17th March, 1988.

ROYAL COURT (INFERIOR NUMBER)

Before Mr. V.A. Tomes, Deputy Bailiff

Jurat M.G. Lucas

Jurat M.W. Bonn

Between

Her Majesty's Attorney General

and

Jonathon James Clark, Appellant

Advocate A.D. Robinson for the Appellant
Advocate Miss S.C. Nicolle for the Attorney General

The Appellant in this case was convicted by the Magistrate on the 23rd October, 1986, on three charges brought under Articles 28(1), 16 and 3 respectively of the Road Traffic (Jersey) Law, 1956 (hereinafter called "the Road Traffic Law") and one charge brought under Article 2 of the Motor Traffic (Third Party Insurance (Jersey) Law, 1948 (hereinafter called "the Third Party Insurance Law"). They all related to one occasion on the 19th July, 1986, at about 04.35 hours, in Grosvenor Street, St. Helier. Count 1 charged the taking and driving away of a motor vehicle - a Honda 550 motor cycle - J52832, without having either the consent of the owner thereof or other lawful authority. Count 2 charged the Appellant with being unfit to drive through drink or drugs when in charge of the same motor vehicle. Count 3 charged the Appellant with using the same motor vehicle whilst uninsured in respect of third party risks. And Count 4 charged the Appellant with driving the same motor vehicle while he was not the holder of a driving licence. The Appellant was fined on each of the four counts and in respect of Count 2 (Article 16 of the Road Traffic Law - in charge of a motor vehicle whilst unfit) he was disqualified for holding or obtaining a licence to drive for a period of twelve months.

The Appellant now appeals against that conviction on four grounds, namely that the Magistrate failed, or failed adequately, to direct himself that he must be satisfied beyond reasonable doubt that the Appellant was guilty of the offences; that the decision of the Magistrate was unreasonable or could not be supported having regard to the evidence; that the Magistrate erred in law in finding that on the evidence the Appellant could be guilty of the offences; and that the decision of the Magistrate was unsafe or unsatisfactory in all the circumstances of the case. As to sentence, the Appellant appeals only against the disqualification for holding or obtaining a licence to drive on the ground that the Magistrate misdirected himself in law in not finding that there were special reasons to avoid disqualification.

The facts can be briefly stated. On the evening of the 18th July, 1986, Mr. Alan Clutterham had parked his motor cycle at the upper end of Grosvenor Street, near the Victoria College gates. He removed the key. No one had permission to take, remove or drive away the motor cycle. At about 04.35 hours the next morning, the 19th July, 1986, Police Constable Graham Steven Harrison and Woman Police Constable Patricia Burkitt found the Appellant sitting astride Mr. Clutterham's motor cycle at the lower end of Grosvenor Street near its junction with La Motte Street some two feet into the roadway from the kerb. The Appellant was intoxicated. The motor cycle had suffered some damage. The police officers' attention was drawn to him because they had seen him earlier that night, when he did not have a vehicle, and he was not wearing a crash helmet. When approached, the Appellant gave evasive, indeed nonsensical, answers to questions about his address. He was cautioned and conveyed to Police Headquarters, where he denied having been on a motor cycle and, after an initial agreement, refused to be medically examined and/or provide samples of blood and urine. At 06.01 hours the Appellant said to P.C. Harrison: "I know I was on a motor bike but I wasn't driving it. Listen, give me a break. You're not daft, you know what the score is". At 06.02 hours the Appellant said "This is fucking daft. I was on the motor bike but I couldn't be riding it. I didn't have the keys". The police officer told the Appellant that he was in charge of the motor cycle and the Appellant replied "That's fucking

daft, I wasn't riding it". He was detained. Later the same day the Appellant was interviewed; he was reminded that he was under caution and the following question and answer interview was recorded:-

"Q. What can you tell me about the earlier hours of this morning when you were found with the motor cycle?

A. I'd been on the firm's dinner and well, I usually drink bitter. Where we went everything was free. I was drinking wine and ended up on Irish coffee. That's what probably affected me. And then I remember leaving. It must have been the open air that hit me. I think I was trying to go to the Kontiki and the motor bike, well, I used to have motor bikes, I like motor bikes. It must have been the drink. I've got a bit of a record but I'm not a thief unless I thought it was one of my friend's and I was moving it for him to give him a bit of a shock in the morning.

