Neutral Citation No. [2010] NIMag 1 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **05/02/10**
*(subject to editorial corrections)**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

Petty Sessions District of East Tyrone

Complainant

AND

County Court Division of Fermanagh and Tyrone

JUSTINAS SEDBARAS

Defendant

Meehan DJ (MC)

1. The Defendant stands charged with the following offences, on foot of a complaint dated 23rd December 2008;

that you

1 on the 2nd day of November 2008, in the County Court for the Division of Fermanagh & [South] Tyrone, used a motor vehicle, namely, a Vauxhall Astra car, on a road or other public place, namely, Manse Road Dungannon, without there being in force in relation to the user of the said motor vehicle by you such a Policy of Insurance or such a Security in respect of third-party risks as complied with the requirements of Part VIII of the Road Traffic (Northern Ireland) Order 1981 contrary to Article 90(4) of the Road Traffic (Northern Ireland) Order 1981.

2 on 2nd day of November 2008, in the County Court Division of Fermanagh and [South] Tyrone, were in charge of a motor vehicle on a road, namely Manse Road Dungannon after

consuming so much alcohol that the proportion of it in your breath exceeded the prescribed limit, contrary to Article 16(1)(b) of the Road Traffic (Northern Ireland) Order 1995.

2. I heard the prosecution evidence in this matter on 30th October last. The Prosecution case is that on 2nd November 2008 at approximately 2.50 am Police received a report of a crashed car at Manse Road, Dungannon. Upon arrival in the vicinity, Police encountered 2 males walking toward them and carrying boxes of beer, from the direction of the car, which had crashed into a hedge. One of the Constables saw the Defendant, Mr. Sedbaras, throw an object into the hedge and another thereupon searched the hedge and grass and found a car key, which he passed to a third Constable. He established that the key fitted the car. Enquiries established that Mr. Sedbaras was the registered keeper of the vehicle; indeed, he was found to have the Log Book on him at the time. The Police did not attempt to start the engine. This was considered too dangerous, in case of fuel leak or the like. On the other hand, the Police view was that the car did not look badly damaged and ought to be have been capable of being driven, once pulled out of the hedge. That would require it to be towed out; the car was completely off the road, lying tilted into the hedge, all 4 wheels being in the hedgerow. The Defendant was suspected of being under the influence of drink and was subsequently found, on the evidential test at the Police Station, to be over the legal limit. He admitted to Police that he was not insured to drive the vehicle, but said that it was another person, a third person, who had been driving.

3. At the conclusion of the Prosecution case, prosecuting counsel did not accept my invitation to amend the second charge to that of actual drink driving (rather than merely that of being in charge), and, indeed, applied to withdraw that of using a vehicle without Insurance, on the basis that the evidence was insufficient to show that Mr. Sedbaras had been driving the vehicle at the material time.

4. In these circumstances, indicating I felt it time to clarify the matter, I refused leave to withdraw the charge of No Insurance and invited written submissions from each side on my disposition to substitute a charge of actual drink driving for the lesser offence then before the court. I am grateful to both counsel for those submissions and for the copies of various Judgments appended to each.

5. In its written submissions, the Prosecution, having reconsidered the matter, now contend that the law in Northern Ireland is as enunciated

in the Irish case of DPP v Cormack [1999] 1 ILRM 398 and make application to amend the relevant charge to one of driving a motor vehicle with excess alcohol in breath, contrary to Article 16(1)(a) of the 1995 Order, maintaining that there is in law is a case to answer in this respect. No mention is made in the written submissions to the no insurance charge. This may well be because the application to withdraw it in court had been refused and no further submissions had been invited. However, I take it that the Prosecution would now contend that there is also a case to answer in this respect.

6. Counsel for the Defence reiterates in his written submissions that no issue is taken with much of the prosecution evidence. The defence would be that the Defendant was not the driver of the car prior to the accident and that it would have been impossible to drive it from the scene.

