Neutral Citation Number: [2009] IEHC 179

THE HIGH COURT

2008 1438 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR /APPELLANT

AND

LLOYD FREEMAN

ACCUSED/RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin dated 21st day of April, 2009.

Introduction

1. On its face, this appeal by way of case stated simply raises issues as to the interpretation of s. 17 of the Road Traffic Act 1994. This provision relates to the statutory procedure to be adopted for the signing of a certificate following provision of a breath specimen, which certificate may be used in evidence in a prosecution under s. 13 of the Road Traffic Act 1994.

2. In one sense it might be said the points at issue here are purely "technical". They relate simply to what constitutes a "duly completed" certificate under the section; and whether the garda administering the test to the accused, Garda Paul Dempsey, should have signed the form before the accused, Lloyd Freeman, rather than, as happened here, afterwards. A further issue is as to the consequences in law of adopting a procedure *prima facie* at variance from the statutory provisions engaged. But this judgment also must discuss and consider the precedential status of a prior judgment of this court *prima facie* on all fours with this case; whether there are other authorities which should be applied by way of distinction from that authority; and the extent to which, if at all, a discretion of this court can be exercised in an appeal by way of case stated on a point of law, as opposed to a judicial review which is a discretionary remedy.

The statutory provisions

3. Section 17 of the Act of 1994 provides:-

> "17.—(1) Where, consequent on a requirement under section 13 (1)(a) of him, a person provides 2 specimens of his 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 49 (4) and 50 (4) of the Principal Act and the other specimen shall be disregarded.
>
> (2) Where the apparatus referred to in section 13 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 49 (4) or 50 (4) of the Principal Act, he shall be supplied forthwith by a member of the Garda Síochána with 2 identical statements, automatically produced by the said apparatus in the prescribed form and *duly completed by the member in the prescribed manner*, stating the concentration of alcohol in the said specimen determined by the said apparatus.
>
> (3) On receipt of the statements aforesaid, the person shall on being requested so to do by the member aforesaid—
>
> *(a) forthwith acknowledge such receipt by placing his signature on each statement, and*
>
> *(b) thereupon return either of the statements to the member*.

It is important to note the penal provisions attached to s. 17 as follows:-

> "(4) A person who refuses or fails to comply with subsection (3) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 3 months or to both.
>
> (5) Section 21 (1) shall apply 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. (emphasis added)."

Section 21 of the Road Traffic Act 1994 provides:

> "21.—(1) A duly completed statement purporting to have been supplied under *section 17 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts, 1961 to 1994, of the facts stated therein, 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 by or under this Part prior to and in connection with the supply by him pursuant to

section 17(2) of such statement (emphasis added).

The regulations made under s. 17 of the 1994 Act
4. In order to place the matter in further statutory context it is necessary to refer to the regulations applicable to the administration of s. 17 of the Act of 1994. These are the Road Traffic Act 1994 (Section 17) Regulations 1999 (S.I. No. 326 of 1999) which provide at regulations 4 and 5:-

> "4. The Statements to be produced, pursuant to section 17 of the Act of 1994, shall be in the form set out in the Schedule to these Regulations.
>
> 5. For the purpose of completing the statements referred to in article 4, *the member of the Garda Síochána who required the arrested person to provide two specimens of breath shall:—*
>
> (a) prior to the provision of the specimens, input the following information into the apparatus referred to in section 13(1) of the Act of 1994—
>
> (i) the name and address of the person providing the specimens,
>
> (ii) the section of the Road Traffic Act, 1961 (No. 24 of 1961) which it is alleged that the person contravened,
>
> (iii) his or her name and number, and
>
> (*b) following the automatic production of the statements by the apparatus, sign the said statements* (emphasis added).