Q. Where was the bike when you found it?

A. I'm not quite sure.

Q. Can you remember if you pushed it or free-wheeled on it?

A. I'm not sure. I can't remember. I think I pushed it. I don't think I would have been capable of free-wheeling it.

Q. There is some damage to the bike. Do you remember dropping it?

A. Vaguely yes. If there was any damage, I'll pay for it.

Q. Have you a licence for heavy bikes?

A. No.

Q. Is there any way that you'll be insured for the bike?

A. I've got my own car insurance, I'm insured at work. No I shouldn't imagine so.

Q. Is there anything else you want to say?

A. I'd just like to apologise for wasting your time. I know I'm no angel but this is totally out of character."

As to the facts, Mr. Robinson urged upon us that we should disregard the statements made by the Appellant both at the scene and in the early morning when the Appellant was very drunk. We do not agree. The Appellant was intoxicated but not incapable. Nothing relevant was said at the scene but the statements made at 06.01 and 06.02 hours are relevant and the Magistrate was right to take them into account. Mr. Robinson further urged upon us that the question and answer interview produced nothing of value to the prosecution. Again, we disagree. We believe that the Appellant was admitting that he, solely, was responsible for the movement of the motor cycle (we use a neutral term deliberately) from the position where it had been left by its owner, some two hundred yards or more, to the position where the Appellant was found astride it. We concur with the view expressed by the Magistrate when he said "It's an extraordinary stretch of the imagination to imagine that more than one person was involved in the motor bicycle incident". In our judgment the Magistrate's finding that the Appellant alone was responsible for the movement of the motor cycle was both safe and satisfactory.

Count 1

Mr. Robinson further submitted that "driving" in Count 1, taking and driving away, and "driving" in Count 4, driving without a licence, had the same

meaning. He argued that if the Court was satisfied that the Appellant had moved the motor cycle, then the manner of moving was important; that there was a doubt whether the Appellant had pushed or had free-wheeled upon the motor cycle; that the Appellant must be given the benefit of that doubt and be treated as having pushed it; and that pushing the motor cycle would not in law amount to driving it away.

The first case to which we were referred was H.M. Attorney General v. Le Mottee (6th August 1984, unreported). The facts of that case were very different in that the appellant was a passenger in a motor car, reached over with one hand and took hold of the steering wheel in such a way that the direction of the car was changed. He was found by the Magistrate to be driving and this was upheld on appeal because the appellant, if only for a short time, had control to such an extent that the direction of the vehicle was changed. We do not find that case of any assistance.

Mr. Robinson referred us to Wilkinson's Road Traffic Offences, 12th edition, page 32, as follows:-

"1.52 'Driving'

There are a number of cases on whether a person can be said to be 'driving'. Some are not easy to reconcile.

In Saycell v. Bool (1948) 2 All ER 83 a person who sat in the driving seat, released the brake and let the vehicle run a hundred yards downhill was held to 'drive it' although there was no petrol in the tank and the engine was not started. In Ames v. MacLeod (1969) SC I the High Court of Justiciary in Scotland held that a person 'drove' his car which had run out of petrol when he steered it by placing his hand on the wheel while walking beside it as it coasted down a slight incline in the road. In R v. Munning (1961) Crim LR 55 a magistrates' court held that pushing a motor scooter was not driving. In R v. Roberts (No 2) (1965) 1 QB 85 releasing the brake of a lorry parked on a hill

and putting the vehicle in motion so that it ran down the hill was held not to be 'driving'. In R v. Kitson (1955) 39 Cr App R 66 a passenger awoke to find the driver gone and the car moving. He steered it for 200 yards until he could safely stop. He was held to be a 'driver'.

.....

In R v. MacDonagh (1974) RTR 372, it was held that a person who pushed a car along a road with both feet on the ground with one arm in the car to control the steering wheel was not 'driving' the car and could not be therefore convicted of driving while disqualified.

It will be noted that the facts of Ames v. MacLeod and R v. MacDonagh are virtually indistinguishable. R v. MacDonagh must be taken as representing the law in England and Wales. The conflict between the two cases may be the reason for a court of five judges in the latter case. A reading of the judgment of Lord Widgery CJ in MacDonagh leads, it is submitted, to the following conclusions:

(1) The primary consideration as to whether a person is 'driving' is essentially a question of fact, dependent on the degree and extent to which the person has control of the direction and movement of the vehicle.

(2) One test is whether the accused was 'in a substantial sense controlling the movement and direction of the car' (Ames v. MacLeod). A person cannot be said to be 'driving' unless he satisfies this test.

(3) The fact that a person satisfies the test of control in Ames v. MacLeod is not necessarily exhaustive. It has still to be considered whether the activity in question could fall within the ordinary meaning of the word 'driving' in the English language. (See also McQuaid v. Anderton and R v. Roberts below.)

Further tests to determine whether a person is driving have been established by Burgoyne v. Phillips (1983) RTR 49 and Jones v. Pratt, (1983) RTR 54.

(4) The essence of driving is the use of the driver's control in order to direct the movement of the vehicle however the movement is produced (Burgoyne v. Phillips). (This is in effect a reiteration of (1) and (2).)

(5) Whether the defendant himself deliberately sets the vehicle in motion is an important factor (Burgoyne v. Phillips).

(6) In borderline cases, it is important to consider the length of time the steering wheel or other control was handled (Jones v. Pratt).

