ROYAL COURT

16th December, 1988

Before: The Bailiff and
Jurats Baker & Gruchy

Her Majesty's Attorney General
- v -
Nigel Donnelly

Appeal against conviction in respect of one infraction of Article 16 (amended) of the Road Traffic (Jersey) Law, 1956.

Advocate S.C.K. Pallot for the Crown
Advocate P.C. Sinel for the Appellant.

JUDGMENT

BAILIFF: Mr. Donnelly, the appellant in this case, appealed against his conviction by the learnèd Relief Magistrate on the 20th September, 1988, of an infraction of Article 16 of the Road Traffic (Jersey) Law, 1956, that is to say driving a motor vehicle on the road in St. Brelade at 1800 hours on Sunday the 26th June, 1988, whilst unfit through drink or drugs.

The case raises an interesting point. The important facts are that Mr. Donnelly was seen by Constable's Officer Williams in company with some people who were behaving in a way that gave rise to suspicion on the part of Constable's Officer Williams. It is perfectly true that the driving of the appellant in no way drew Constable's Officer Williams' attention. It was really the behaviour of the people to whom he had given a lift and in particular of one of the men, who was urinating in the road, which drew the attention of Mr. Williams, and he reported the matter to the police. After that there is some conflict of evidence as to timing. The first policeman, P.C. Shingles, stated that he received the call and arrived at Mr. Donnelly's house in Dongola Road, (and I think we can take due knowledge of the fact that it is two or three minutes away from "The Robin Hood" public house) where he found Mr. Donnelly's car badly parked, but that was accounted for by the evidence of Mr. Donnelly about the difficulty of parking there. He found the radio was still on and Mr. Donnelly later gave an explanation that it was the kind of radio which, if you turned it off, would occasionally turn itself on again. He also found the car unlocked, and Mr. Donnelly gave evidence that he did not lock his car; and we do not think the question of locking or unlocking the car is of great significance: What was more important, he found the engine very warm. He then ascertained that Mr. Donnelly had gone to the "Robin Hood" public house. There was a conflict of timing. He stated that he found Mr. Donnelly in the public house and he was told by him that he had drunk half a pint of beer and the officer saw the pint glass half empty in front of him. In the officer's opinion Mr. Donnelly was under the influence. Mr. Donnelly said that he had been in the "Robin Hood" for some five to ten minutes. The policeman was not told of what came to light later in the course of the trial, when Mr. Donnelly had stated that on arriving back home, he had helped himself to some whisky from a bottle which he had then thrown away into a skip which was near his house, and that in the pub he had had two "Bacardis". The evidence in regard to the "Bacardis" was supported by the defence witness, Mr. Ramsey, who was an employee of Mr. Donnelly. There was some discussion about the effect of stale alcohol but we do not think that is particularly relevant. Acting Sergeant Hairon gave evidence that at 1925 hours, Constable Shingles had told him that there was somebody in the station suspected of being "D.I.C." and that Acting Sergeant Hairon saw the accused who told him that he had drunk quite a lot. He was unable to tell him when he had actually

driven the car. D.C. Attwood had been on duty at St. Brelade at 1800 hours and he arrived at Police Headquarters, according to his evidence, at 1930 hours and he commenced interviewing the accused at 2000 hours. Samples were taken from the accused of his blood and urine and the Analyst's report was received in evidence. Advocate Sinel now says the report was inadmissible; but in fact it was received in evidence. The only agreement he made with the prosecution was that he would not require the Analyst to be heard in evidence. If that was so, then there is an inference that he did not object to the report's going in, and it cannot be said that it is now inadmissible. The point was not argued before the learnèd Relief Magistrate; it was accepted as being put in; neither is the accuracy of the report in dispute. Therefore it was admitted. I will come to the question of whether this sort of evidence is admissible in this case in a moment. The report shows an alcohol content of 230 milligrammes per 100 millilitres of blood and 284 milligrammes per 100 millilitres of urine which are very high figures.

That, in basic outline, are the facts of the case. There are a number of additional points to which Advocate Pallot drew our attention and Advocate Sinel likewise, but we do not think it necessary to go into any further detail.

The point at issue is whether the learnèd Relief Magistrate was entitled (the figures themselves in the report not being in dispute) to receive such figures as evidence at all, and whether the Crown had succeeded in discharging the burden of proof that at the relevant time i.e. 6 o'clock, in the evening in St. Brelade the accused's condition was such that he was committing an infraction of Article 16 of the Road Traffic Law. According to the accused he had drunk some three pints in the course of the afternoon, plus the whisky and Bacardi. Advocate Sinel said that even if the Analyst's evidence were accepted in the absence of more detail from the Analyst as to the effect and the time of the breakdown of the alcohol etc., the type of scientific evidence which the Analyst usually gives, the Magistrate was not entitled to have regard to those figures. It follows that if he were not entitled to have regard to those figures, there was not very much else upon which the accused could be convicted and therefore he was entitled to be discharged.

