THE SUPREME COURT

[Supreme Court Appeal No: 74/2016; 78/2016]

[Court of Appeal No: 526/2015]

[High Court Record No: 2015/267 SS]

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
O'Malley J.

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA FRANCIS MCMAHON)

RESPONDENT

AND

MIHAI AVADENEI

APPELLANT

JUDGMENT of Ms. Justice O'Malley delivered the 20th day of December 2017

Introduction

1. Two issues have been debated in this appeal. The first is whether a document adduced in evidence against the appellant in a Road Traffic Act prosecution was in the form required by the legislation and the regulations made thereunder. Each Court that has dealt with this matter so far – the District Court, High Court and Court of Appeal – has held that it was not. The second issue is whether, if this Court is of the same view, the document should nonetheless be held admissible as evidence of the truth of its contents.

2. The appellant was tried in the District Court for an offence contrary to s. 4(4) of the Road Traffic Act 2010 ("the Act") – that is, driving a mechanically propelled vehicle while there was present in his body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 22 microgrammes of alcohol per 100 millilitres of breath. At the hearing the defence made a submission to the effect that the prosecution had not proved the case in the manner required by s. 13 of the Act. The argument was that the document relied upon to prove the breath alcohol level (referred to in the Act as a "*statement*") was not "*duly completed*" in that it did not comply with the form prescribed in the Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2011, made under the Act. That argument depended upon the proposition that the form prescribed by the regulations included both an Irish and English language version of the contents. The statement in this case is in the English language only.

3. It should be made clear from the outset that the question does not relate to any asserted constitutional entitlement to an Irish language version of the statement, or to any argument of that nature. It is a matter of statutory interpretation, arising in circumstances where the content of a statement in the prescribed form is given an evidential status it would not otherwise have, and constitutes the principal evidence that the offence has been committed.

4. The learned District Judge agreed with the defence submission and found as a fact that the statement was not "*duly completed*". He then referred a question of law to the High Court, asking whether, on the facts of the case, he was entitled so to hold.

5. The High Court (Noonan J.) agreed with the District Judge – see *The Director of Public Prosecutions (At the Suit of Garda Francis McMahon) v. Mihai Avadenei* [2015] IEHC 580. However, an appeal by the prosecutor was successful in the Court of Appeal – see [2016] IECA 136. The latter Court considered that the statement was defective, but that the defect did not materially affect the substance of the document and it was not misleading in content or effect. On that basis, s. 12 of the Interpretation Act 2005 applied and the statement was not invalidated. It was therefore to be considered as complying with the prescribed form.

6. The parties have maintained consistent positions in relation to the issues. The appellant says that the form does not comply with the regulations; that the degree of non-compliance is more than the mere "*deviation*" envisaged by the Interpretation Act 2005 and is a matter of substance; and that, therefore, the statement cannot be considered to have been "*duly completed*" for the purposes of ss. 13 and 20 of the Act. The respondent says that the form does comply with the regulations, but argues, in the alternative, that any non-compliance amounts only to a "*deviation*" covered by the Interpretation Act.

The statutory procedure in respect of breath alcohol

7. As might be expected from its technical nature, the offence in question is detected by means of an apparatus capable of analysing the level of alcohol in a sample of breath. The statutory procedure involves the provision of two samples. The apparatus then provides a printout of the result in terms of microgrammes of alcohol per 100 millilitres of breath in each specimen. For the purpose of any prosecution, where there is a variance between the two specimens the lower result is taken. The apparatus is programmed to produce the printout on a pre-set form, which will include other prescribed details to be entered by the garda operating the apparatus such as the identity of the driver and the garda concerned.

8. A power to require a driver to provide two breath samples for analysis by the apparatus is conferred by s. 12 of the Act, and arises (*inter alia*) where the person concerned has been arrested on suspicion of having committed an offence under the provisions of s. 4. Failure to comply with a requirement made under s. 12 is in itself an offence.

9. The statutory procedure to be followed after the taking of the two specimens is set out in s. 13 of the Act, which is here reproduced in full:

"13.— (1) Where, consequent on a requirement under section 12 (1)(a) of him or her, a person provides 2 specimens of his or her breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen—

(a) in case the apparatus determines that each specimen has the same concentration of alcohol, either specimen, and

(b) in case the apparatus determines that each specimen has a different concentration of alcohol, the specimen with the lower concentration of alcohol,

shall be taken into account for the purposes of sections 4 (4) and 5 (4) and the other specimen shall be disregarded.

(2) Where the apparatus referred to in section 12 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 4 (4) or section 5 (4), he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in that specimen determined by that apparatus.

(3) On receipt of those statements, the person shall on being requested so to do by the member—

(a) immediately acknowledge such receipt by placing his or her signature on each statement, and

(b) thereupon return either of the statements to the member.

(4) A person who refuses or fails to comply with subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both.

(5) Section 20 (1) applies to a statement under this section as respects which there has been a failure to comply with subsection (3)(a) as it applies to a duly completed statement under this section."

10. Section 20(1) of the Act is the provision dealing with the evidential status of the statement and provides:

"20.— (1) A duly completed statement purporting to have been supplied under section 13 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2010 of the facts stated in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him or her by or under Chapter 4 prior to and in connection with the supply by him or her under section 13 of such statement."

11. The "*prescribed form*" referred to in the section is provided for in the Road Traffic Act 2010 (Prescribed Form and Manner of Statements) Regulations 2011 (S.I. 541/2011). Regulation 3 and 4 provide as follows:

"3. The form set out in the Schedule is prescribed as the form of the statements to be automatically produced for the purposes of section 13(2) of the Act of 2010 by an apparatus referred to in s. 12(1)(a) of that Act.