7. By the same token, counsel accepts that the court has a discretion to amend the charge in the manner intimated, but contends that it is contrary to public interest that I should do so. The Prosecution "… have never made the case that the defendant was driving the car". Prosecuting counsel declined to amend the charge in response to an invitation from the bench at the outset and repeated the same position before closing its case. The prosecution witnesses had been cross-examined on that basis. Had the amendment been made at the outset, the Defendant would have then known the case being made against him and could have made his defence accordingly, so that there would have been no prejudice to him. It is further contended that if the prosecution had not made the application to amend in the middle of a defence application of no case to answer, the latter application could have proceeded, so that there would be real prejudice - "very substantial prejudice" - in permitting the proposed amendment. The Defendant had been open and transparent throughout; the amendment could have been made at an early stage without prejudicing him and there is a public interest in such a transparent Defendant being able to make an application of no case to the charge for which he had received a Summons and after facing all the PPS evidence.

8. The relevant prosecution evidence includes the following;

    (a) The Defendant was the owner of the car and its registered keeper.
    (b) The Defendant had been travelling in the car at the time of the accident.

(c) The Defendant had been found at the scene with one other man.
(d) In interview, the Defendant had stated, through an interpreter, that the car had been driven by a black man, who had fled the scene before the Police arrived.
(e) The Defendant, when encountered by the Police, was in possession of the car keys.
(f) The Defendant sought to throw those keys away surreptitiously while the Police were talking to him.
(g) The Defendant had alcohol in his breath in excess of the prescribed limit at the material time.

9. Article 16 of the Road Traffic (Northern Ireland) Order 1995 provides as follows;

> *Driving, or being in charge of, a motor vehicle with alcohol concentration above prescribed limit*
>
> 16. - (1) If a person-
>
> (a) drives or attempts to drive a motor vehicle on a road or other public place, or
>
> (b) is in charge of a motor vehicle on a road or other public place,
>
> after consuming so much alcohol that the proportion of it in his breath, blood or urine exceed the prescribed limit he is guilty of an offence.
>
> (2) It is a defence for a person charged with an offence under paragraph (1)(b) to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.
>
> (3) The court may, in determining whether there was such a likelihood as is mentioned in paragraph (2), disregard any injury to him and any damage to the vehicle.

10. Defence counsel intimates in his written submissions that he would be able to establish no case if the charge remained one under Article 16(1)(b) (in charge). The basis of such a contention is nowhere set out in those submissions. It may rest upon a contention that the prosecution have failed to adduce any evidence that when the Police arrived the Defendant's car was found to be "on a road or other public place." It might open an issue as to whether the Prosecution have presented any evidence to show that the ditch in which the car had come to rest was "a public place", within the meaning of the road traffic legislation. That would raise interesting issues for decision. I

have not heard the Defence argument, nor, in particular, a response from the Prosecution, so I am not going to form a view, either way.

11. The real issue, so far as assessing prejudice be concerned, is whether, had the charge been amended at the outset of the case, the defence would have conducted the case any differently. Counsel for the Defendant does make that assertion in his written submissions, but does not elaborate. I simply do not see how the cross-examination would have been conducted any differently. Throughout the cross-examination, it was apparent that the Defendant, if he entered the witness box to answer the charges, would contend that he was not the driver of the car on the night in question and the cross-examination of the Prosecution witnesses was on that basis. I do not see how the cross-examination would have been materially different, if the allegation had been that he was the driver of the vehicle, rather than that he was the person in charge of it. It might make a difference to the evidence which the Defendant may call, if required to answer the Prosecution case – I do not know, but that is a different matter and remains one entirely for the Defendant. I do not consider that the Defendant would be prejudiced in his defence by the proposed amendment.

12. Article 155 of The Magistrates' Courts (Northern Ireland) Order 1981 provides;

    155. A magistrates' court may during any proceedings upon such terms as it thinks fit, make any amendment in any complaint, summons, warrant, process, notice of application or appeal or other document which is necessary for the purpose of raising the real question at issue and arriving at a just decision.

13. The public interest requires that the guilty be convicted and the innocent acquitted. As has been observed elsewhere, it is no necessary part of a fair trial process that guilty Defendants get off on some technicality.

14. A Divisional Court in the case of Newcastle-Upon-Tyne Justices ex parte John Bryce (Contractors) Ltd. [1976] 1 WLR 517 ruled that a Magistrates' Court may allow the substitution of a different charge, notwithstanding that the Defendant might have a defence to the original charge, provided the evidence grounding the proposed substitution is apparent from the tendered documents, is based on substantially the same facts, the Prosecution not having sought to

depart from those facts alleged and provided that the Defence has not been misled or taken by surprise.