The Case Stated summarised
5. On 18th day of September, 2008, Judge Gerard Haughton, Judge of the District Court stated this case at the request of the prosecutor/appellant (hereinafter referred to as *"the prosecutor"*) who was dissatisfied with his determination of a proceeding which came before him on 12th February, 2007, at a sitting of the Dublin Metropolitan District Court which determination is challenged as being erroneous on a point of law. The matter may be summarised in this way:-

6. The accused, Lloyd Freeman was charged that on 20th October, 2006, at Queen Street, Dublin 7 in the Dublin Metropolitan District he drove a mechanically propelled vehicle in a public place 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 exceed a concentration of 35 milligrams of alcohol per 100 millilitres of breath contrary to s. 49 (4) and (6)(a) of the Road Traffic Act 1961 (as inserted by Section 10 of the Road Traffic 1994, as amended by section 23 of the Road Traffic Act 2002).

7. In brief:-

(a) Garda Ruth Collins when operating a check-point at Queen Street stopped Mr. Freeman's car and observed that his eyes were glassy and red, his speech slurred and there was a smell of intoxicating liquor from his breath. She thereafter formed the opinion that Mr. Freeman had consumed intoxicating liquor to such an extent as to have improper control of a mechanically propelled vehicle. She furnished the requisite cautions to the accused under s. 49 of the Road Traffic Act 1961. The accused was informed in simple terms the reason for his arrest.

(b) Thereafter the accused was conveyed to Pearse Street garda station. He arrived there at 23:50. He was introduced to the member in charge who completed the custody record and read over and provided the accused with a copy of his notice of rights.

(c) At 00:10 the accused was taken to the doctor's room by Garda Collins, Garda Dempsey and a student Garda McCartney. He had been observed by Garda Collins for a twenty minute period and had taken nil by mouth. At 00:12 Garda Collins introduced the accused to the intoxilyzer operator, Garda Dempsey, and was present when Garda Dempsey made requirements pursuant to s. 13(2) of the Road Traffic Act 1961 to 1994 for the purposes of breath test, and required two specimens of breath from him. The accused provided a sample of his breath with the result of 64 mgs. of alcohol per 100 mls. of breath. A copy of that breath specimen was handed in as evidence to the District Judge at the hearing of the prosecution.

(d) Garda Paul Dempsey gave evidence that he was on duty at Bridewell garda station on the night and morning in question. While on duty he had been contacted by Garda Collins who informed him that she had made an arrest and requested him to perform an intoxilyzer breath test on the accused. Garda Dempsey was a qualified operator of the machine designed for measuring the level of alcohol present in breath. He had attended at Pearse Street garda station for the purpose of conducting this test.

(e) Garda Dempsey informed the accused he would be conducting the test. He testified that he too got a smell of intoxicating liquor from the accused, stated that he was unsteady on his feet, that his speech was slurred, and formed the opinion that he was drunk. He told him of his opinion. He then administered the test on an intoxyliser machine at 00:17. There was no issue regarding the efficacy of the machine or the physical environment in which the test was administered.

(f) Prior to administering the test Garda Dempsey entered the accused's details into the machine. He informed the accused of the requirement under s. 13 (1)(a) of the Road Traffic Acts 1961 to 2004 to the effect that the accused was required to provide two specimens of breath by breathing into the apparatus for determining the level of alcohol in his breath and warned that failure to comply with the test would be an offence under s. 13 (2) punishable by a fine of up to but not exceeding €2,000 or by a term of imprisonment up to six months and this was explained in ordinary terms.

(g) Garda Dempsey stated the accused provided two samples of his breath and the test reading was a result of 60

mgs. of alcohol per 100 mls. of breath. He stated that *pursuant to s. 17 the accused signed both copies of the test receipt and Garda Dempsey* ***then*** *signed them and offered the accused the opportunity to take one of the copies which he did*.

(h) Garda Dempsey under cross-examination agreed with the contents of his official witness statement. This had been disclosed to the defence, and was to the following effect:

> *"Under s. 17 Mr. Freeman signed both copies of the test receipt and* ***then I signed them*** *and offered Mr. Freeman the opportunity to take one of the copies at 00:30 which he did. At 00:38 I searched Mr. Freeman and placed him in a cell*" (emphasis added).