4. For the purposes of completing the statements referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—

(a) before the person provides a specimen of his or her breath in accordance with section 12(1)(a) of the Act of 2010, input into the apparatus referred to in that section—

(i) the name, address, date of birth and gender of the person providing the specimens,

(ii) the provision that it is alleged the person has contravened, namely, section 4(4) or 5(4) of the Act of 2010, and

(iii) his or her name and number,

and

(b) following the automatic production of the statements referred to in section 13(2) of the Act of 2010, sign the statements."

12. The text of the statutory instrument immediately after regulation 4 is here reproduced in full.

SCHEDULE

Road Traffic Act, 2010, section 13 — statement

Apparatus:

Serial Number:

Garda Síochána Station:

Test Number:

Date of start of test:

Person who provided specimens
Name:

Address:

Date of Birth:

Gender:

Analysis

Test g/100ml Time
Blank

Simulator Check 1

Blank

Breath Specimen 1

Blank

Breath Specimen 2

Blank

Simulator Check 2

The specimen to be taken into account for the purposes of section _____ of the Road Traffic Act, 2010 is specimen _____ above. The concentration of alcohol in the breath for the purposes of that section is _____ microgrammes of alcohol per 100 millilitres of breath.

Member of An Garda Síochána
Name:

Number:

Signature

I, the undersigned, hereby acknowledge the receipt of this statement.

.....

Signature of person who provided specimens of breath.

AN SCEIDEAL

An tAcht um Thrácht ar Bhóithre, 2010, Alt 13 — ráiteas

Gaireas:

Sraith-Uimhir:

An Stáisiún Garda Síochána:

Uimhir Tástála:

An Dáta ar Thosaigh an Tástáil:

An Duine a Sholáthair na hEiseamail
Ainm:

Seoladh:

Dáta Breithe:

Inscne an Duine:

Anailís

Tástáil g/100ml Am
Bán

Seiceáil Insamhlóra 1

Bán

Eiseamal Anála 1

Bán

Eiseamal Anála 2

Bán

Seiceáil Insamhlóra 2

Is é an t-eiseamal atá le cur san áireamh chun críocha alt _____ den Acht um Thrácht ar Bhóithre, 2010 ná eiseamal _____ thuas. Is é an tiúchan alcóil san anáil chun críocha an ailt sin ná _____ micreagram alcóil an 100 millilítear anála.

Comhalta den Gharda Síochána
Ainm:

Uimhir:

Síniú

Admhaímse, a bhfuil mo shíniú thíos, leis seo go bhfuair mé an ráiteas seo.

.....

Síniú an duine a sholáthair na heiseamail anála.

13. The name, title and seal of the Minister for Transport, Tourism and Sport follows thereafter.

14. The statutory instrument is not available in the Irish language. There is no reference in the text of either the Act or the regulations to the use of the two languages, and therefore no express legislative guidance as to whether what follows after the text of the regulation is to be seen as one composite document or two independent, alternative forms of statement.

15. The regulations have been amended since the High Court judgment in this matter, and it is now a matter of choice as to whether the form is in English or Irish. However, obviously this case is governed by the 2011 regulations.

The case stated
16. The findings of fact in the District Court hearing are set out in the consultative case stated to the High Court. It deals with the circumstances in which the appellant was stopped, subjected to a roadside breath test, arrested and brought to Store Street garda station. There is no issue as to the lawfulness of that process, or as to his treatment in the garda station, or as to the sequential procedure followed by the garda in relation to the operation of the apparatus.

17. The garda entered into the apparatus the details required by the regulations to be provided by him. The appellant then provided two specimens of his breath pursuant to a demand made under s. 12 of the Act, which included a warning as to the penal consequences of a refusal. The apparatus produced a statement that accords with the English language text set out in the Schedule. It recorded a concentration of 54 microgrammes of alcohol per 100 millilitres of breath. This document was then signed by both the appellant and the garda.

18. In cross-examination at the hearing, the garda confirmed that he had entered the information required from him in English, and that the document automatically issued by the apparatus was in English only. He said that the particular apparatus was capable of producing the printout in both English and Irish.

19. It is accepted that the statement records all the factual matters required by the regulations. It is also accepted that it follows the form prescribed by the Schedule as far as the English language section is concerned. The issue in the District Court was whether an Irish language section was required by the regulations to be included, and, if so, whether the document could be described as having been "*duly completed*" in its absence. The prosecution case was that the Schedule contained the prescribed form in English, followed by an Irish translation.

20. The learned District Judge, having reserved his decision, accepted the defence submission that there was one schedule to the regulations, and that it contained the prescribed form in English and Irish. He therefore ruled that the regulations required the statement to be in both of the official languages, with one version following the other. He found that the point raised was a fundamental one and went to the heart of the prosecution. He concluded by finding "*as a fact*" that the document was not "*duly completed*".

21. The District Judge then referred the following question to the High Court for determination:

> *"(i) On the facts so found, was I entitled to hold that the document purporting to show the concentration of alcohol in the breath of the accused is not a 'duly completed' certificate within the meaning of Section 13 of the Road Traffic Act 2010 and S.I. 541/2011, namely the Road Traffic Act 2010 (Section 13) Prescribed Form and Manner of Statements Regulations 2011?*

High Court Judgment
22. Noonan J. concluded that the District Judge was correct in his analysis of the regulations and Schedule. The language of s. 13(2) was, he considered, clearly mandatory. There was no provision in the regulations for alternative forms to be produced, in Irish and English. The "Schedule" referred to in the regulations therefore had to be the entirety of the form after the word "SCHEDULE". The judge held that there was no ambiguity about the interpretation, and it was not open to the court to speculate as to the intentions of the draftsman.

23. For the purpose of determining what the consequence of that finding was, Noonan J. analysed a number of the leading judgments dealing with challenges to the prosecution of Road Traffic Act offences where the issue was compliance with the statutory requirements. He then considered the submission of the prosecutor that, in the instant case, s. 12 of the Interpretation Act 2005 could be relied upon. That section provides:

> *"12.—Where a form is prescribed in or under an enactment, a deviation from the form which does not materially affect the substance of the form or is not misleading in content or effect does not invalidate the form used."*

24. Noonan J. held that this provision was not of assistance to the prosecution. What had occurred here was, in his view, a failure to reproduce an entire half of the prescribed form. It could not be described as a mere "*deviation*".

