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ROYAL COURT
(Samedi Division)

187A.

25th September, 1995

Before: The Deputy Bailiff, and
Jurats Blampied and Vibert

Police Court Appeal - (The Relief Magistrate)

Stafford William Freeborn

- v -

The Attorney General

Appeal against conviction on 7th July, 1995, following a not guilty plea to:

1 count of failing without reasonable excuse to provide a specimen of breath when required to do so, contravening the Road Traffic (Jersey) Law, 1956, as amended: Article 16(B)(4).

Appeal allowed.

Advocate S. Slater for the Appellant.
S.C.K. Pallot, Esq., Crown Advocate.

JUDGMENT

THE DEPUTY BAILIFF: The facts of the case are perfectly clear. At about 23.20 hours on Thursday, 2nd February, the appellant had been drinking at a friend's home.

5 Driving home and turning off the Rue des Genêts into La Route de Noirmont he turned in front of a police vehicle coming up the hill.

10 The turn alerted the police officers and they followed the car down La Route de Noirmont until they put the blue light on somewhere near the top of Ouaisné Hill, but the appellant's car was actually stopped near the bottom of Ouaisné Hill

The appellant got out of the car; the officers smelt alcohol on his breath.

5 The appeal really falls into two heads. First, Mr. Slater asked whether this was a random test and on that basis s.163 of the English Road Traffic Act, 1988, reads:

10 *"A person driving a motor vehicle on a road must stop the vehicle on being required to do so by a constable in uniform".*

15 This is very similar to Article 26 of the Road Traffic (Jersey) Law, 1956, which reads:

20 *"Any person driving a vehicle on a road shall stop the vehicle on being so required by a police or traffic officer, and if he fails to do so shall be liable to a fine not exceeding [five hundred pounds].*

25 The fact that the section and the Article are so similar leads us to refer to a passage in Blackstone's Criminal Practice (1995 Ed'n): pp.803-805, at p.804 which reads:

30 *"The power of the police to stop a vehicle is now contained in the Road Traffic Act 1988, s.163. There is nothing to prevent random stopping, but the law requires one of the conditions in s.6(1) or (2) to be complied with before a breath test is administered. The suspicion that a motorist has alcohol in his body does not, therefore, have to arise before the vehicle has been stopped by the police but can be formed at any stage (Patterson v. Charlton [1986] RTR 18). In Chief Constable of Gwent v. Dash [1986] RTR 41, police were stopping vehicles at random in order to apprehend drivers who might be suspected of having excess alcohol in their bodies. Macpherson, J, giving the judgment of the Divisional Court, said (at pp.46-7, emphasis added):*

35 *... there is no restriction upon the stopping of motorists by a policeman in the execution of his duty and the subsequent requirement for a breath test should the policeman then and there genuinely suspect the ingestion of alcohol. It may be said by some to be bad luck that such a situation arises but it is not unlawful provided the officer is in uniform and acts without oppression, or caprice, or some false pretence or proved 'malpractice'."*

40 We are quite satisfied that this was not a case where there was any form of impropriety. The original manoeuvre alerted the police officers and that was sufficient cause, if any were

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required, to cause the vehicle driven by the appellant to be stopped.

5 However, the second point is, of course, of much more matter. Article 16(b) sub-section 4 of the Road Traffic (Jersey) Law, 1956, states:

10 "A person who without reasonable excuse fails to provide a specimen of breath when required to do so in pursuance of this Article shall be guilty of an offence and liable to a fine not exceeding £500".

15 The appellant had been drinking; he admitted to it. Two or three times he refused the police officers a breath test. Very shortly afterwards he changed his mind and said "O.K. I will provide". Driven to Police Headquarters he was shown on the intoximeter to have been within the statutory limitation.

20 Mr. Pallot relies heavily on mens rea. Let us just for a moment see what Police Constable Andrieux said in his evidence before the Police Court Magistrate:

25 WITNESS: "I explained to him our reason for stopping him and the fact that I could smell intoxicants and requested a breath test, believing he was under the influence of alcohol".