Applying principles (1), (2) and (3) in MacDonagh it was held that the defendant was 'pushing' rather than 'driving'. Similarly it was suggested that a person pushing a broken-down motor cycle and walking beside it could not be said to be 'driving'. On the other hand it was suggested that it would be possible to find as a fact that a person was driving if a motorist pushing the vehicle had one foot in the car in order to make more effective use of the controls.

In Burgoyne v. Phillips the defendant was sitting behind the steering wheel of his car. Assuming he still had the keys in the ignition, he let the car roll forward to drive off carefully. He realised he had no keys and put the brakes on quickly. The steering wheel was locked and the engine was not running. The car rolled a distance of thirty feet by gravity and collided with another vehicle. The Divisional Court held that the defendant was driving as opposed to attempting to drive and was rightly convicted of driving with excess alcohol.

The facts of Burgoyne v. Phillips do not altogether tally with the test used (i.e. test (4) above). The defendant had only limited scope for control.

He apparently merely released the handbrake. Releasing the handbrake was held not to be driving in R v. Roberts. However, unlike the person in that case he was behind the steering wheel and intended to drive. The facts of Burgoyne v. Phillips are similar to those in Saycell v. Bool save that Burgoyne v. Phillips seems to be the first conviction for driving (apart from the 'continuing' cases noted below) where there was no control of the steering.

.....

Lord Widgery CJ in McQuaid v. Anderton (1980) 3 All ER 540 said that the law hereafter on these points is that laid down in R v. MacDonagh and justices will be well advised to apply that authority and no other."

We had the benefit of the full report of Regina v. MacDonagh (1974) RTR 372 CA. We quote from the judgment delivered by Lord Widgery C.J.

"The appellant's version was that he had pushed the car standing with his two feet on the road putting his shoulder against the door pillar and putting one hand inside the car on the steering wheel in order to control its movement. The recorder directed the jury that, even if they found that the facts were or might have been as thus described by the appellant, it would still be proper to describe him as driving the car and thus guilty of the offence if he was 'in a substantial sense controlling the movement and direction of the car'. The matter now comes before this court on a short but important issue, namely, whether the recorder should have directed the jury that, if they thought the facts were or might have been as stated by the appellant, then he was not driving and therefore entitled to an acquittal.

By section 99 of the Road Traffic Act 1972, it is provided:

'If a person disqualified for holding or obtaining a licence....(b) while he is so disqualified drives on a road a motor vehicle....he shall be guilty of an offence.'

Numerous other provisions of the same Act make it an offence to drive a motor vehicle when lacking some necessary qualification. Thus, under section 84(1) a person may not drive unless he has the appropriate driving licence. The Act does not define the word 'drive' and in its simplest meaning we think that it refers to a person using the driver's controls for the purpose of directing the movement of the vehicle. It matters not that the vehicle is not moving under its own power, or driven by the force of gravity, or even that it is being pushed by other well-wishers. The essence of driving is the use of the driver's controls in order to direct the movement, however that movement is produced.

There are an infinite number of ways in which a person may control the movement of a motor vehicle, apart from the orthodox one of sitting in the driving seat and using the engine for propulsion. He may be coasting down a hill with the gears in neutral and the engine switched off; he may be steering a vehicle which is being towed by another. As has already been pointed out, he may be sitting in the driving seat while others push, or half sitting in the driving seat but keeping one foot on the road in order to induce the car to move. Finally, as in the present case, he may be standing in the road and himself pushing the car with or without using the steering wheel to direct it. Although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language. Unless this is done, absurdity may result by requiring the obtaining of a driving licence and third-party insurance in circumstances which cannot have been contemplated by Parliament.

This approach to the problem which we have outlined is, we think, supported by the authorities. In Wallace v. Major (1946) KB 473 the headnote reads:

'A person who is at the wheel of a disabled motor vehicle for the purpose of steering it while it is being towed by another motor vehicle is not a

driver and is not driving a mechanically propelled vehicle within the meaning of section 11 of the Road Traffic Act 1930'.

In reaching this decision, Lord Goddard CJ said, at p.477:

'After all, we have to remember that this is a penal Act and we are bound to construe it strictly and not to stretch the language in any way. In my judgment it is impossible to say that a person who is merely steering a vehicle which is being drawn by another vehicle is driving that vehicle.'

While we adopt the approach of Lord Goddard CJ to penal legislation, we respectfully doubt whether the correct conclusion was reached on the facts of that case. The court seems to have regarded the defendant as merely a steersman, and to have ignored his responsibility for the use of the brakes. Treating him as a mere steersman, the court found support in what is now section 196 of the Act of 1972 for saying that he could not be a driver. In Saycell v. Bool (1948) 2 All ER 83 the owner of a lorry which had run out of petrol released the handbrake and while sitting in the driving seat steered the vehicle down an incline for a distance of 100 yards, and Lord Goddard CJ said, at p.84:

'....it seems impossible to say that in those circumstances he was not "driving"....'

