

IN THE HIGH COURT OF JUSTICE

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QUEEN'S BENCH DIVISION

(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

Wednesday, 7th April 1993

B e f o r e :

LORD JUSTICE EVANS

and

MR JUSTICE MORLAND

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Crown Office List

R E G I N A

-v-

EPPING JUSTICES EX PARTE PERRY COLIN QUY

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(Computer Aided Transcript of the Stenograph Notes
of John Larking, Chancery House, Chancery Lane,
London WC2

Telephone No: 071-404 7464

Official Shorthand Writers to the Court)

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MRS S CANAVAN (instructed by Higgins & Co.,
3 The Shrubberies, George Lane, E18 1BD) appeared on
behalf of the Applicant.

MR R MANDEL (instructed by Crown Prosecution Service)
appeared on behalf of the Respondent.

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J U D G M E N T
(As approved)

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Wednesday, 7th April, 1993

J U D G M E N T

LORD JUSTICE EVANS: Mr Justice Morland will read the judgment of the Court.

MR JUSTICE MORLAND: A motorist who is suspected of driving with excess alcohol can be required to give two specimens of breath for testing in an Intoximeter machine at a police station, subject to certain limited exceptions under section 7 (3) of the Road Traffic Act 1988 ("the Act"). If the specimen with the lower proportion of alcohol exceeds the statutory limit of 35 microgrammes of alcohol in 100 millilitres of breath but is below 50 microgrammes then the motorist is given the statutory option by section 8 (2) of the Act. He "may claim that it should be replaced by such specimen as may be required under section 7 (4)" and "if he then provides such a specimen, neither of the two specimens of breath should be used". The specimen which may be required under section 7 (4) is a specimen either of blood or of urine, and the constable has the statutory right to decide which of them it is to be, subject to the following restrictions:-

"but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine" (Section 7 (4)).

The House of Lords has recently reaffirmed in the D.P.P. v. Warren [1992] 3 W.L.R. 884 that the right to decide whether the further specimen should be of blood or urine

is the constable's and his alone, and that there is no need for him to invite the driver to express his own preference for giving blood or urine (page 895E). Section 7 (4) also comes into play when specimens of breath cannot be or are not required at the police station for one of the reasons given in section 7 (3) and D.P.P. v. Warren was such a case. When breath specimens have been given and the motorist's statutory option arises under section 8 (2), the constable must explain to him if he exercises the option to provide an specimen, then "it will be for the constable to decide whether that specimen is to be of blood or urine and, if the constable intends to require a specimen of blood to be taken by a medical practitioner, the driver should be told that his only right to object to giving blood and to give urine instead will be for medical reasons to be determined by the medical practitioner" (per Lord Bridge at p.895D).

The present case is concerned with the operation of the "medical reasons" limitation on the police officer's right to require a specimen of blood under section 7 (4). This was considered by the Divisional Court in Johnson v. West Yorkshire Metropolitan Police [1986] R.T.R. 167 (also noted at 1986 Crim.L.R 64), which was decided under the corresponding (amended) provisions of Road Traffic Act 1972. The court held that "the existence of a medical reason must be decided by the medical practitioner and not by the police officer, no matter how experienced and well-intentioned he may be" (per Otton, J. at p.177G), but this does not mean the

officer is required "to act as no more than a messenger, obliged to turn out the medical practitioner whenever the suspect contrived to utter a form of words suggesting a claim for medical immunity. The police officer cannot have the power to rule upon a medical issue, but he must have the power to form a view on whether such an issue has been raised at all" (per Mustill L.J. at p.175E). This judgment was approved by the House of Lords in D.P.P. v. Warren (at p.893C).

The issues

The first issue before us is the correct application of these statutory provisions in a case where the motorist said, or may have said, that he was reluctant to give a specimen of blood because he was "afraid of needles". Is this capable of being a "medical reason" within section 7 (4), or not?