(i) At the conclusion of the prosecution case the accused did not go into evidence but sought a direction. Counsel on behalf of the accused opened the provisions of s. 17 of the Road Traffic Act 1994 and submitted that the provisions of the section had not been complied with, as the accused had signed the s. 17 certificates prior to the garda signing same. He relied on the decision in *D.P.P. v. Thomas Keogh* (Unreported, High Court, Ex Tempore, Murphy J., 9th February, 2004) and argued this non-compliance entitled the accused to a direction of acquittal.

(j) The District Judge found as a fact that Garda Dempsey had requested that the accused sign the section 17 certificate first, prior to the garda doing so, and further that this sequence at variance from that in the section, had been recorded in his witness statement disclosed to the defence. He held that by reason of the aforesaid, the s. 17 certificate was not a "duly completed statement" and accordingly the presumption provided for by s. 21 (1) of the Act of 1994 could not be relied on by the prosecution.

Ms. Wilson, on behalf of the prosecution submitted to the District Judge that there was still oral evidence before the court for consideration even if the presumption had been rebutted. The District Judge indicated that the production of a duly completed statement was an essential proof and he dismissed the case. (The emphases in the case stated have been added for the purposes of clarity in this judgment.)

8. At the request of the prosecutor the District Judge stated the following questions, for the opinion of the High Court:-

> "1) Having found as a fact that the accused signed the section 17 first, was I correct in law in holding that the section 17 certificate was not a "duly completed statement" within the meaning of s. 21 (1) of the Road Traffic Act 1994?
>
> 2) Was I correct in law in dismissing the charge?"

9. The gist of the case therefore is that the form signed by Mr. Freeman was not "duly completed" and did not carry with it the presumptions which arise under s. 21(1) of the Act of 1994. It was found the form was not sufficient evidence, was an essential proof for the prosecution, and thus the District Judge granted a direction.

D.P.P. v. *Keogh*

10. Senior Counsel for the accused Conor Devally S.C., contends that this precise point has been determined previously, in a case stated entitled *DPP v. Thomas Keogh* (Unreported, High Court, Ex tempore, Murphy J., 9th February, 2004). I have been provided with a note of the judgment. That note unfortunately does not set out the full facts of the case nor was the note approved by the judge. But having recited the contents of the relevant article in the statutory instrument Murphy J. observed at p. 2 of the judgment as noted by counsel:-

> "In this case the Section 17 certificate is a statement that is evidence against an accused that not alone contains a penal element but also creates a separate offence; this must be borne in mind."

The judge added:-

> "*The sequence of signing is dealt with in the statutory instrument*. It is clear that the Garda must sign the statement when it is produced. The Act of 1994 also comes into play. That is on receipt of the statements aforesaid [s.] 17(3) refers back to [s.] 17(2) and duly completed by the member in the manner prescribed; it seems s. 2 duly completed can be signed off…" (emphasis added).

Murphy J. remarked:-

> "It is clear that two identical statements have to be duly completed and the accused places his signature in each statement and returns one to the member."

11. Having recited the contents of the form the judge referred to authorities which had been cited before him which are considered in greater detail later in this judgment. The judge considered a situation where an evidential deficit is "merely technical". He then turned to consider the position which arose on the facts before him. He said that, by contrast to a situation where a defect was purely technical, the position under s. 17 was different, even when there was no evidence of "prejudice" to an accused. He observed:-

> "In my opinion it does seem that the other cases referred to by the prosecutor namely *D.P.P. v. Somers, D.P.P. v. Reynolds,* which follows *Somers* that the deficit there was merely technical.
>
> In this case for two reasons I have to interpret the section more strictly.
>
> 1. The purpose of the signature is to authenticate the section 17 certificate.
>
> 2. There is a penal element involved which must be dealt with in a strict manner."

He concluded:-

"For that reason I would answer the case stated in the affirmative, namely that the District Court Judge was correct in law in determining that the Section 17 certificate was inadmissible in evidence against the accused and dismissing the charge against him."