In Reg. v. Roberts (1965) 1 QB 85 the Court of Criminal Appeal declined to say that the appellant was 'driving' when he had maliciously released the handbrake of a motor vehicle and thus allowed it to run down a hill unattended. Lord Parker CJ said at p.88:

'....on the authorities, a man cannot be said to be a driver unless he is in the driving seat or in control of the steering wheel and also has something to do with the propulsion.... There are no cases, so far as this court knows, where

a man has been held to be guilty of....driving....if, although he has something to do with the movement and the propulsion, he is not driving in any ordinary sense of the word.'

We would draw attention to the two factors to which Lord Parker CJ refers: first, that the alleged driver must be in the driving seat, or in control of the steering wheel; and, secondly, that his activities are nevertheless not to be held to amount to driving unless they come within the ordinary meaning of that word.

The last case to which we would refer is Ames v. MacLeod, 1969 JC 1 where the facts were very close to those of the instant case. The accused, who was alleged to have been driving a motor car, had been walking beside it as it ran down a slight incline, and had steered it by placing his hand on the wheel. The car had run out of petrol. The Lord Justice-General thought that the question turned on whether the defendant was

'in a substantial sense controlling the movement and direction of the car,'

and held that this test was satisfied. The other judges concurred.

We respectfully agree that a person cannot be driving unless he satisfies the test adopted by the Court of Session, and we recognize the importance that this legislation should be given the same meaning in England as in Scotland. But we do not think that the test is exhaustive. It is still necessary to consider whether the activity in question can fall within the ordinary meaning of the word 'driving'.

Giving the words their ordinary meaning there must be a distinction between driving a car and pushing it. The dividing line will not always be easy to draw and the distinction will often turn on the extent and degree to which

the defendant was relying on the use of the driver's controls. Where, however, the defendant was walking beside a vehicle which was being pushed or moving under gravity, we do not think that the mere fact that he had his hand on the steering wheel is enough to say that he was driving in any ordinary sense of that word. The view that such a defendant is not driving for the purposes of the Road Traffic Act 1972, is reinforced by a consideration of the consequences which would flow under that Act if a different view were taken. Some of the motor vehicles to which the Act applies, notably motor cycles, must from their nature be manhandled from time to time. Suppose a man pushes a broken-down motor cycle by walking beside it and holding the handle bars; such activity would bring him within any of the definitions of 'driving' suggested by the Crown because he is in full control of the vehicle and is using the steering (and possibly the braking) controls. Can it possibly have been intended by Parliament to require such a person to hold a driving licence? We think not. So, in the present case we do not think that any ordinary meaning of the word 'drive' could extend to a man who is not in the motor car, who has both feet on the road, and who is making no use of the controls apart from an occasional adjustment of the steering wheel."

At page 36, Wilkinson's Road Traffic Offences deals with "Pushing and Driving", as follows:-

"Proceedings are sometimes brought against persons who have been disqualified from driving or have no driving licence when they have been caught pushing a car or motor cycle, with the engine not running, or against persons pushing a car with someone else at the steering wheel. In the former case the defendant would be 'driving' if he was in the driving seat or otherwise in control of the steering and had something to do with the propulsion, eg if he was engaged in a common design with his friends who were pushing, if not actually pushing himself (R v. Roberts (1964) 2 All ER 541). If neither he nor his accomplices had any control over the steering, they would not appear to be driving. In the other case (the accomplices pushing from behind or at the side

but with no personal control of the steering), it is submitted that they would be aiding and abetting the one in control of the steering if they were all engaged in a common design and could therefore properly be charged (Shimmell v. Fisher (1951) 2 All ER 672). These cases suggest that pushing motor vehicles with control of the steering would be 'driving', although sometimes the facts would point also to an attempt to drive. In almost all cases it would be 'using' by those engaged in the common design whether there was 'driving' or not.

The position has now been clarified by the decision of R v. MacDonagh. ..... It was observed that cases such as these are near the borderline. If, for example, the defendant in R v. MacDonagh also had had one foot in the car to control the brakes, he might well be properly convicted. In R v. Munning (1961) Crim LR 55 a magistrates' court held that pushing a motor scooter was not driving. The decision is not binding but is in principle similar to that in MacDonagh. On the other hand in Crank v. Brooks (1980) RTR 441 Waller LJ said that if a person had been using a pedal cycle as a scooter by having one foot on the pedal and pushing herself along she would not have been a foot passenger. There is no reason why the same principle should not be applied to a motor bicycle. If so, such a person would appear to be driving.

It may be worth remarking that MacDonagh and Munning are the first cases in which the more current meaning of the word 'driving' is relied upon. The conception of the term 'driving' goes back before the invention of the mechanically propelled vehicle - as do 'carriage' and 'carriageway' (see eg the Town Police Clauses Act 1847 and s.35 of the Offences against the Person Act 1861). A driver (or 'drover') drove or steered by using reins, by pushing or goading or by otherwise guiding. He might be behind the animal, in or on a vehicle drawn by it or on the animal. Seemingly if it were recalcitrant he might be in front of it".

