compliance with the provision would therefore have been likely to hinder the use of the vehicle on that occasion for police purposes?"

[4] It was submitted on behalf of the appellant that the magistrate had failed to consider the material issues in a number of respects:

(a) He had not adverted to the burden and standard of proof.

(b) He had accepted a blanket justification for exceeding the speed limit, consisting of the respondent's training, without considering such matters as the circumstances of the individual case, the need in those circumstances to exceed the limit in the interests of the safety of the occupants of the vehicle and the respondent's state of mind at the material time.

[5] The magistrate did not advert expressly to the question of the burden and standard of proof, though it appears likely from his findings which we have quoted that having satisfied himself as to the matters which he set out in paragraph 3 of the case he regarded the respondent as having had an obligation to establish them. We shall, however, defer further consideration of this part of the case until we reach conclusions on the second issue, since the extent of the exemption from liability may have a bearing on determination of the first issue.

[6] It was not in dispute between the parties that the vehicle was being used at the time for a police purpose. Mr McCloskey QC submitted, however, on behalf of the appellant that for the exemption contained in Article 42(1) to apply it had to be established that compliance with the speed limit would be likely to hinder the use of the vehicle on that occasion for that police purpose. In some cases that might be self-evident from the facts of the case, eg if the vehicle was being used for the pursuit of fleeing criminals or if a fire engine was hastening to a fire or an ambulance rushing an emergency case to hospital. In the case of a vehicle of the Close Protection Unit conveying a

passenger, however, it was not enough to show that the driver had received general training to drive in the manner set out in paragraph 3 of the case. In order to show that compliance with the speed limit would hinder the use of the vehicle for police purposes the defendant would have to prove some facts which supported his concern for the safety of the occupants and established a need to exceed the limit in order to allay that concern. Mr Larkin QC for the respondent submitted that the magistrate was entitled to find that the respondent was exercising in good faith his discretion to exceed the speed limit in the interests of the security of the occupants of the vehicle and his conclusion should not be upset. Mr McCloskey QC riposted by contending that in order to provide a proper foundation for such a conclusion the magistrate had to find that specific facts were established which justified the driver in the circumstances of the case in regarding it as necessary to exceed the limit.

[7] We agree with the appellant's general proposition that it is necessary to consider the facts and circumstances of each case. This approach is consistent with that adopted by the Divisional Court in *Aitken v Yarwood* [1964] 2 All ER 537, in which the court examined the facts proved in order to determine whether the vehicle was being used at the material time for police purposes. CPU drivers may quite properly be trained to be watchful for vehicles whose occupants may pose a threat and to drive at a speed different from the traffic flow in order to detect whether any such vehicle may be trailing or shadowing the CPU car. We do not consider that this instruction can be understood and applied in such a way as to give a driver carte blanche to exceed the speed limit on all roads on all occasions. In our opinion it is necessary to conduct some examination into the circumstances. To take one extreme, if the police vehicle is being driven on a quiet road in a safe area at a time of day or night when there is no traffic in its vicinity, there would appear to be no sufficient reason on this ground to drive at a speed over the ordinary limits. There are no doubt situations at the other extreme where it is strongly advisable that the driver puts into effect this training instruction in order to ascertain whether any vehicle in the vicinity may represent a threat. In between the extremes, the driver must in our view apply the precepts of his training to the conditions in which he is driving and exercise an informed discretion as to the speed at which he should drive. We cannot and do not intend to be prescriptive about the situations in which an officer may feel it advisable to exceed the speed limit. Each case will depend on its own facts and due regard will be given by the courts to the way in which an officer exercises his discretion in applying his training to the performance of his duty on the occasion in question. In some cases it may be relevant that the driver held an honest, even if mistaken, belief concerning the existence of facts or circumstances which might have justified his exceeding the speed limit.

[8] In the present case the magistrate accepted the respondent's evidence that part of his training for close protection duty consisted of driving at

speeds different from that of surrounding traffic in order to detect whether his vehicle was being tailed by other traffic and that he exercised his discretion in the manner of his training for the better protection of his passenger, the principal who he was escorting. It was necessary, however, to provide a factual link between these averments, so that the magistrate could decide what justification the respondent had for so exercising his discretion. In the absence of such factual connection neither the magistrate nor we in this court could decide whether the exemption contained in Article 42(1) was applicable. It is not in our opinion possible on the facts set out in the case stated to ascertain properly whether compliance with the speed limit would have been likely to hinder the use of the vehicle for police purposes, as the magistrate held. For this reason we consider that the magistrate's decision cannot stand.

[9] We return then to the question of the burden and standard of proof, matters which were not the subject of a question in the case stated but which were the subject of argument in the appeal and which require resolution for decision of these cases. Our starting point has to be Article 124 of the Magistrates' Courts (Northern Ireland) Order 1981, which provides:

> "**124.**-(1) When the defendant to a complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, the burden of proving such exception, exemption, proviso, excuse or qualification shall be on him.
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> (2) This Article shall have effect whether the exception, exemption, proviso, excuse or qualification relied on –
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> (a) accompanies or does not accompany the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded; or
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> (b) is or is not expressly specified or negatived in the complaint."

This Article makes it clear that the persuasive, and not merely the evidential burden, of proof shifts on to the defendant where he is relying on an exempting provision, which Article 42(1) plainly is. In accordance with ordinary principle the standard is that of proof on the balance of probabilities. It is not necessary in the present case to consider the construction of the statute in order to determine whether the burden shifts on to the defendant, as the court had to do in such cases as *R v Edwards* [1975] QB 27 and *R v Hunt*

[1987] AC 352, let alone to examine the arcane distinction between provisos and exceptions or the extent to which the facts are within the knowledge of the defendant (although they clearly are in a case of this type).

[10] It is, however, necessary to consider whether such an imposition of the burden of proof is in contravention of the respondent's Convention rights contained in Article 6(2) of the European Convention on Human Rights, which provides:

> "2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The European Court of Human Rights gave guidance in *Salabiaku v France* (1988) 13 EHRR 379 on the compatibility with Article 6(2) of such matters as presumptions, with which may be classed the reversal of the burden of proof. It stated at paragraph 28 of its judgment:

> "Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law … 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."

As Lord Hope of Craighead observed in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at page 384F, a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual, bearing in mind the "discretionary area of judgment" within which the judiciary will defer, on democratic grounds, to the considered opinion of Parliament: *ibid* at page 381.

[11] In the present case the public interest requires, on the one hand, that speeds be controlled in order to prevent driving at excessive speed and, on the other, that police are enabled to carry out their duties if their performance requires officers to exceed the applicable limits. The individual officer charged with exceeding the limit will generally have the best knowledge of the facts which may give rise to a defence under Article 42(1) of the Order and in some cases he may be the only person who can establish those facts. In these circumstances it is in our view proportionate to place on him the burden of establishing the defence based on the exemption contained in Article 42(1).

We therefore do not consider that that constitutes a breach of Article 6 of the Convention.

[12] For the reasons which we have given we consider that there are grounds for quashing the decision of the magistrate, but we propose instead to exercise the power conferred on us by section 38(1)(*f*) of the Judicature (Northern Ireland) Act 1978. We shall therefore allow the appeal, but shall not answer the question in the form in which it is posed. We shall remit the case to the magistrates' court, to be heard by a different magistrate, who is to reconsider the complaint and reach a decision in accordance with the ruling of the court.