The Court of Appeal
25. The Court of Appeal (in a judgment by Edwards J.) agreed with the analysis of Noonan J. save in respect of the applicability of s. 12 of the Interpretation Act.

26. Looking at s. 13 of the Act of 2010, the Court held that subsection (2) imposed a number of conjunctive requirements. Following compliance with those, a further number of conjunctive requirements were imposed by subsection (3), pursuant to which the person concerned was obliged to acknowledge receipt of the statements and thereupon return one of them to the garda.

27. Looking next at the regulations, Edwards J. accepted that they had to be strictly construed and that a purposive interpretation was not permitted. That being so, they had to be given their literal meaning, with any ambiguity to be resolved in favour of the accused person. The literal interpretation was that there was only one Schedule, and that everything following the word "SCHEDULE" was part of the prescribed form. There was a degree of ambiguity in that use of the Irish words "AN SCEIDEAL" suggested two versions of one form, one in Irish and one in English. However, resolution of that ambiguity in favour of the accused required a return to the literal meaning.

28. However the Court of Appeal took the view that what had occurred was indeed covered by the terms of s. 12 of the Interpretation Act. Edwards J. put the matter (in paragraphs 62 and 63 of the judgment) in these terms :

> *"62. Contrary to the view taken by the trial judge, I do not consider that the deviation from the format prescribed in the present case materially affected the substance of the form. There was no information that the statement actually produced in this case failed to record or communicate as a result of the omission of the Irish part of the form. Moreover, the essential information was communicated in precisely the format and layout specified in the Regulations of 2011. What was omitted was merely the repetition of that information in Irish. That Irish part, even if it had been included, would not have added anything of substance to the document. Moreover, the omission of the Irish part could not have operated to mislead as to the contents of the document, or as to its effect.*
>
> *63. A prescribed form does nothing more than provide a means of presenting and communicating specified information in an orderly and structured way. The information required to be presented and communicated represents the substance of the document. The structured format represents its form. The deviation in this case was purely one of form, rather than one of substance. In finding that 'a failure to reproduce an entire half of the prescribed form could not be regarded as a mere 'deviation' from the form prescribed', the trial judge seems to have conflated form and substance. Section 12 does not talk about 'mere' deviations. It covers any deviation providing it is not a deviation of substance or is not misleading in content or effect. In this case there was a substantial deviation from the specified format, but it did not materially affect the substance of the document."*

The first issue – does the form used in this case comply with the regulations?
29. I agree entirely with the judgments of the High Court and Court of Appeal on this aspect. On a literal reading, the prescribed form must contain everything that follows the word "*Schedule*". There is no requirement for, and no benefit to be gained from, a purposive approach to the question. There is nothing absurd about the finding that, as worded, the regulations required a single bilingual form, to be provided in two identical versions. Indeed, a person unfamiliar with the practices of Irish parliamentary drafting, but who is aware that there are two official languages in the State, might well consider it appropriate. To hold otherwise requires speculation on the part of the Court as to the intentions of the draughtsman in including an Irish language translation in the instrument.

The second issue – the consequences of non-compliance
30. There seem to be few authorities in which s. 12 of the Interpretation Act 2005 has been considered. It is referred to in *DPP v Jakubowski* [2014] IECCA 28, concerning a search warrant that was not in accordance with the form prescribed by the District Court Rules.

31. Giving the judgment of the Court of Criminal Appeal, O'Donnell J. referred to O.12 r.23 of the District Court rules (which provides that a failure to adhere to a form prescribed in those Rules is not to vitiate the proceedings in question, provided that the form or words actually used are sufficient in substance and effect) and compared it to O.124 of the Rules of the Superior Courts. He also looked at s. 12 of the Interpretation Act and concluded:

> *"These are sensible provisions and in combination it seems to the Court that they apply here with the effect that it cannot be said that the search warrant here was invalid. Accordingly any entry was lawful, and the trial court was right not to exclude the evidence obtained on foot of the search warrant."*

32. The parties have referred to a large number of authorities exemplifying the approach of the courts to the consequences of defective procedures and forms in cases of this nature under the Road Traffic Acts. These are relevant to the extent that they may assist in answering the questions posed by s. 12 – does the deviation from the prescribed form materially affect the substance of the form? Is it misleading in content or effect? Although s. 12 was a new provision when enacted, in the sense that it did not appear in previous Interpretation Acts, the concepts concerned are not new to the courts.

33. Therefore, at the risk of bewildering the reader, I think it helpful to analyse the authorities in some detail. The decisions will be grouped according to broad categories and examined before embarking upon consideration of the principles illustrated. However, I will begin with two statements of general principle. The first is from a relatively early authority, *Director of Public Prosecutions v Kemmy* [1980] I.R. 160. This is a passage from the judgment of O'Higgins C.J. at p. 164, which, although the Chief Justice dissented as to the result in the case, is referred to in almost all of the authorities on the topic, and is taken to represent a correct statement of law.

> *"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements, but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof."*

34. The question in that case was whether a medical practitioner had "*duly completed*" a form. He had written the required particulars on the top copy of a carbonised duplicate, thereby filling in both at the same time, and had forwarded the bottom copy to the Medical Bureau of Road Safety. The defence argued that this was a copy and that the "*duly completed"* form forwarded to the Bureau had to be the original. In the Supreme Court, Henchy J. noted that the purpose of the form was to give written evidence that the statutory requirements in regard to a specimen had been carried out. He considered that in the circumstances there was no original and no copy – it was the same form in duplicate, and each form was identical to the other. Once it was conceded that both were filled in by the same medical practitioner, each had the same evidential value for the purpose of compliance with the section.

35. O'Higgins C.J. dissented because he considered that the defence submission was correct, and that the forwarding of a copy did not comply with the statute.