The authorities preceding *D.P.P.* v *Keogh*
12. A consideration of the authorities demonstrates that one essential distinction made by the courts is as to the nature and effect of the error or omission in evidence. One question for this court to determine is what was the nature of the evidential deficit, and whether it was such as to necessarily give rise to a "direction" of no case to answer in the court below?

***D.P.P. v Kemmy* 1980 I.R.**
13. The *Director of Public Prosecutions v. Kemmy* [1980] I.R. 160 illustrates some of these points. Kemmy was a case brought pursuant to s. 3 of the Summary Jurisdiction Act 1857 as later extended.

14. The evidence there established that the medical practitioner who had furnished the prescribed form pursuant to s. 21 of the predecessor Road Traffic Act of 1978 had completed and signed duplicate forms when one lay exactly underneath the other, and the forms were so made that, as he wrote each entry and his signature on the upper form, the same entries and signature were written by him on the corresponding parts of the lower form. It was also established that only the lower duplicate form was sent to the Medical Bureau of Road Safety with the relevant container containing the sample. The District Judge dismissed the complaint as he held only a copy of the completed statutory form as had been sent to the Bureau, and that therefore the complainant had failed to prove compliance with the section which provided that the completed form together with the sealed container should be sent as soon as practicable to the Bureau.

15. Speaking for the majority of the Supreme Court, Henchy J. observed that the forms were "identical twin forms" save that the underneath or yellow part acquired the filled-in entries by a reproductive process. He considered that s. 21 of the Act, as then in effect, did not require, or even make reference to a copy of the prescribed form. It merely made reference to a requirement that the prescribed form be completed and forwarded. He concluded that this requirement had been fully complied with. He found that each of the two forms was identical with the other in description and content and one was therefore not a "copy" of the other, and that they were the same form in duplicate. He concluded therefore that 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 section 21.

16. The judge observed that his conclusion was in no way affected by a reference elsewhere in the Act to the "completed certificate" of the Bureau which required the affixing thereto of the seal of that Bureau which is embossed. A copy of that certificate which did not reproduce the sealing would manifestly be no more than a copy. Section 21 on the contrary, referred only to the prescribed form and made no reference to a copy so that when that prescribed form in its two identical versions was completed in identical terms by a single act of filling in, each might be treated as the prescribed form duly completed. Thus there was sufficient evidence to convict. The decision of Griffin J., also in the majority in this court of three, was to similar effect.

17. O'Higgins C.J. in the minority noted that the form which had been forwarded to the Bureau had not been signed by the doctor although it contained a true impression of what was entered on the form. This in his view was not the "completed form" as provided for by s. 21. The former Chief Justice observed at p. 164:-

"Where a statute provides for a particular form of proof or *evidence on a 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" (emphasis added).

***DPP v. Somers* [1999] 1 I.R. 115**
18. By way of contrast DPP v. Somers [1999] 1 I.R. 115, (also a case stated, referred to and distinguished by Murphy J. in *Keogh*), was a case where the doctor carrying out a test failed to identify in one part of the form (the second paragraph) whether a sample taken from the accused was blood or urine, but where she had, by deletion, in another part of the form clearly indicated the accused had provided a blood sample. On those facts O'Flaherty J. observed at p.119:-

"It seems to me that at most what happened here was that the doctor made a technical slip by not filling out the second paragraph of the prescribed form. There could be no confusion in anyone's mind on reading the documents as completed, but that it was a blood sample that was to be forwarded to the Medical Bureau of Road Safety.

The certificate issued by the Bureau specified that there had been a concentration of 270 milligrams of alcohol per 100 millilitres of blood found in the specimen. That is over three times the permitted limit. If courts were to allow such flimsy point as this to govern cases, the administration of justice would most likely be brought into disrepute.

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 in 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 to bring about what would be a manifest injustice as far as the prosecution of this offence was concerned."