The second issue raised by the applicant, Perry Colin Quay, relates to the guide known as "Book 116" which the Essex police, like other forces, use on occasions such as this in order to comply with the procedures required by the Act. It was held in D.P.P. v. Rous (1992) 94 Cr.App.R. 185 that the questions and answers which the police officer is required to ask and to record are not an "interview" for the purposes of the Police and Criminal Evidence Act 1984 ("PACE"). But Mrs Canavan, for the applicant, submits that those of the questions and answers which are designed to comply with the requirements of section 8 (2) and section 7 (4) does not constitute such an "interview" and therefore

are subject to the provisions of, in particular, section 78 of PACE.

Third, there is a procedural issue which will be further described below.

History

The applicant was charged with the offence of driving with excess alcohol and he was convicted by the Epping Justices on 29th January 1992. He sought to appeal by way of Case Stated but the Justices' Clerk wrote on their behalf refusing to state a case, followed by a reference to the facts of the case, apparently in order to indicate what conclusions the Justices had reached on the basis of the evidence they heard. The applicant now seeks an order of mandamus requiring the Justices to state a case, but only in the alternative to an order for certiorari which would quash the conviction.

Leave to make the application was granted by the Queen's Bench Divisional Court on 23rd June 1992. Neither the Justices nor the prosecutor was represented on that occasion, nor was any evidence filed on their behalf.

Mrs Canavan appeared before us on behalf of the applicant and, to her evident surprise, Mr Mandel appeared on behalf of the D.P.P. without prior notice to her or her solicitors. Mr Mandel told us that the D.P.P. had been notified of the hearing only on the previous day, and that he was instructed to appear solely in order to dispute that the Court had

jurisdiction to set aside the conviction by order of certiorari, which the D.P.P. regards as giving rise to an issue of principle; so far as the application for mandamus requiring the Justices to state a case is concerned, he was available to assist the Court but did not seek to advance any positive case. We should record that he was requested to and did give such assistance, which we have found helpful and we record our appreciation of it.

"Medical reasons"

The applicant's evidence by affidavit before us is that the two Intoximeter readings were 46 and 43, and it continues:-

"The Sergeant then told me that it was my choice but I could provide an alternative sample of blood. I told the Justices that I had told Sergeant Perrella that I was afraid of needles but that I had offered to provide a urine sample but was not allowed to do so. In cross-examination I disagreed that Sergeant Perrella had simply read out the question as written in the Book 116. I was quite definite that I offered urine." (affidavit para.9).

For the purposes of considering the issue of law, we shall assume that the statutory option under section 8(2) was offered to the applicant, that his reply indicated that he chose to offer a sample of urine but gave as his reason for being unwilling to provide a sample of blood that he was "afraid of needles", and that the officer nevertheless insisted that any further sample should be of blood, not of urine. The officer was entitled to make this demand, unless the reason given for refusing to provide a specimen of blood was

capable of being a medical reason within section 7(4) of the Act.

The facts in Johnson (above) are comparable but the comparison is not exact. There, the motorist replied "No, I don't like needles". He was then asked a series of questions set out at page 173 of the report:-

'(Q) You say you don't like needles, is there any reason for you saying this? - (A) No, it is just something that happened a few years ago.

(Q) What was that? - (A) I went into hospital for sugar in my water and had a blood test. I fainted when they stuck the needle in.

(Q) Were you told by the hospital staff that you were not to have needles stuck in you because you were allergic to them? - (A) No.

(Q) Do you think it was probably due to your condition at the time that you fainted? - (A) It probably was but it put me right off needles.

(Q) Are you a diabetic? - (A) No, I just had too much sugar in my water then, I've been all right since.'

In the present case, the answer recorded in Book 116 was a simple "No", but according to the applicant's evidence before us the sergeant under cross-examination "accepted that comments are made during the procedure that are not necessarily recorded in the Book 116. He also said that it was possible that I had told him that I was afraid of needles and that if it had been said he may not have recorded it in the Book 116, particularly if it had been mentioned whilst we were by the Lion Intoximeter machine In re-examination, he said that if he had thought that someone had a serious reason for failing to provide a specimen he would have recorded it" (affidavit para.5). Whilst this evidence suggests that there was

some discussion between the applicant and Sergeant Perrella, which was not limited to the single word "No" and which according to the applicant included a statement by him that he was afraid of needles, there is no suggestion that he gave any specific reason for his fears or referred to any particular occasion when he had suffered harm or any ill-effects from their use.