36. The second general principle comes from the decision of this Court in *Oates v Browne* [2016] 1 I.R. 481. The issue there was whether or not the defendant was entitled to seek certain information, prior to his trial, in relation to the workings of the relevant apparatus. As such, the decision is not concerned with questions of admissibility. However it is worth stressing that the *rationale* of the judgment – that the defendant was entitled to the information because he was entitled to challenge the evidence to be adduced against him, and he was not, therefore, obliged to demonstrate in advance any particular basis for supposing that the information would assist him – arises from the fair trial rights of an accused person.

37. The starting point, therefore, is that documents of the nature of the form under consideration are given a particular evidential status that they would not otherwise have, on condition that the legislative requirements are satisfied. Those requirements must not be interpreted in such a way as to defeat the right of an accused person to a fair trial.

The authorities
Lawfulness of arrest as prerequisite to lawful demand for specimen

38. The cases looked at here concern the status of the driver at the time when the statutory procedures are carried out. The issue in *The People (Director of Public Prosecutions) v. James Greeley* [1985] I.L.R.M. 320 arose from the fact that the defendant was not under arrest at the time. Having been stopped and having submitted to a roadside test, he went voluntarily to the garda station and gave a blood sample. The argument subsequently made on his behalf was that the procedure involved in taking the sample was unlawful, in that the statutory power to require a person to give a specimen applied only to a person who had been arrested and brought to the garda station. It followed that the Bureau certificate was inadmissible in evidence. This contention was upheld by Barrington J., although he stressed that he did not see the case as involving a breach of constitutional rights.

> *"The problem is that s.23 of the Road Traffic Act 1978 makes prima facie evidence a certificate which, without that express statutory enactment, would not be evidence at all. But it seems to me that the system pre-supposes that the appropriate legal procedure culminating in the issuing of the certificate has been followed. If the defendant can show that the correct procedure was not followed and that there was in fact no power to require him to furnish a blood specimen then it appears to me [that] the certificate is not a certificate of the kind contemplated by s.23 of the Road Traffic Act 1978 and has no status as evidence in a court of law."*

39. In the more recent case of *Director of Public Prosecutions v. Cullen* [2014] 3 I.R. 30, the majority in this Court held that similar reasoning applied where the defendant had been subjected to an unlawful arrest (in this case, because of the unjustified use of handcuffs). Again, the analysis was not based on consideration of the exclusionary rule relating to unconstitutionally obtained evidence, as it was then understood. Rather, it was grounded on the fact that, under the statutory scheme, the authority to demand a sample was dependent on the procedure having commenced by a lawful arrest. The judgment of Fennelly J. makes reference to earlier decisions of the Court in *Director of Public Prosecutions v Finn* [2003] 1 I.R. 372 and *Director of Public Prosecutions v Fox* [2008] 4 I.R. 811, both of which concerned a period of time spent observing the arrested person before making the demand for a breath sample. In *Finn* it was held that the detention had become unlawful because no explanation had been offered in evidence for the lapse of time, other than a reference to unspecified guidelines. By contrast, in *Fox* a similar period of time was explained, and the Court considered the explanation acceptable. Again, it was stated by Hardiman J. that the issue arose because of the necessity that, under the terms of the statute, the demand for a specimen be made while the person was under lawful arrest.

The procedure for taking the specimen – (i) making an unauthorised demand of the driver

40. The issue in *Director of Public Prosecutions v Corcoran* [1995] 2 I.R. 259 related to the power under the Road Traffic (Amendment) Act 1978 to require a person:

> *"either to permit a designated registered medical practitioner to take from the person a specimen of his blood or, at the option of the person, to provide for the designated registered medical practitioner a specimen of the person's urine."*

41. The defendant consented to the taking of a blood sample but, notwithstanding his full cooperation, the doctor could not take one. The defendant was *"reminded"* by the garda of his option to provide a urine specimen and he did so, under the belief that he was obliged so to do.

42. In holding that in the circumstances the defendant had not been obliged to provide a urine sample; that he had not given it with his *"free election"* and that the result of the analysis of that sample was inadmissible, Lavan J. referred to the judgment of Denham J. in the case of *Howard v. The Commissioners of Public Works* [1994] 1 I.R. 101 for the proposition that where the language of a statute was clear the court must give effect to it, applying the basic meaning of the words. This strict approach was particularly important in the case of penal statutes. The plain language of the provision under consideration did not suggest that the optional provision of a urine sample became obligatory if, through no fault of the subject, a blood sample could not be taken.

43. Corcoran was considered by this Court in *Director of Public Prosecutions v Moorehouse* [2006] 1 I.R. 421, where Kearns J. did not disagree with the approach to statutory interpretation adopted by Lavan J.

44. The apparatus used by the defendant in *Director of Public Prosecutions v. McDonagh* [2009] 1 I.R. 767 required the user to provide two breath specimens within one three-minute "*cycle*" of the machine. The defendant had some difficulty in doing this. No specimen was obtained on his first attempt, and only one was obtained on the second. The apparatus returned that result as "*incomplete*". He managed to provide two specimens of breath in one cycle in his third effort. It was argued on his behalf that the two lawfully taken specimens were the single one from the second effort and the first from the third. The submission was that, as there was no power to require him to give a third specimen, it followed that a certificate relating to the specimens provided on a third

attempt was inadmissible. The significance of the argument lay in the fact that the apparatus can give a different result for each sample, and it is the lower one that is to be utilised.

45. On a case stated from the Circuit Court, this Court agreed with the defence submission. Denham J. noted that the obligation to give a specimen was a statutory restriction of the right against self-incrimination, justified by social and community reasons. As such, it had to be construed strictly and in accordance with the right to due process. In this case, a process had been brought into being by the operating system of the apparatus, whereby the prosecution sought to rely on specimens that were not in fact the first and second specimens. This meant that a defendant could in theory be prosecuted in circumstances where the lower figure from the actual first and second samples would not have grounded a case.