Two later High Court authorities post dating *D.P.P.* v *Keogh*
19. In *D.P.P. (O'Reilly) v. Barnes* [2005] 4 I.R. 176 (Unreported, High Court, O'Neill J. 18th July, 2005) also a case stated, a garda operating the intoxilyzer merely typed the wrong offence into the machine. The District Judge refused the application but agreed to pose a case stated. O'Neill J., held at p.182:-

> "I have come to the conclusion that the error which was made in this case does not detract from the due completion of the statement in question. I have come to the conclusion that having regard to all of the surrounding circumstances, namely the setting out of the charge on the charge sheet, the clear identification of the offence involved and the evidence that was given against the accused as recited in the case stated the strict compliance by the prosecutor and Garda Keenan that the statutory procedure set out in ss. 13 and 17 of the Road Traffic Act 1994, it does not seem to me to have been possible that the accused was confused let alone misled as to the particular offence for which the specimen was taken. It would appear to me that a suggestion that there was any lack of certainty in the circumstances of this case as to the particular offence in respect of which the two specimens of breath were taken is simply unreal and not credible. I am quite satisfied that the error in question did not and indeed could not have imposed any prejudice on the accused or exposed him to any risk of injustice."

20. The "absence of prejudice" principles applied by O'Neill J. in *Barnes*, were also applied by Dunne J. in the case of *Ruttledge v. District Judge Clyne & D.P.P.* (Unreported, High Court, Dunne J., 7th April, 2006). It is important to underline that O'Neill J. was identifying the evidential context in which he upheld the District Judge's decision to refuse the application. He considered that on the facts as outlined, the judge had been correct in refusing the application for a direction. By way of slight distinction, in *Ruttledge*, a judicial review, Dunne J. emphasised that her decision was based on the discretionary jurisdiction of the court in a *certioari* application. The facts too were somewhat different from the instant case, in that a garda had inadvertently substituted the name of the prosecuting garda for the accused in the form. Having considered extensively the authorities dealing with discretion Dunne J. held that this error did not vitiate the proceedings. She observed at p. 16 of the judgment that it was of:-

> *"such an obvious or trivial or inconsequential nature that it could not have given rise to any confusion or misleading of the accused or indeed imposed any prejudice on him or any injustice."*

Having held that the error was not such as to go to jurisdiction, Dunne J. emphasised that not every error was such as to go to jurisdiction and applying the discretion of the court, refused relief.

21. In this case Senior Counsel for the Director Ms. Sunniva McDonagh S.C. submits that the error was simply that, at the time the prescribed form was handed to the accused, it had not been signed by the garda; that the garda rectified this error after the accused had signed the form; and accordingly the issue for this court is whether, when the accused actually received the document it was by then in the "prescribed form". The prosecution submit that there was no breach of any of the statutory provisions of the Road Traffic Act 1994 and that the case is concerned with a mere technical omission. Thus it is said the facts of the case are similar to *Somers* and *Barnes*, and not within the "strict interpretation" category considered by O'Higgins C.J. in *Kemmy*.

22. Subject to a proviso, I think that there is force in this submission. There is no suggestion at all that what happened here perpetrated any substantive injustice on the accused. The point raised can only be described as wafer thin. The accused has no "merits" as such. The point only arises in the most technical of senses. There is no evidence that anyone was confused or misled. While the statement may have been signed in the incorrect sequence, it was otherwise "duly completed". It had ultimately been signed and countersigned. While it may not have been (to quote the section) "sufficient evidence", I am not convinced the form was, as found in *Keogh*, "inadmissible evidence". Pursuant to the statutory provision, (s. 21) the duly completed statement is to be both: *"sufficient evidence without the necessity of proof of any signature on it"*, and, that *"the signatory was the proper person to sign it"*. Taken in isolation from its statutory context, this would not necessarily indicate that, the sequencing of the signature procedure was an essential aspect of a statutory intent, or a fundamental requirement for the protection of the rights of the citizen as evinced by the intent of the Oireachtas in the text of the Act. But the proviso is that these cases must be judged in their procedural, statutory, and evidential context. Here statutory context is of particular importance. This point is illustrated in authorities to which I now refer.