If we assume that the applicant is correct, and that he did tell the officer that he was "afraid of needles", then we feel bound by the decision in Johnson's case to hold that this was capable of amounting to a "medical reason" and that the officer was not entitled to insist upon a blood specimen, without more. This does not mean, however, that the doctor had necessarily to be called. If the officer had asked whether there was a reason for the applicant's fear of needles, then the answers might have been on similar lines to those in Johnson's case and the need to call a doctor would have been established. But the answers might have revealed there was no past experience nor any other foundation for the claimed apprehension which is capable of forming a medical reason, and in that case, applying Johnson, the officer would have been justified in deciding as he did.

This conclusion would normally lead to an order of mandamus directed to the Justices and requiring them to state a case, as the applicant requested them to do. But such an order would be superfluous if the only facts which could be found by the Justices would make it inevitable that he should be found not guilty, and in

the present case in order to avoid this the applicant seeks an order of certiorari, to set the conviction aside. This gives rise to the issues of jurisdiction upon which the Director of Public Prosecutions addressed us through Mr Mandel. Before addressing this issue, we can conveniently deal with the second "Book 116" issue raised by Mrs Canavan.

Book 116

The Code of Practice promulgated under section 66 of PACE provides by paragraph C.6 that "procedures undertaken under [section 7 of the Road Traffic Act] do not constitute interviewing for the purposes of the Code". The Code does not have statutory effect, but in D.P.P. v. Billington (1988) 87 Cr.App.R.68 it was conceded and in D.P.P. v. Rous (1992) 94 Cr.App.R.185 it was held that the statutory "catechism" is not an interview covered by paragraph C.12 of the Code and therefore is not subject to these provisions of PACE. It is sufficient to say that the conclusion reached in D.P.P. v. Rous and the reasons given in the judgment of Mann, L.J. in our view are correct.

Book 116 contains no requirement it should be signed, or even seen, by the motorist. Its evidential status is solely that of a contemporary record made by the police officer, to which he may refer in order to refresh his memory when he gives evidence in Court, with leave from the Court. It has the same status, in other words, as the police officer's notebook. The fact that it is not seen or signed by the motorist does not give

grounds for a "natural justice" challenge as was suggested by Mrs Canavan in her written submission though not pursued in argument before us.

Form of relief

The Justices' reply to the applicant's request for them to state a case should be quoted here:-
"Having considered the application by the defendant to state a case in the matter of CPS v. Perry Colin Quay, heard at Epping Magistrates Court on 29th day of January 1992, we hereby refuse to state a case as required, it is our view that the application is "frivolous" within the meaning of section 111 (5) of the Magistrates Courts Act 1980. Our findings of fact, relevant to the grounds mentioned in the application to state a case are as follows:-

The custody sergeant had complied with the requirements of the Road Traffic Act 1988. He explained to the defendant that as his breath specimen reading was 43/100, the defendant had the option to have it replaced by either a blood or urine sample and would he like to have it replaced? The defendant replied "no". At no time before or when the question was being asked did the defendant mention he had a medical reason for failing to provide blood or urine. The defendant said in evidence and when cross-examined, that the custody sergeant only offered the option of blood, not urine. We accepted the evidence of the custody sergeant on this point."

The crucial sentence is "At no time before or when the question was being asked did the defendant mention he had medical reason for failing to provide blood or urine". This is ambiguous. It could mean that the Justices found as a fact that the applicant said nothing which was capable of amounting to a medical reason and that, in particular, he made no mention of "being afraid of needles"; or alternatively, that in their view that statement, even if made, was not capable of amounting to a medical reason.

If the Justices are now required to state a case,

their findings of fact will be based on notes of recollections of evidence given in January 1992. This is not an impossible burden, but is not one which they ought to be asked to undertake unless it is necessary to do so; compare R. v. Ipswich Crown Court ex p. Baldwin [1987] All E.R. 596.