46. Finnegan J. agreed. In discussing the proper interpretation of the statute, he endorsed the approach of Kearns J. in *Moorehouse* and referred also to the dicta of Goff L.J. in *Howard v Hallett* [1984] R.T.R. 353 – "*the machine must follow the Act and not the Act follow the machine*". In other words:

> *"It would be inappropriate to allow the manner in which a particular apparatus operates to regulate the construction of the section but rather the apparatus in its operation should correspond with the requirements of the section."*

47. He went on:

> *"In construing a penal statute, as any other statute, the literal rule should be applied but it should not be applied if this would lead to an absurd result which is pointless and which negates the intention of the legislature derived from the construction of the section within its context: where appropriate a purposive interpretation may be applied."*

48. On a literal reading of the statute, only two specimens were envisaged, the higher of which was to be disregarded. The driver's obligation was complete once two samples capable of measurement were given.

The procedure for taking the specimen – (ii) failure to safeguard the defendant's statutory rights

49. The Court has been furnished with Counsel's note of an ex tempore judgment given by Kelly J. in *McCarron v His Honour Judge Groarke* (4th April 2000). The question in that case was the effect of non-compliance with s. 18(2) of the Road Traffic Act 1994, pursuant to which the garda was obliged to offer to the person concerned one of two sealed containers holding the specimen taken or provided by him, together with a statement in writing indicating that he could retain either of the containers. The Circuit Court judge found that the accused had in fact taken a container and retained it, but that he had not been given the statement in writing. He ruled, apparently on the basis of Somers (considered below at paras. 62 to 65), that this was a mere technical failure. On the evidence, the defendant had exercised his rights and had suffered no prejudice.

50. In the subsequent judicial review proceedings Kelly J. disagreed with this analysis. He contrasted the alleged failure to complete the form in Somers with what had occurred in this case – a failure to comply with a provision that was in mandatory terms.

> *"It is not a flaw of no significance or one which could not work an injustice. It is not in accordance with the purpose and objects of the legislation to fail to provide the statement in writing to the accused. In fact it is in discord with the purpose and object of the legislation."*

The procedure for taking the specimen – (iii) the sequence to be followed

51. In *Director of Public Prosecutions v Lloyd Freeman* [2009] IEHC 179 the issue turned upon the order in which the form was signed by the member of the Garda Síochána and the defendant. The terms of the applicable provision (s. 17 of the Road Traffic Act 1994) required the garda, when the apparatus determined that an offence might have been committed, to forthwith supply to the driver two identical statements automatically produced by the apparatus and "*duly completed*" by the garda. The driver was then obliged to acknowledge receipt by signing both statements, and to return one to the garda. "*Due completion*" under the regulations (the Road Traffic Act 1994 (Section 17) Regulations 1999) required the garda to sign the statements "*following*" their production by the apparatus. In this case, the evidence established that the garda handed the statements to the defendant, who therefore signed the two copies before the garda did. The District Judge ruled that the statement was not, in those circumstances, "*duly completed*". The prosecutor appealed by way of case stated.

52. In the High Court, MacMenamin J. was inclined to accept, in principle, the prosecution argument that what had occurred was a mere technical omission. The point made by the defence was, he felt, "*wafer thin*". No substantive injustice had been perpetrated. Further, he felt that the provision in the statute as to signature (which stated that the duly completed statement was to be sufficient evidence both of any signature on it and the fact that the signatory was the proper person to sign it), taken in isolation, might indicate that the sequencing of the signature procedure was not an essential aspect of the statutory intent or a fundamental requirement for the protection of the rights of the citizen. However, he continued:

> *"But the proviso is that these cases must be judged in their procedural, statutory and evidential context."*

53. Having considered the authorities on the Road Traffic Acts, and the approach of the Supreme Court to an issue raising similar considerations in *Maguire v Ardagh* [2002] 1 I.R. 385, MacMenamin J. held that to be "*duly completed*", a form signed by a driver had to have been already completed in accordance with the statute, and therefore had to contain the garda's signature.

54. It may be noted that MacMenamin J. did not accept a submission made by the prosecutor, based on *Moorehouse*, that the provisions should be interpreted in a purposive manner. The significant point here, in his view, was that refusal on the part of a driver to sign the document would give rise to penal liability on his part.

> *"The duty is to be construed mutually – it cannot be 'penal' for an accused, but not 'penal' for a member of An Garda Síochána who administers the test. Section 17(3) cannot be legitimately divorced or 'ringfenced' from s.17(1) and (2). The 'statement aforesaid' referred to in subs (3) is linked to the 'duly completed' statement produced by the apparatus under s.17(2). All the subsections and the regulation are to my mind so interlinked in their statutory context, that to seek to divorce one from the other, to say one subsection is penal and one is not, would be an impermissible exercise in linguistic analysis."*

55. *Director of Public Prosecutions v. Kennedy* [2009] IEHC 361 is another case concerning the sequencing of the statutory requirements. It was established in evidence that the garda had explained to the defendant that he had a right to retain one of the specimens, and that he gave him the same information in writing. It was further established that the defendant took one of the samples. However, it transpired in evidence that while the explanation was given, both samples were in the hands of the doctor, and that it was the latter who gave one of them to the defendant. The submission raised was that the offer of the container was a mandatory requirement and had to be performed by the garda. On a case stated, McMahon J. held that this was a "*wholly artificial*" argument and that the garda did not have to have the containers in his hands when he made the offer.

> *"The subsection means that the garda must tell the accused that he may have one container to retain for himself and that this must be indicated also to the accused in writing. The latter is to ensure that there is written proof should there be a subsequent dispute…*
>
> The purpose of the subsection is, of course, to provide the applicant with the opportunity to have the sample in the container subjected to analysis in an independent laboratory of his choice, so that he can challenge the official result if he so wishes."