Cases involving breach of a mandatory provision

23. There are other authorities which have a considerable relevance, and pre-date *Barnes* in 2005, and *Ruttledge* in 2006. In these, the statutory and evidential context is rather different. These decisions refer to procedures which are clearly mandatory, and where the statutory intent is that the vindication of rights of an accused is to be ensured by a rigid adherence to the terms of the statute.

24. In *McCarron v. Judge Groarke* (Unreported, High Court, Kelly J., Ex Tempore, 4th April, 2000) the prosecuting garda had not complied with the statutory requirements set out in s. 18 (2) of the Road Traffic Act 1994, in that he had not offered a specimen to the accused person. Kelly J. observed that the failure to comply with the provisions of s. 18 (2) was an actual failure of compliance with a statutory provision in mandatory terms where the term "shall" in the subsection was used by the draughtsman.

25. This was a case therefore, where there had been a real failure of compliance with a mandatory statutory entitlement. It was something more than a mere technical "error" or "slip". What occurred constituted true prejudice or detriment – the denial of an opportunity for independent verification of the sample which should have been provided.

26. Having referred to O'Flaherty J.'s observations in *Somers*, Kelly J. stated in *McCarron* at p. 6 of counsel's note of the judgment:-

> "One can understand why the Supreme Court in that case (Somers) came to the conclusion where one part of the form was not filled out, but where it is otherwise clear that the form in question was in fact completed. *The situation is quite different here where a mandatory procedure renders admissible in evidence a certificate of the Medical Bureau of Road Safety without further proof"* (emphasis added).

27. Kelly J. referred to the judgment of Barrington J. in *The People (D.P.P.) v. James Greeley* [1985] I.L.R.M. 320, where the accused was brought to the garda station on suspicion of having committed an offence but was not actually arrested until after he was brought to the garda station. He had not therefore been brought as an "arrested person" under s. 49 (6) of the Act and therefore the procedure which occurred rendered the certificate (otherwise *prima facie* evidence) was not evidence at all. Barrington J. found at p. 324:-

> "I do not think that the present case should properly be regarded as a case where evidence has been obtained in breach of the defendant's constitutional or legal rights. The problem is that s. 23 of the Road Traffic Act 1978 [now s. 21 of the 1994 Act] 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 not status as evidence in a court of law"* (emphasis added).

28. Again one can see that this was a more substantive issue, even by way of contrast to that in the instant case. In Greeley the accused had not been lawfully arrested. What followed rendered the certificate inadmissible as evidence, as the correct mandatory statutory procedure had not been followed.

29. In *McCarron* Kelly J. observed that the failure to follow a prescribed mandatory procedure under s. 18 (2) was not a "tiny flaw on the proofs of the prosecution" coming within the ambit of *D.P.P. v. Somers.* He pointed out at p.7:-

> "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 a statement in writing to the accused. In fact it is in discord with the purpose and object of the legislation."

Kelly J. likened the position in *McCarron* to that described by O'Higgins C.J. in *Kemmy*. He distinguished the position from that considered by Henchy J. in the *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447 where the judge observed in relation to a blood sample form at p. 449:-

> *"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 this form was not duly completed."*

30. The resonance and resemblance of the phrase "duly completed" to the facts of this case is difficult to ignore. Can it be said that what occurred here was any more than a "technical slip"? Perhaps not. But the essential rationale of *McCarron* and *Greeley*, is that, where there has been a clear failure to comply with a *mandatory* requirement which according to the statute must be followed, what follows is that the certificate is "not evidence".

31. This must be seen in the light of *Keogh*, a decision which is *prima facie* on all fours with the instant case, which should be binding unless it is shown that the decision was clearly wrong and should not be followed.

Stare decisis

32. I cannot avoid the inference that the net effect of the prosecution's submission is that I am being asked to decide that the decision in *Keogh* contained a manifest error or, was reached *per incuriam*. Clearly the concept of a decision which is reached *per incuriam* is an essential part of the doctrine of *stare decisis*. A court may conclude that a previous court of the same jurisdiction reached a decision without taking into account a relevant argument, an important judicial precedent, or a relevant statutory provision. In such circumstance the decision of such a court may be disapproved in a later case by a court of concurrent or superior jurisdiction. (*cf. D.P.P. v. Glen Geasley, Court of Criminal Appeal* Fennelly J. – 24th March, 2009).