However R v. MacDonagh was decided after the enactment of the Theft Act 1968 which created, under section 12, the offence of 'taking' a conveyance.

Accordingly, the Road Traffic Act 1972 does not include the offence of "taking and driving away" analagous to Article 28 of the Road Traffic Law.

Wilkinson's Road Traffic Offences, at page 37, under the heading of "Taking a Conveyance" says this:-

"The earlier legislation now repealed used the expression 'taking and driving away' and certain cases on the meaning of this may still be helpful. Where one man held the steering wheel and two others pushed, without the engine being started, all were held to be taking and driving away (Shimmell v. Fisher (1951) 2 All ER 672). Pedalling an auto-assisted cycle without starting the engine was 'driving away' (Floyd v. Bush (1953) 1 All ER 265). Releasing a vehicle's brake at the top of an incline and then quitting it, so that it ran downhill unattended, was not taking and driving it away since there cannot be driving unless the defendant is in the driving seat or in control of the steering wheel and also has something to do with the propulsion of the vehicle (R v. Roberts (1964) 2 All ER 541)."

The earlier cases are relevant to the question we have to decide in relation to the first charge faced by the Appellant that of "taking and driving away" under Article 28 of the Road Traffic Law.

We do not agree that Counts 1 and 4 necessarily stand or fall together; "drives away" in Article 28 does not necessarily have the same meaning as "drive" in Article 3. The Court of Appeal in R. v. MacDonagh did not have to consider that question.

Maxwell on Interpretation of Statutes, 12th edition, at page 279, says:-

"The same word may be used in different senses in the same statute (Whitley v. Stumbles (1930) AC 544; Carter v. S.U. Carburettor (1942) 2 KB 288) and even in the same section (Doe v. Angell (1846) 9 QB 328).

Insofar as Article 28 of the Road Traffic Law is concerned Shimmel v. Fisher and others (1951) 2 All ER 672 is to be preferred. There, the respondents, without the consent of the owner or other lawful authority, released the handbrake of a stationary motor vehicle, and while one of them held the steering wheel, the other two pushed it a few yards. The Divisional Court held, on appeal by case stated, that "driving away" within the meaning of s. 28(1) on the Road Traffic Act, 1930, must be construed as causing a vehicle to move from the place where it was standing, and, therefore, the respondents had committed an offence under the sub-section.

Lord Goddard C.J., who delivered the judgment of the court, said this:-

"The point involved is: What is the true meaning of the words "takes and drives away" in this sub-section? The justices were not prepared to give the same construction to them as to the words "takes and carries away" in s. 1(1) of the Larceny Act, 1916. They thought that, having regard to the limited motion of the lorry and the limited degree of control exercised over it by the respondents, no offence had been committed. I think the justices were wrong. "Driving away" in s. 28(1) must be construed as causing the vehicle to move, and so a motor vehicle can be said to be driven if somebody pushes and somebody steers and thus it is made to move from the place where it has been standing. That satisfies the word "away", but there is a proviso to s. 28(1) as follows:

"....if....the court, or....jury, are satisfied that the accused acted in the reasonable belief that he had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case, have given his consent, if he had been asked therefor, the accused shall not be liable to be convicted of the offence."

That shows that the statute is not meant to deal with the case where a person is moving a vehicle simply for his convenience, because, for example, it is blocking his doorway. That is not an offence, but the very fact that the

legislature has put in that proviso shows that any other form of moving a vehicle is an offence. Therefore, I think the justices came to a wrong construction and that they must find that the respondents did commit the offence."

The same proviso is to be found in Article 28 of the Road Traffic Law. We agree that any other form of moving a vehicle is an offence. Therefore for the purposes of Count 1 it is unnecessary for us to consider the manner in which the Appellant moved the motor cycle. Once he had pushed the motor cycle off its stand or support and it was in motion, whether pushed or free-wheeled, the offence of "taking and driving away" was complete. The motor cycle did not run downhill unattended, it was steered or guided and pushed or free-wheeled, accordingly it was taken and driven away.

The appeal on Count 1 is dismissed.

Count 2 charged the Appellant with being in charge of the motor cycle on a road when he was unfit to drive through drink. It is common ground that the motor cycle was "on a road" and that the Appellant was unfit. The appeal revolves solely on the interpretation of the words "in charge of".

Wilkinson's Road Traffic offences, at page 188, says this:-

"Whether or not a person is 'in charge' of a motor vehicle is a question of fact (see Lord Goddard CJ in R v. Harnett (1955) Crim LR 793 and R v. Short (1955) The Times 10 December). But the meaning of the phrase has given rise to considerable difficulty in the past; and there has been a difference in approach between the Scottish and English courts. In general, the Scottish courts have required a close connection between the defendant and the control of, or likelihood of driving, the motor vehicle. The English courts have tended to work from the presumption that someone must be 'in charge' of any motor vehicle which is parked on a road or public place, and, prima facie, that person will be the person with the keys.