Due completion of the form

56. *Director of Public Prosecutions v Collins* [1981] I.L.R.M. 447 was a case where the prescribed medical practitioner's form was not fully filled in, the doctor having omitted to insert his name in the space provided in the statement "*I, the undersigned designated medical practitioner – [blank space] took from the person named at 1 above the blood specimen…"* However, he had signed at the point indicated for signature.

57. Henchy J. considered that the blank line was probably intended to have the name inserted but it was an "*optional"* entry, and nothing would have been gained if the name had in fact been inserted.

> *"What was required to complete (i.e. to make whole) this part of the form was for the designated medical practitioner to verify, by signing his name at the end line, that he had done the several things recited in the printed form as having been done by him. The opening words 'I, the undersigned designated medical practitioner' and the signature at the end identify one and the same person, and the signature purports to aver that Dr. Lundon did the acts which the intervening part of the form attributes to him. It is therefore, in the words of s.23(1) 'a duly completed form under s.21' and enjoys the probative value ascribed to it by s.23(1)."*

58. A second issue arose from the requirement that the doctor specify whether he had taken a specimen of blood or urine by deleting the reference to whichever substance had not been taken. He had drawn a line through the words "*the specimen of urine*" but had not fully deleted the rest of that line. Henchy J. stated that no reader of the form could realistically have concluded that it was other than a completed form in respect of a blood sample.

> *"The purpose of this form was to identify the particular blood sample and to show that the set procedures were followed in regard to it. Once Dr Lundon affixed his signature to the form as filled in, the failure to delete in full the line referring to a specimen of urine was no more than a technical slip. It left the true content of the filled-in and signed form unaffected. So it cannot be said that this slip meant that the form was not duly completed."*

59. *Director of Public Prosecutions v. O'Neill* (Unreported, Supreme Court, 30th July 1984) was another case concerning the medical practitioner's certificate. The doctor had filled in the space provided for the time at which he took the specimen, but had failed to state whether it was day or night. An issue arose as to whether the form complied with the statutory requirement that the time at which the sample was taken should be stated.

60. In this Court Hederman J. stated that the contention that this was a defect rendering the form incomplete could not be sustained. The District Court had evidence of all of the facts from the time of the defendant's arrest until after completion of the form, and the time noted on the form could refer only to the time at which the evidence established that the specimen was taken. The defendant could not have been under any misapprehension as a result of the manner in which the form was filled in, or have been in any way prejudiced.

61. It was observed, however, that different considerations might arise under other parts of the Road Traffic Acts if there was not precise evidence from which it must be inferred that an accused had notice of the time of the happening of any particular event.

62. In *Director of Public Prosecutions v. Somers* [1999] 1 I.R. 115 the medical practitioner's form contained a space with the heading "*Nature of specimen*", where the practitioner was supposed to insert "*blood"* or "*urine*" as appropriate. The doctor had left this space blank. However, at a subsequent section he deleted a reference to urine, thereby leaving a complete sentence in which he declared that he had taken a specimen of blood. On a case stated from the Circuit Court, this Court held that the omission did not amount to non-compliance with the statutory requirements. O'Flaherty J. observed that there could be no doubt that the form conveyed the information that it was concerned with a blood sample. The case was "*all but*" ruled by the earlier decisions in Kemmy and Collins. At most, what had happened was a technical slip causing no confusion.

> *"It is true that in general the law expects strict compliance with the wording of statutes, especially in a penal context. But this is so that the purposes and objects of the legislation are observed. It is impossible to seek perfection at all stages of life and when there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possibly work any injustice to an accused and is not in discord with the purposes and objects of the legislation, then the courts are required to say that such a slip, as we have here, cannot be allowed bring about what would be a manifest injustice as far as the prosecution of this offence is concerned."*

63. Barron J. agreed. He stressed the importance of certainty in criminal law, and the concomitant necessity to construe strictly statutes within the criminal law field.

> *"What has to be construed here are provisions to ensure that there will be certainty as to what has been done leading to a prosecution. The accused person is entitled to know at his trial that everything that should have been done had been done. There must be no room for doubt."*

64. Looking at the facts of the case before the court, Barron J. posed the question whether there could be any doubt as to compliance with the statute.

> *"The form as filled in sets out the name of the person from whom the specimen was taken; the place where it was taken; the date on which it was taken; the time at which it was taken; together with a signed statement by a designated doctor that she took a specimen of blood from the person named on the form, divided it into two parts, placed each in a container which she forthwith sealed, labelled with the name of the person and the date, and gave both to a member of the Garda Síochána.*

Clearly what was required to be done by s.18(1) was done and there was a signed statement of the designated doctor to that effect. There could not have been any doubt but that there was compliance with the requirements of the statutory provisions. The accused could have had no reason to query nor to have any doubt as to what was done. In my view therefore the prescribed form was completed."

65. Of note, Barron J. expressly agreed with the above-cited passage from the judgment of O'Higgins C.J. in *Kemmy*, saying that the section under consideration must be complied with strictly. Strict compliance happened where, as in the case under consideration, there was no doubt as to what had been done.

66. The defendant in *DPP (O'Reilly) v. Barnes* [2005] 4 I.R. 176 had been arrested on suspicion of the offence colloquially known as "drunk in charge", contrary to s. 50(4) of the Road Traffic Act 1961, as amended. He was subsequently charged with that offence and a statement produced by an intoximeter apparatus was adduced in evidence. However, the garda who operated the apparatus had mistakenly entered the information that the specimen was being taken for the purposes of an offence under s.49(4) of the Act ("drunk driving").

67. O'Neill J. commented that there could be no doubt that the statement in question was in the prescribed form. The issue was whether it could be said to be "*duly completed*". He considered, having regard to the "*long line*" of authorities, that there were two guiding principles informing decisions as to the admissibility of certificates or statements of this nature, which proved their content in the absence of contradictory evidence. The first was that laid down by O'Higgins C.J. in *Kemmy*. The second was illustrated by the judgment of O'Flaherty and Barron JJ. in Somers. A court should therefore approach a challenge to such evidence on the basis that it must be satisfied that there had been strict compliance with the relevant statutory provision before admitting the evidence.