33. I have not been persuaded that the decision of Murphy J. in *Keogh* was *per incuriam*. It has not been shown that it contains any manifest error. I do not think that a decision which is so directly on point such as *Keogh* can be reduced to vanishing point by arguments based by analogy in relation to other statutory provisions or evidential omissions. No relevant distinctions on the facts have been identified. It is important to have regard to the true rationale of *Keogh* – that is to say that while the error may indeed be "technical", it involves a breach of a penal provision which must be interpreted and applied strictly. In the absence of any distinguishing feature or identified error I must find the decision is binding upon me, and I am therefore constrained to follow it. *Keogh* was not appealed to the Supreme Court.

34. I take into account that some of the authorities relied on by the prosecutor to which reference has been made in this judgment are later in time - but they are not directly on point. In *Keogh*, Murphy J. states clearly that the provision in question is to be strictly interpreted. The provision is a penal statute, (cf. s. 17 (4)) which lays down a penalty for failure to comply with subs. 3 of a fine not exceeding £500 or imprisonment for a term not exceeding three months. This point is explained in greater detail later.

***Maguire v. Ardagh* [2002] 1 I.R. 385 – a similar provision**

35. The provisions in question are in fact not dissimilar to the compliance procedure giving rise to an evidential presumption as to the "consent" under s. 3 of the Committee of the Houses of the Oireachtas (CHO) Compellability, Privileges and Immunities of Witnesses Act 1997, considered in *Maguire v. Ardagh* [2002] 1 I.R. 385.

Section 3(9) of that 1997 Act provided:-

> "(a) A consent of the appropriate sub committee under subs. (1) ("a consent"), shall be in writing and the documents containing it shall be signed by the chairman of the subcommittee or by another member of the subcommittee duly authorised on that behalf by such chairman.
>
> (b) A consent shall relate to a specified committee as specified functions of that committee and may relate, as may be specified in the consent, to one or more specified directions or classes or directions, or all directions, in relation to a specified person or matter or persons generally and shall be subject to such restrictions, limitations, or other conditions (if any) as may be specified in the consent.
>
> *(c) A document –*

i. Produced at a meeting of a committee by the chairman of the committee or another member of the committee who is acting as chairman thereof, or

ii. Produced in a court by the chairman of a committee or another member of the committee duly authorised on that behalf by such chairman,

and purporting to comply with para. (a) and to contain a consent relating to that committee shall, unless the contrary is shown be evidence,

(I) of the consent and that it relates to that committee, to the functions of that committee specified in the consent and to the directions or classes of directions so specified and that those directions are classes of directions that relate to the persons or matters so specified, and

(II) Of any restrictions, limitations or other conditions so specified to which the consent is subject."

Denham J. observed of this provision:-

> "The words are plain. They require that a consent of the appropriate subcommittee shall be in writing. The words are clear. It is a mandatory requirement. The consent is required to be in writing. There is no provision for an oral consent. Further, section 3(9) is precise in requiring that the document containing the consent shall be signed by the chairman of the subcommittee or by another member of the subcommittee duly authorised in that behalf by such chariman. Thus not only is the consent to be in writing but is required to be in documents signed by a specified person."

She continued:-

> "Section 9(c) provides for a presumption that a document produced, inter alia, in a court purporting to comply with para. 3(9)(a) and to contain a consent shall, unless the contrary is shown, be evidence of the consent. Once again the section is affirming that the consent is in writing in a specific document and as such is entitled to the presumption of authenticity."

She concluded:-

> "I am satisfied that a valid consent under this section must be in writing in a document as specified. An oral consent, or a consent not yet in document form as specified, is not a consent for the purposes of s. 3(9) of the Act."

The point is clear. Non-compliance vitiates the evidential presumption.