An example of the Scottish courts' approach is Crichton v. Burrell 1951 SLT 365. The owner of a car, who had a key of the car on him, was waiting by the car for another man, who had a duplicate key, to come and drive the car. The owner was arrested before the other man arrived. The owner's conviction was quashed by the High Court of Justiciary, which stated that 'in charge' meant 'in de facto control', in which, on a strict construction, the owner would appear to have remained. In view of the statutory defence now available this approach would appear to be wrong, if and in so far as the concept of being 'in de facto control' is intended to include an element of likelihood of driving. For if it is, there would be no need for the statutory defence.

The English courts' approach can be seen in the case of Woodage v. Jones (No 2) (1975) RTR 119. A driver was stopped by other motorists, and pulled off the road, drawing into a garage forecourt. When he learnt that the police had been called, he walked off, and was half a mile away when arrested. He was held to have been still 'in charge', as he had not put his vehicle into the charge of anyone else. In Ellis v. Smith (1962) 3 All ER 954, a bus driver who left his bus on the road when he went off duty was still 'in charge' unless and until he handed the bus over to the charge of someone else.

The most robust statement of this principle is by Lord Goddard CJ in R v. Short above: 'Somebody must be in charge of a car when it is on a road unless it has been abandoned altogether.' This suggests that a person will be 'in charge' of his car even, for example, whilst asleep in bed, and therefore vulnerable to prosecution in circumstances which might appear grotesque.

In the final analysis, a person whose blood-alcohol level is in excess of the prescribed limit will only be sure of avoiding a conviction for being 'in charge' of his motor vehicle if he has taken it off the road or public place, or has taken positive steps to place it in the charge of someone else."

We have no hesitation in deciding that the Appellant was 'in charge' of the motor cycle. Mr. Robinson invited us to prefer the Scottish approach to

that of the English courts. But the moment that the Appellant had "taken and driven away" the motor cycle he was in 'de facto' control of it. Whilst it is true that the Appellant did not have a key, the person in charge is only prima facie the person with the keys. In our judgment, the Appellant had taken the motor cycle out of the charge of its owner and into his own charge. Moreover, the Appellant was sitting astride the motor cycle. Even if he had not free-wheeled the motor cycle to the position where he was found astride it, a question that is not necessary for us to decide in relation to this count, the fact that he was sitting astride it was capable of being accepted as evidence of intention to free-wheel it further. He had not parked the vehicle, it was on the road, some two feet from the kerb. He told the police that he thought he was trying to go to the Kontiki, which is some distance away from where he was found. In evidence, he said that he must have thought he would go to the Kontiki or to the chip shop to get chips for his girl-friend "and go back to her place which is on La Motte Street", also some distance away from where he was found facing in that direction. His home was in Poonah Road, a much greater distance away. Under the proviso to Article 16 the burden of proving to the satisfaction of the court that he had no intention of driving (free-wheeling) the motor-cycle, albeit on the balance of probabilities, was upon the Appellant. He failed to discharge that burden to the satisfaction of the Magistrate and he failed with us too.

Accordingly the appeal against conviction on Count 2 is also dismissed.

Count 3 charged the Appellant with using the motor cycle whilst uninsured against third party risks. Mr. Robinson conceded that "use" must have a wider meaning than "drive"; but, he said, in order to be guilty of this offence the Appellant must have been in control, managing or operating the vehicle as a vehicle.

Again, we turn to Wilkinson's Road Traffic offences, at page 59:-

"(6) The cases indicate that a person driving a vehicle will normally be using it. A person may use it by having custody or control of it without driving it...."

"A person does not use a motor vehicle under s.143 (insurance) of the 1972 Act unless there is an element of controlling, managing or operating the vehicle as a vehicle (cited with approval in Nichol v. Leach (1972) RTR 476);...."

Mr. Robinson submitted that the words used by the Magistrate at page 26 of the transcript "Any form of control, I think is using, any form of control", are too wide. No doubt in splendid isolation they are, but we have no doubt that the Magistrate meant control of the vehicle as a vehicle. Mr. Robinson referred us again to R v. MacDonagh (supra) at page 374:-

"Although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language. Unless this is done, absurdity may result by requiring the obtaining of a driving licence and third-party insurance in circumstances which cannot have been contemplated by Parliament".

We have no hesitation in deciding that the Appellant was "using" the motor cycle. We have already found that the Appellant, solely, was responsible for the movement of the motor cycle from the position where it had been left by its owner, over a distance of some two hundred yards or more, to the position where the Appellant was found astride it. Whether he was pushing it or free-wheeling it he was controlling, managing or operating it as a vehicle. If as seems probable, he dropped it, causing damage, he picked it up again. He was found sitting astride it. Clearly, he was in control of it and he was using it.