JUDGE SHORT: "That's understood, thank you".

WITNESS: "I then asked him again - he again refused".

JUDGE SHORT: "In any special terms?"

30 WITNESS: "He just said no".

JUDGE SHORT: "No".

35 WITNESS: "It was at this stage, after he had refused twice, that I pointed out to him that it was an actual offence to refuse and he could be arrested. Fair enough. I then again asked him if he was willing to provide a sample and he again refused. At this stage he was becoming quite irate and agitated. At approximately 23.30 hours I then arrested Mr. Freeborn for failing to provide a breath sample to which he replied "O.K." On getting into the vehicle - the rear of the police vehicle - he then said "O.K., I will provide a sample".

40 JUDGE SHORT: "Right, it was about how long after the last refusal?"

45 WITNESS: "A matter of 10 - 20 seconds after. We were near ... we weren't far from the vehicle so it was in the process of taking him to our vehicle. It wasn't very long".

JUDGE SHORT: "I see, but the previous conversation had lasted a little longer than 10 or 20 seconds?"

50 WITNESS: "Yes, it had".

The Article that we have referred to and the terms of it are drafted in the ordinary language of ordinary people. That is: a person who without reasonable excuse fails to provide a specimen of breath when required to do so shall be guilty of an offence. But ordinary language is, on the face of it, imprecise and flexible and in our view it must always be interpreted in accordance with common sense.

In the recent case of Smyth v. DPP (18th May, 1995) Unreported Judgment of the Court of Appeal of England, the accused asked if he could change his mind and the Judge in that case said this:

"I doubt if it is helpful to ask the question whether the appellant's reply was equivocal, presumably by way of analogy with an equivocal plea. The latter most commonly arises when the defendant says something on arraignment like, "Guilty, but it was all an accident". Had the appellant been a defendant in the dock who, when asked how he pleaded, replied "Guilty", and then five seconds later said "Can I change my plea, I want to plead not guilty?", I cannot imagine it being held that he was not entitled to change his plea".

And again in that Judgment we read:

"The Justices appear to have had regard only to the prosecutor's second contention in their finding, which I shall repeat:

"a) the appellant had refused to provide the specimens of breath for analysis when he said 'No' in answer to their request.

b) the refusal was clear and unequivocal.

c) in those circumstances, we did not need to consider whether or not the appellant changed his mind."

This must mean that the Justices ignored the appellant's words "Can I change my mind?" and "I want to change my mind", which followed as little as five seconds after his "No", and must be relevant words and conduct to be taken into account. I do not therefore consider that the Justices, as the tribunal of fact, ever did apply their minds to all the relevant words and conduct of the appellant in deciding whether he had refused to supply a specimen".

Mr. Pallot said that, in effect, in Smyth the appellant never took a firm view. We do not follow that argument on our interpretation of the case.

5 In this present case the appellant, within 30 seconds, had
changed his mind. Mr. Pallot said that the consequences
thereafter are irrelevant because he had made a firm decision to
refuse and as a matter of policy the police were perfectly
entitled to take whatever actions they took thereafter. That may
10 well be within the concept of common sense. The appellant was in
a temper; he admitted to it; he said he was very angry; he
behaved, in our view, unreasonably and irrationally. But in our
judgment we cannot see that to change his mind within 30 seconds
of being told that he was going to be arrested for failing to give
15 a breath test is something which can be held against him in the
way that it has. Therefore in the peculiar circumstances of this
very unusual case we are prepared to allow the appeal. Mr. Salter
shall have his legal aid costs.

Authorities

Smyth v. DPP (18th May, 1995) Unreported Judgment of the
Court of Appeal of England.

Blackstone's Criminal Practice (1995 Ed'n): pp.803-805.

Road Traffic (Jersey) Law, 1956: Article 26.

Road Traffic Act 1988: s.163.