68. He continued:

> *"On the other hand where objection has been taken to the statement on the basis of an error in it, if the error is of such an obvious or trivial or inconsequential nature so that it could not be said that it gave rise to any confusion or misleading of the accused or imposed any prejudice on him or in any way exposed him to any injustice, then the court should conclude that the error in question did not detract from the due completion of the statement in question and it should be admitted and permitted the force and effect provided for by, as in this case s.21(1) of the Road Traffic Act 1994."*

69. O'Neill J. took the view that the error under consideration by him could not, in the circumstances of the case, have confused, let alone misled, the accused. There was no lack of certainty as to the particular offence in respect of which the breath specimen was taken. There was no risk of prejudice or injustice.

70. This decision was followed by Dunne J. in *Ruttledge v District Judge Clyne* [2006] IEHC 146. There, the form presented in evidence was defective in that the garda had in error inserted his own name in the space intended for the name of the driver. The District Judge mistakenly believed that he could amend that error. In judicial review proceedings all parties accepted that he could not, and the debate was whether or not his purported exercise of a power to amend entitled the defendant to an order of certiorari. Dunne J. held that it did not. The error made by the garda had been of such an obvious, or trivial, or inconsequential nature that the District Judge would have been entitled to convict on foot of the contents of the form without amendment.

71. In *Director of Public Prosecutions (O'Brien) v. Hopkins* [2009] IEHC 337 the defect relied upon by the defence was the failure of the medical practitioner to record the date of the taking of the sample on the label of the sample container provided to the defendant. He had instead inserted a purported date of birth for the defendant, which was in itself inaccurate.

72. Hedigan J. noted that it was undisputed that the container was one of the two used on the night of the alleged offence; that it was sealed and affixed with the name of the defendant; and that the certificate was otherwise free from defect. Having considered the authorities, he stated that the correct approach to be taken where the objection was of such a technical nature was to require the defendant to demonstrate some form of prejudice. He distinguished Freeman on the basis that the flaw in that case related to the certificate sought to be put in evidence, whereas in the case under consideration the flaw related only to the label on the container. The breach was purely technical and no prejudice had been established.

73. A second issue in the case of *Director of Public Prosecutions v Kennedy* (referred to above at paragraph 55) arose from the fact that the doctor had signed a form containing the statement that he had given both containers to the garda. This statement was obviously contradicted by the evidence, which established that he had handed one to the defendant. McMahon J. held that the error in the form was neither a breach of the statute nor a breach of the regulations, and amounted merely to a mistaken statement in respect of a non-essential requirement. The error having been recognised as such because of the evidence to the contrary, the effect was that the form lost its evidentiary status in respect of that fact. It did not invalidate the form as a whole, or the other matters averred to therein.

74. McMahon J. went on to say that the effect of an error must be examined in the light of the circumstances of each case. Here, it had no significance and had not prejudiced the defence.

75. In *Director of Public Prosecutions v Mullins* [2015] IEHC 695 the medical practitioner had not filled in his form completely, in that he left blank both of the spaces intended for specification of the nature of the sample taken (i.e. blood or urine). In the High Court I held that in those circumstances the form failed in a fundamental way to fulfil the evidential objective of the statute. The form could not be said to be "*duly completed*", and thus raise a presumption that the doctor's obligations in respect of the taking of a sample had been complied with, when he had failed to record what sample he took. If it were to be admitted into evidence it would not prove that the doctor had performed his statutory role of taking either of the two specimens mandated by the Act.

76. This judgment leaves open the possibility of proof of the required matter without reference to the form.

Discussion

77. The submission has been made in this case that the Court is dealing with a penal statute that must be strictly construed by the

courts and strictly complied with by members of the Garda Síochána. There is no dispute as to either of these propositions – the question is whether a "*strict*" approach means, in the circumstances of any given case, that identification of a particular defect has the consequence of invalidating the prosecution evidence.

78. It is a striking feature of the debate that the submissions on both sides, and the authorities upon which they are based, appear to consider only decisions in other cases involving Road Traffic Act cases (specifically, relating to the prosecution of cases of driving under the influence of alcohol). There is no reference to the authorities from the broader field of criminal law, where comparable issues would generally be dealt with according to the principles relating to (depending on the nature of the defect) the adequacy of the prosecution evidence or the admissibility of improperly obtained evidence. Broadly speaking, the principles concerned with improperly obtained evidence come into play where evidence is challenged as being the fruit of either a breach of the constitutional rights of an accused (in which case the issue now falls to be considered according to the decision of this Court in *Director of Public Prosecutions v. J.C.* [2015] IESC 31) or of an action which, although not amounting to a constitutional violation, is nonetheless illegal. It is well recognised that cases in the latter category give rise to a discretion on the part of a trial judge to exclude the evidence, according to long established criteria. In *People (AG) v. O'Brien* [1965] I.R. 142 Kingsmill Moore J. said:

> *"It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilising the fruits of such methods. It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions, and that the answer to the question depends on a consideration of all of the circumstances."*

79. Kingsmill Moore J. considered that the criteria included the nature and extent of the illegality; whether it was intentional or unintentional, the result of an ad hoc decision or a settled policy; and whether it was trivial or technical in nature or a serious invasion of important rights.