Accordingly, the appeal against conviction on Count 3 is also dismissed.

Count 4 charged the Appellant with driving the motor cycle while he was not the holder of a driving-licence.

We have already said that Counts 1 and 4 do not necessarily stand or fall together and that "driving away" in Article 28 does not necessarily have the same meaning as "drive" in Article 3.

In R v. MacDonagh it was held that a person who pushed a car along a road with both feet on the ground with one arm in the car to control the steering wheel was not 'driving' the car and could not be therefore convicted of driving whilst disqualified. The primary consideration as to whether a person is 'driving' is essentially a question of fact, dependant on the degree and extent to which the person has control of the direction and movement of the vehicle.

Wilkinson's Road Traffic Offences, at page 33, says this:- "....in MacDonagh it was held that the defendant was 'pushing' rather than 'driving'. Similarly it was suggested that a person pushing a broken-down motor cycle and walking beside it could not be said to be 'driving'...."

At page 9 of Regina v. MacDonagh, Lord Widgery C.J. said this:-

"....under section 84(1) a person may not drive unless he has the appropriate driving licence. The Act does not define the word 'drive' and in its simplest meaning we think that it refers to a person using the driver's controls for the purpose of directing the movement of the vehicle. It matters not that the vehicle is not moving under its own power, or driven by the force of gravity, or even that it is being pushed by other well-wishers. The essence of driving is the use of the driver's controls in order to direct the movement, however that movement is produced".

And, as we have already cited:-

"Finally, as in the present case, he may be standing in the road and himself pushing the car with or without using the steering wheel to direct it. Although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language. Unless this is done, absurdity may result by requiring the obtaining of a driving licence and third-party insurance in circumstances which cannot have been contemplated by Parliament".

And, at page 375:-

"Giving the words their ordinary meaning there must be a distinction between driving a car and pushing it. The dividing line will not always be easy to draw, and the distinction will often turn on the extent and degree to which the defendant was relying on the use of the driver's controls. Where, however the defendant was walking beside a vehicle which was being pushed or moving under gravity, we do not think that the mere fact that he had his hand on the steering wheel is enough to say that he was driving in any ordinary sense of that word. The view that such a defendant is not driving for the purposes of the Road Traffic Act 1972, is reinforced by a consideration of the consequences which would flow under that Act if a different view were taken. Some of the motor vehicles to which the Act applies, notably motor cycles, must from their nature be manhandled from time to time. Suppose a man pushes a broken down motor cycle by walking beside it and holding the handle bars; such activity would bring him within any of the definitions of 'driving' suggested by the Crown because he is in full control of the vehicle and is using the steering (and possibly the braking) controls. Can it possibly have been intended by Parliament to require such a person to hold a driving licence? We think not. So, in the present case we do not think that any ordinary meaning of the word

'drive' could extend to a man who is not in the motor car, who has both feet on the road, and who is making no use of the controls apart from an occasional adjustment of the steering wheel."

It appears to us that no distinction can reasonably be made between a broken down motor cycle and one, the key of which is not in the possession of the man pushing it.

We suspect that the Appellant sat on the motor cycle and free-wheeled it down Grosvenor Street and had the Magistrate made a finding of fact to that effect we should not have disturbed it. But he did not do so. The Appellant was found sitting astride the motor cycle but it was not then in motion. When questioned as to whether he had pushed it or free-wheeled on it he said "I'm not sure, I can't remember. I think I pushed it. I don't think I would have been capable of free-wheeling it". We are not entitled to take judicial notice of the fact that it is probably easier to sit upon and free-wheel a heavy motor cycle than to push it, or of the fact that Grosvenor Street has an incline which would assist free-wheeling. The matter has to be decided on the evidence and, on the evidence, there is a doubt that must be resolved in the Appellant's favour. Accordingly, we have to determine the matter on the basis that he pushed the motor cycle by walking beside it and holding the handle bars.

That being so we are persuaded by R v. MacDonagh that the defendant was not driving for the purposes of Article 3 of the Road Traffic Law. This is a penal provision and we are bound to construe it strictly and not to stretch the language in any way.

Accordingly, we quash the conviction and sentence on Count 4.

Disqualification

The Appellant appeals against sentence only to the extent that he appeals against the disqualification for holding or obtaining a licence to drive

for a period of twelve months. The disqualification was imposed only on Count 2, that is to say the infraction of Article 16 of the Road Traffic Law, i.e. that when in charge of the motor cycle the Appellant was unfit to drive through drink.

Article 16(2) provides as follows:-

"A person convicted of a motoring offence under this Article shall, unless the court for special reasons thinks fit to order otherwise,....in the case of a first offence be disqualified for a period of twelve months.....for holding or obtaining a licence."