15. In that case, it is notable that there was most likely a complete defence to the original charge and that it was precisely because there was that defence, precisely because the Prosecution had failed to lay alternative charges to include the correct one for the facts adduced that the Divisional Court, per Lord Widgery C.J. at least, felt that the magistrates "… could hardly have reasonably come to any conclusion other than that the amendment here should be permitted."

16 In the case of Ende v Cassidy [1964] Crim LR 565, the Defendant was charged with obstructing the highway by parking his vehicle on it. The Prosecution evidence was that the car was thus parked outside the block of flats where the Defendant lived, but the justices accepted the Defence submission that the Prosecution had failed to prove that he had parked it there. The Divisional Court (Lord Parker C.J., Widgery and John Stephenson JJ.) held that there was a prima facie case to answer. "Common sense" made it a strong case that it was the Defendant and not somebody else who had caused the car to obstruct the road.

17 In Scruby v Beskeen [1980] RTR 420, the Prosecution evidence of careless driving against the Defendant was limited to the account of the movements of a blue Range Rover at a certain place and time. The Range Rover had been driven on after the incident. Police enquiries led to the Defendant, who admitted driving his own blue Range Rover in the vicinity on the day and around the time in question, but denied being involved in that incident. Having failed in an application of no case, he offered no evidence, was convicted of careless driving and appealed by way of case stated. The Divisional Court (Roskill LJ and Caulfield J) ruled that, on foot of the Defendant's admission, the question was whether the justices were prepared to draw the "irresistible inference" that he must have been the driver of the Range Rover involved. There was some evidence from which that inference was to be drawn. In such circumstances, where the Defendant then does not give evidence, it is a matter for the tribunal of fact whether to draw those inferences. That there was admissible evidence was "beyond question".

18 In Henderson v Hamilton [1995] SLT 986 the Defendant faced a charge of driving while disqualified and using the vehicle without insurance. The Police had come upon him lying across the passenger seat of a van

which was parked on a road. The keys were found under the passenger seat. When the Police returned to the scene 15 minutes later they found that the engine was warm. There was no-one at the van and it was as they had left it. The Sheriff had ruled that there was a case to answer and the Defendant then offered no evidence. On appeal against his conviction, the High Court of Justiciary ruled that the Sheriff was entitled to draw the inference that the Defendant had driven the van to the locus, because all the established facts were consistent with the most probable explanation.

19 In DPP v Cormack [1999] IRRM 398, the Defendant was charged with the offence, in the Republic of Ireland, of driving in circumstances where there would have been a statutory excess of alcohol within 3 hours of so driving. The Gardai had come upon the Defendant's car in a ditch. The Defendant admitted at the scene that he had been driving the car and disclosed that the accident had happened 10 minutes earlier. The car was blocking the road and the keys were still in the ignition. The man showed all the usual signs of being drunk and was later found to have been three and a half times over the statutory limit. Nonetheless, the District Judge ruled that the statements of a drunk man were inadmissible and that there was otherwise insufficient evidence that he had been the driver of the car. The High Court had agreed. Nonetheless, the Supreme Court of Ireland ruled that the admission of a man, drunk or sober, was admissible. In any event, even without such an admission, there was sufficient evidence to call for an answer from the accused.

20 Bearing in mind all the case law cited before me, I find that the Prosecution evidence in the case, as adumbrated at paragraph 8, above, would permit an inference that the Defendant was the driver of the vehicle on the date and at the place in question, when it crashed into the hedge, should no further evidence be adduced and should I decide to draw such an inference. I therefore rule that there is a case to answer on the amended charge of drink driving and using the vehicle on a road or other public place without insurance.

21 If I may make a more general observation before concluding, the fact situation which has arisen in the instant case, whereby Police come upon a person in or near a vehicle, where that person proves to be under the influence of drink, is not unusual. Heretofore, the practice of the Public Prosecution Service, as I have observed it, seems to be to limit the Complaint to the lesser offence of being in charge of the vehicle whilst under the influence, unless a witness can be found who

actually saw the Defendant driving. This is to disregard the evidential process of drawing inferences. In cases like this, the better course for the Prosecution is to lay alternative charges, one of being in charge, one of actual drink driving, leaving it to the tribunal of fact to decide, on the evidence, between the two.

Dated this 5th day of February 2010

Signed: ……..
Judge John I. Meehan
District Judge (Magistrates' Court)