80. This principle has been applied in a long line of authorities. A recent example is found in the judgment of Clarke J. in *People (DPP) v Jagutis* [2013] 2 I.R. 250, where (in the course of a discussion about a defective warrant) the following observation was made:

> *"It is appropriate to pause to emphasise that the use of the term 'discretion' in this context does not imply that the Court can do as it pleases…In truth what the law requires is that, in deciding whether to admit or exclude evidence obtained on foot of the execution of a defective warrant, the court is required to take into account a broad range of circumstances before determining whether, on balance, the evidence should be admitted or excluded. The role of the court is, therefore, non-automatic. It does not automatically follow from a determination that a warrant is defective that evidence obtained on foot of the execution of the warrant is either to be admitted or to be excluded."*

81. A fuller analysis of the authorities on this topic will be found in any of the leading Irish textbooks.

82. It is undoubtedly the case that the section under consideration is a penal statute in that it creates a penal liability. "*Strict construction*" means that the court must consider whether there has been observance of the purposes and objects of the legislation, and whether it has been proved "that everything that should have been done has been done" (*Director of Public Prosecutions v. Somers*).

83. The implications of a strict construction were examined by O'Higgins J. in *Mullins v. Harnett* [1998] 4 I.R. 426, where a passage from Maxwell on Statutes was approved:

> *"According to Maxwell 12th Edition pp. 239 to 240, 'The strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction.' It would appear that the principle applies not only to criminal offences but to any form of detriment. At p.572 of Bennion, the nature of the principle is stated thus:*
>
> > *'Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful… However it operates, the principle requires persons should not be subjected by law to any sort of detriment unless this is imposed by clear words.'"*

84. This passage was endorsed by Hardiman J. in *Montemuino v The Minister for Communications* [2013] 4 I.R. 120, who also agreed with the analysis in Dodd's Statutory Interpretation in Ireland to similar effect:

> *"It is presumed that an enactment creating a penal, or taxation, liability or other detriment should be construed strictly so as to prevent the imposition of penal liability unfairly by the use of oblique or slack language (CW Shipping v Limerick Harbour Commissioners [1989] I.R.L.M. 416). It is said that nobody should suffer a detriment by the application of a doubtful law and that a person should not be found guilty of a statutory offence where the words of the statute have not plainly indicated that the conduct in question will amount to an offence. The principle may be applied so as to require the precise fulfilment of statutory conditions precedent to the infliction of punishment and to require strict observance of technical provisions concerning criminal procedure and jurisdiction. The greater the penalisation, the greater the weight to be attached to the principle."*

85. There is no doubt about these principles. The question is whether, in their application to this case, the principles have the consequence that use of the statement in the format described means that the statutory conditions precedent to the imposition of criminal liability have not been met.

86. To begin with, it seems clear that use of the defective statement did not in any way impinge upon the clarity of the legislative definition of the offence with which the appellant was charged. The principle against "*doubtful penalisation*" is therefore not relevant in this case. Production of the statement does not in itself create any criminal liability, or impose any detriment. It is a piece of evidence that can be used to establish liability, and the issue is simply one of admissibility and adequacy with respect to that purpose.

87. Secondly, the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime if:

> *(i) A precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or*
>
> *(ii) The power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or*
>
> *(iii) The power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or*
>
> *(iv) The power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove.*

88. Although the context within which disputes about the admissibility of evidence has undoubtedly been altered by the judgments of this Court in *Director of Public Prosecutions v. J.C.*, the decisions cited above in relation to the first two of these principles are not in question in this case. The powers conferred by the Act must accordingly be exercised within the statutory context and in accordance with the statutory conditions. Such powers cannot be added to by error on the part of a garda, so as to be exercisable in respect of a person who has not been made amenable to the statutory regime or so as to enable demands to be made that are not authorised by the Act.

89. It seems likely that disputes about the "*due completion*" of the statutory forms will fall into either the third or fourth category. The latter presents a simple enough situation – if a form has been filled in so inadequately as to fail to prove the requisite matters, either in whole or in part, it will to the same extent lose the benefit of the evidential status conferred by the Act.

90. The third category may be more complex. Having regard to the authorities, there should in my view be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible. My own view, therefore, would be that both McCarron and Freeman should be regarded as being at the far end of the spectrum of insistence upon the letter of the statute.

91. Had the defendant in McCarron not in fact been informed of his right to take and retain a sample, that would have been a clear breach of the statutory protection of his fair trial rights. If he had not actually taken the sample, the failure to give him the printed information might have left a court in doubt as to whether he had been properly informed. Given, however, that he accepted that he had been informed; that he took the sample and that he gave it to his legal representative, it is difficult to see that any unfairness arose.

92. Similarly, it is correct to say that in Freeman the form proffered to the defendant for signature was not, at that point, a "*duly completed*" form. After all, the form would have no evidential status if not signed by the garda. If the defendant had refused to sign it unless the garda did so first, it is difficult to imagine that he could have been prosecuted for such refusal. However, in circumstances where the garda signed it immediately after the defendant, it is again hard to see any impact upon the fairness of the trial of the offence with which the defendant was charged.

93. I bear in mind here the consideration, which obviously influenced MacMenamin J., that a person in this situation signs the form under pain of prosecution in the event of a refusal to sign. However, it is important to note that the signature is simply for the purpose of confirming receipt. It can not be held to amount to approbation of the contents – the defendant is neither accepting nor warranting the accuracy of the content of the statement. The fact that there is a legal compulsion to sign does not, in my view, necessarily relate to or justify a conclusion that a flaw in the form means that it should be excluded.

Conclusion

94. The first question to be determined in this case is whether the form of statement relied upon by the prosecution in this case complied with the statute and regulations. My view on that question is the same as that of each of the judges in the District Court, High Court and Court of Appeal – a straightforward literal reading of the regulations indicates that the form should have contained the Irish language version.

95. The second question is whether, notwithstanding that defect, the Court can apply s. 12 of the Interpretation Act 2005. Again, I agree with the analysis of the Court of Appeal. The "*substance*" of the prescribed form is the information intended to be proved in evidence by means of the statutory status accorded to the form, and all of the required information is present in this case. The content is in no way misleading, confusing or unfair. No right of the appellant is violated by its admission. Accordingly, whether the matter is looked at solely through the prism of the authorities on this type of prosecution or in the light of the general principles of the criminal law, I can see no reason why the form should not be admitted into evidence.

96. In the circumstances I would dismiss the appeal.