In support of his submission on this particular point Mr. Sinel cited (and we agree with both counsel that these cases were in fact relevant) the case of R. -v- Richards (1975) 1 W.L.R. 647. There the defendant was seen by a witness at the wheel of a car which had been involved in an accident (and I am reading from the headnote). When the police constable arrived the defendant had left the car, but he returned some twenty minutes later and told the constable that he had been home and had had one drink but had not been drinking before the accident. He subsequently provided a laboratory test specimen for analysis which showed 172 milligrammes of alcohol per 100 millilitres of blood. He was charged with two offences: first, with having driven over the blood alcohol level contrary to Section 6/1 of the Road Traffic Act (1972) (of which we do not have an equivalent here) and secondly with being unfit to drive through drink, contrary to Section 5/1 of the 1972 Act which is in similar terms to our own legislation. In that case of course Mr. Sinel pointed out there was some direct evidence as to what he had been doing; he was approached by a neighbour to whom he was offensive and he was found slumped over the wheel of a car. In that particular case the relevant passage is to be found commencing at page 135:

> "Before 1962 (and this is to do with blood tests of course) a motorist had to be persuaded to submit to such tests. If he refused as the law then stood no adverse inference could be drawn from his refusal".
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> And then the learned Judge goes on to cite the passing of Section 2 of the Act of 1962 which allowed inferences to be drawn. He goes on:
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> "The wording of Section 2 of the Act of 1962 is substantially the same as the wording of Section 7/1 of the Act of 1972". (And the Act of course of 1972 is the Act under which he was charged for having been over the actual statutory limit). He goes on as follows: "The minor differences which occur are due to the fact that under the Act of 1972 a procedure for measuring breath has now been admitted as part of the statutory procedure so it follows then that from 1972 onwards scientific evidence of the kind which was given in the present case became admissible under the statute; it has always been admissible at common law. Later in 1962 in R. -v- Somers

the admissibility of the kind of evidence which is now being considered in the present case. It adjudged that evidence of that kind was properly admissible".

On page 137 referring to the actual Section 5 which is our Article:

"It is important to look at Section 5 of the Act of 1974 because that Section embraces more than one offence. Sub-section 1 reproduces Section 6/1 of the Act of 1960, sub-section 2 also reproduces another part of the old law, Section 6/2 of the Act of 1960 as amended by Section 32/1 of and paragraph 1 of schedule 1 of the Road Safety Act (1967) namely by providing that a person who when in charge of a motor vehicle which is on the road or other public place (and he interposes here) - but not driving a vehicle - is unfit to drive through drink or drugs shall be guilty of an offence. Dealing with an offence under Section 5 the Court has to consider fitness to drive. Fitness to drive may depend upon all sorts of circumstances, the amount of alcohol shall make one man unfit to drive does not necessarily make another man unfit. That is a fact of life".

On the authority of that case Advocate Sinel has submitted that the learnèd Relief Magistrate was wrong in law to admit the evidence at all of the Analyst. I cannot find anything in that judgment which would support that submission. In my opinion the Court has always admitted evidence from the Official Analyst in common law on many occasions and I cannot find it improper to allow it now. However, there was a further case which would be perhaps more in point than R. -v- Richards which was decided on slightly different facts and really is based on a slightly different section of the English Road Traffic legislation and that is the case of R. -v- Durrant (1969) 3 All E.R. Here the man had an accident he then went and had a double brandy and it showed on analysis of his blood sample that he had 126 milligrammes of alcohol per 100 millilitres of blood against the prescribed limit of 80. There the appeal was allowed and the conviction was quashed. At page 1358 Parker L.J., says this:

"So the position is simple, the case that he made at the trial was that the only alcohol that he had consumed prior to the accident was at lunchtime that day when he had two pints of beer and a gin and tonic. That was some five hours before he was driving. But he said that having parked his car he was so shaken (and he did suffer minor injuries in the accident) that he went into a public house and had a double brandy. It was in those circumstances it was said at the trial that the analysis of a blood test was false in that it did not disclose the amount of alcohol in the blood at the time of driving but only at the time the test was made".

This was the very point made by Advocate Sinel.

Advocate Pallot has said that he distinguishes between the facts of this case with the very high blood alcohol figures and the facts of that case where the blood alcohol figures were considerably less. He put it in this way that the blood alcohol figures of Mr. Donnelly were "dramatically higher", and therefore the learnèd Relief Magistrate was entitled to convict by asking himself whether he was satisfied that the amount of alcohol which had been consumed after the driving had been proved, was insufficient to affect the figures of the Official Analyst's report.

The Court has decided that the learnèd Relief Magistrate was entitled to come to such a conclusion, if he wished to disbelieve the evidence tendered by the defence. On the evidence of the police, the learnèd Relief Magistrate was satisfied that only half a pint had been drunk by the accused after he had been driving. If the Relief Magistrate wanted to accept that evidence, we cannot say that he was wrong to do so. If he did accept that evidence, and it would appear that he did from his judgment, then he was entitled to have regard to the fact that the amount of alchohol which had been consumed after the accident was negligible and thus, this case could be distinguished from that of R. -v- Durrant and the Relief Magistrate was not prevented from taking this into account in accordance with the decision in R. -v- Richards. That being so we have come to the conclusion that the appellant was properly convicted and the appeal is dismissed.