The sole ground of appeal is that the Magistrate misdirected himself in law in not finding that there were special reasons to avoid disqualification.

At page 51 of the transcript the Magistrate said "I cannot find that in law there is a special reason. I'm rather sorry in a way, but I can't."

And, at page 52, he said "I do not find special reasons, I do find mitigation, accordingly you will be disqualified the minimum which is 12 months."

The phrase 'special reasons' is not statutorily defined. But in R v. Crossen (1939) I NI 106, the King's Bench Division of Northern Ireland held:-

"A 'special reason' within the exception is one which is special to the facts of the particular case, that is special to the facts which constitute the offence. It is in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception."

This passage was approved by Lord Goddard in "Whittall v. Kirby (1946) 2 All ER 552 and it remains the basic definition of the phrase. In R v. Wickens (1958) 42 Cr. App. R 236 four minimum 'criteria' were laid down: to amount to a 'special reason' a matter must:

(a) be a mitigating or extenuating circumstance;

(b) not amount in law to a defence to the charge;

(c) be directly connected with the commission of the offence;

(d) be one which the Court ought properly to take into consideration when imposing sentence.

Wilkinson's Road Traffic Offences at page 764, says this:-

"The following are capable of amounting to special reasons:-

The fact that the defendant drove for a short distance and in circumstances such that he was unlikely to be brought into contact with other road users...."

And at page 769:-

"...the Courts have been anxious to restrict any principle which may be gleaned from these cases to situations where the defendant is unlikely to be brought into contact with other road users and where, if this did happen, danger would be unlikely".

And at page 761:-

"It is important to remember that neither 'special reasons' nor 'mitigating circumstances' automatically enable the defendant to escape disqualification or endorsement. Where 'special reasons' or 'mitigating circumstances' are found it merely means that the court has a discretion to

disqualify the offender for a lesser period or not at all; the court is not bound to exercise its discretion and in an appropriate case will not do so. Indeed in Vaughan v. Duff (1984) RTR 376 it was said (per Robert Goff L.J. at p.381 following Lord Widgery C.J. in Taylor v. Rajan (1974) RTR 304, an 'emergency' case) 'the exercise of the discretion (of special reasons) should only be exercised in clear and compelling circumstances'".

Mr. Robinson urged a number of points which he claimed to constitute 'special reasons'. These can be summarised as follows: 1) the short distance of travel; 2) the engine was not used; 3) if the motor cycle was pushed the movement was very slow, and if free-wheeled it was not on a hill but a very gentle slope; 4) it was 4.30 a.m., when other road users were very unlikely; 5) there was no, or minimal danger; and 6) the road was a one-way quiet residential street. Thus the element of danger to the public was virtually non-existent.

If the Magistrate had said "I find that in law there are matters which are capable of being special reasons but, in the exercise of my discretion, I find none" we would not interfere. It is probable that where, at page 52 he said "I do not find special reasons" he was exercising his discretion. However, he was wrong to say, at page 51 "I cannot find that in law there is a special reason" and he does appear there to have mis-directed himself.

In our view the ambiguity must be resolved in the Appellant's favour. Clearly, there were ample factors that could amount to 'special reasons' and the Magistrate should firstly have so found and secondly gone on to exercise his discretion.

Because, as we have said, the ambiguity must be resolved in favour of the Appellant and because we feel that there were 'special reasons' in this case, we allow this part of the appeal and quash the sentence of disqualification.

AUTHORITIES CITED:-

Saycell -v- Bool (1948) 2 All ER 83.
Ames -v- MacLeod (1969) SC 1.
R. -v- Munning (1961) Crim. LR 55.
R. -v- Roberts (1965) 1 QB 85.
R. -v- Kitson 1955-39 Cr. App. R.66.
R. -v- McDonagh 1974 RTR 372.
Burgoyne -v- Phillips 1983 RTL 49.
Jones -v- Pratt (1983) RTR 54.
McQuaid -v- Anderton (1980) 3 All ER 540.
Wallace -v- Major (1946) KB 473.
R. -v- Roberts (1964) 2 All ER 541.
Shimmell -v- Fisher (1951) 2 All ER 672.
Crank -v- Brooks (1980) RTR 441.
Maxwell on Interpretation of Statutes 12th Ed. p.279.
R. -v- Harnett (1955) Crim. LR 793.
R. -v- Short The Times 10/12/1955.
Crichton -v- Burrell 1951 SLT 365.
Woodage -v- Jones (No. 2) 1975 RTR.
Ellis -v- Smith (1962) 3 All ER 954.
Nichol -v- Leach (1972) RTR 476.
R. -v- Crossen (1939) 1 NI 106.
Whittall -v- Kirby (1946) 2 All ER 552.
R. -v- Wickens (1958) 42 Crim. App. R.236.
Vaughan -v- Duff (1984) RTR 376.
Taylor -v- Rajan (1974) RTR 304.