See also the judgment of McGuinness J.at p. 640 of the Report, and in particular, the observations of Geoghegan J. at p. 737 *et seq*. One might also observe that this was in the context of a provision which was clearly not "penal" in the sense that arises here.

36. In the context of this case, I think that the phrase in the section "*duly completed*" can only be read as meaning full compliance other than by the signature of the person providing a sample. A form not signed by the garda first is "not duly completed"; and therefore the statutory presumption cannot apply to it. Once signed by the garda first, it is only then "duly completed" and must be signed by the recipient.

37. Other authorities in relation to the strict interpretation of a penal statute, *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at p. 151, per Blaney J.; *D.P.P. v. Moorehouse* [2006] 1 I.R. 421 at p. 436; and O'Higgins C.J. in *D.P.P. v. Kemmy* at p. 164 of the reported judgment illustrate the same point as to literal meaning.

Strict construction

38. I revert now to the reason why I consider myself constrained to conclude that s. 17 is "penal" or "related to a penal provision" and therefore the provision as a whole is to be strictly construed (see s. 5 of the Interpretation Act 2005).

39. I have not been persuaded that the provision should be interpreted in the manner considered in the decision of the Supreme Court in *D.P.P. v. Moorehouse* [2006] 1 I.R. 421. To interpret these provisions in question in a "purposive" way would to my mind constitute judicial legislation. A court should lean against the creation or extension of penal liability by extension. I do not think s. 17 (3) which creates the offence can be divorced or looked at in isolation from the strict procedures for compliance laid down in s. 17 as a whole, or from the regulations to which reference has been made. The imposition of a penal liability for failure of compliance by an accused to my mind renders the provision penal. 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.

40. I must conclude that the court is not entitled to go beyond (or behind) the *Keogh* decision. I bear in mind too that in the event that there is an ambiguity in the provision the accused is entitled to the benefit of such ambiguity, in the light of the presumptions which arise in the event of such certificates being admitted into evidence.

Remittal to the District Judge?

41. I have considered whether this case can, or should, be remitted back to the District Judge, a course followed by Ó Caoimh J. in *D.P.P. (Bermingham) v. Reville* (Unreported, High Court, O'Caoimh J., 21st December, 2000) a case where he felt constrained to follow the decision of Kelly J. in *McCarron*.

42. However, critically in this case, it has been accepted in argument by the Director that there was not available before the District Court any other evidence in relation to the accuracy of all the contents of the certificate including the readings. In such position therefore I do not think it appropriate to remit the matter back to the District Judge to hear

further evidence. I must approach the matter only in the light of evidence and facts as found by the District Judge and ultimately in the context of a decision of this court precisely on the point.

43. This is a case stated not a judicial review. Perhaps an area of discretion might have lain with the District Judge to adjourn the case for further prosecution evidence if there had been such available. But this court should not supplant or seek to exercise a discretion whether to adjourn which lay with the District Judge. He held the evidence was insufficient as it stood. He acted in accordance with law. This is not a judicial review where discretionary issues may come into play as illustrated in *Ruttledge*. A case stated is, to state the obvious, not brought pursuant to O. 84 of the Rules of the Superior Court as amended, but by virtue of O. 62 of those Rules. The procedural considerations, such as discretion, the range of remedies and reliefs differ markedly. The task of this court is to answer the questions posed in the case stated.

44. I now turn to the questions as posed by the District Judge. The first of these was:

> "Having found as a fact that (sic) accused signed the section 17 first, was I correct in law in holding that the s. 17 certificate was not a duly completed statement within the meaning of s. 21 (1) of the Road Traffic Act 1994?"

I will amend the question to insert the definite article before the word accused so as to read:

> "Having found as a fact that the accused signed the section 17 certificate first, was I correct in holding that the section 17 certificate was not a 'duly completed statement' within the meaning of s. 21 (1) of the Road Traffic Act 1994?"

To that question as amended I must respond 'yes on the particular facts of the case'.

The second question was:

> "Was I correct in dismissing the charge?"

In the particular circumstances which have been outlined I must also respond 'yes' to this question.

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