We were told that at one stage in the course of those proceedings the Justices indicated to the Crown Office that the intended to serve affidavit evidence in reply to the applicant's, but that in the event that they did not do so; and they were not represented at the hearing before us. Their failure to serve evidence does not compel the conclusion that the applicant's evidence should be regarded as unchallenged. Nevertheless, in the present case his account of the evidence which he gave and of the police officer can be accepted, in our judgment, as accurate, in the absence of any challenge to it. It follows from this that only one conclusion on the relevant facts can be open to the Justices. This is that the applicant made a statement to the effect that he was afraid of needles, in the course of general conversation in connection with the offer to him of the statutory option under section 8 (2), and that Sergeant Perrella did not ask him to explain what his reasons were and in fact did not take the remark as offering a serious reason for failing to provide a blood specimen, he therefore entered "No" as the answer in book 116.

On those findings, the answer in law has to be, in the light of Johnson's case and for the reasons explained above, that the applicant gave what was

capable of being a medical reason. This means that the prosecution was not entitled to rely upon the breath specimen, and the charge is not made out.

Mr Mandel cited *Pulhoffer v. Hillingdon L.B.C.* [1986] A.C. 484 (at 485D and 518) for the proposition that an order for certiorari, as distinct from mandamus, should not be made so as to quash the conviction save in exceptional circumstances. This we fully accept. It seems to us, however, that when requiring the Justices to state a case would be an unnecessary formality, because their findings of fact could only lead to the conclusion that the applicant was not guilty of the offence charged, then the circumstances can be described as "exceptional" and that the order is both permitted and justified.

We, therefore, grant an order of certiorari quashing the conviction for driving a motor vehicle whilst the proportion of alcohol in his breath exceeded the prescribed limit contrary to section 6 (1) of the Road Traffic Act 1988 and the second schedule of that Act

MRS CANAVAN: The applicant in these matters has been legally aided throughout. The first thing I ought to ask for is legal aid taxation of his costs. I think I ought to ask for a defendant's costs order. I cannot recall if he had any contribution in the magistrates court.

LORD JUSTICE EVANS: You are not asking for any order against the D.P.P.?

MRS CANAVAN: My Lord, no. That is the only thing I would say as far as costs.

LORD JUSTICE EVANS: Very well legal aid taxation and your costs can be recovered from central funds.

MR MANDEL: I would ask for the D.P.P. costs out of the central funds.

LORD JUSTICE EVANS: An issue of principle has just been brought up. We have just been advised this apparently is regarded as a question of principle as far as the Crown Office is concerned. Were you aware of that?

MR MANDEL: My Lord, no. The issue of costs?

LORD JUSTICE EVANS: As to whether your costs should be ordered to come out of central funds.

MR MANDEL: Your Lordships certainly have discretion to order such costs to be paid out of central funds by virtue of section 17 of the Prosecution of Offences Act 1985.

LORD JUSTICE EVANS: Is that in Archbold?

MR MANDEL: My Lord, I have brought Halsbury. I do not have Archbold.

LORD JUSTICE EVANS: (Associate speaks to learned Judges) You had better read us the section.

MR MANDEL: Section 17 (1):

"Subject to subsection (2) below, the court may --

(a) in any proceedings in respect of an indictable offence;" -- that does not apply here --

"(b) in any proceedings before a Divisional Court of the Queen's Bench Division or the House of Lords in respect of a summary offence;" -- that does apply --

"order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

(2) No order under this section may be made in favour of --

(a) a public authority or;

(b) a person acting --

(i) on behalf of a public authority; or

(ii) in his capacity as an official appointed by such an authority."

LORD JUSTICE EVANS: You do not count as a public authority?

MR MANDEL: My Lord, no.

"(3) Where a court makes an order under this section but is of the opinion there are circumstances which make it inappropriate the prosecution should recover the full amount mentioned in subsection (1) above, the court shall --

(a) assess what would, in its opinion, be just and reasonable; and

(b) specify that amount in the order."

My Lord, subsection 6 defines the authority. I am sorry, my Lord. One of the definitions is the Crown Prosecution Service or any other.

LORD JUSTICE EVANS: That bars you.

MR MANDEL: Yes, it does. I accept that. I am sorry, my Lord, my error.

MR JUSTICE EVANS: Thank you again for coming, Mr Mandel. Thank you both very much. I am sorry it is so late.
