Neutral Citation: [2015] IEHC 695

THE HIGH COURT

[Record No.2014/1940 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA ANN MARIE MYLER)

PROSECUTOR

AND

BRENDA MULLINS

DEFENDANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 12th day of November 2015

1. This is a consultative case stated by District Judge Haughton pursuant to s. 52(1) of the Courts (Supplemental Provision) Act 1961. The case before him concerned a charge of driving with excessive blood alcohol level, contrary to s. 4(2)(a) and (5) of the Road Traffic Act, 2010 ("the Act"). The issues arise from the manner in which the certificate required under s. 15 of the Act was completed by the medical practitioner.

2. The case stated is here set out in full.

> *1. On the 15th April, 2014, the defendant appeared before me sitting in the District Court Area of Wexford, District No. 23 charged as follows:-*
>
> > *"That you, on the 30th March, 2013, at Ballinteskin, New Ross, Wexford, a public place in the said District did drive a mechanically propelled vehicle registration no. 06-WX-3212 while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in your blood did exceed a concentration of 50 milligrammes of alcohol per 100 millilitres of blood, to wit 101 milligrammes.*
> >
> > *Contrary to Section 4 (2)(a) and (5) of the Road Traffic Act, 2010."*
>
> *2. The case for the prosecution was presented by Inspector Derek Hughes. Mr. John G. Flynn, solicitor appeared for the Defendant.*
>
> *3. The Prosecutrix (Garda Myler) gave the following evidence:- She stated that on the 30th March, 2013, she was attached to Duncannon Garda Station. She was on duty with Garda Peter Buttle. At approximately 7.20pm at Dunmaine, Campile, Co. Wexford she observed vehicle registration no. 06-WX-3212 swerving over and back on the road as it was driven in front of the Garda patrol car. 06-WX-3212 was swaying over and back and into the path of oncoming traffic. The blue lights were switched on and the siren activated. 06-WX-3212 eventually stopped at Ballinteskin. Garda Myler approached the driver. Garda Myler observed that the driver smelled of alcohol and that her speech was slurred. Garda Myler obtained the name (Brenda Mullins) of the driver, together with her date of birth. Garda Myler formed the opinion that the Defendant "was under the influence of intoxicant as to be incapable of having proper control of a mechanically propelled vehicle" in a public place. Garda Myler gave evidence of administering the legal caution. At 7.30pm Garda Myler arrested the Defendant at Ballinteskin, New Ross, Co. Wexford, a public place. I am satisfied that Garda Myler gave the necessary evidence regarding the statutory provisions under which she arrested the Defendant and that she, Garda Myler, advised the Defendant in ordinary language, that she, the Defendant, had been arrested on suspicion of drunk driving.*
>
> > *Garda Myler took the Defendant to New Ross Garda Station, arriving there at 7.45 p.m. The member in charge at New Ross Garda Station was Garda Ciaran Folan. Garda Myler gave evidence to the effect that Garda Folan complied with the Treatment of Person in Custody Regulations. He, Garda Folan, inter alia, handed the Defendant the Form C72S (Notice of Rights) and completed the Custody Record.*
> >
> > *At 8.21p.m. Dr. Beirne, a Designated Doctor arrived at the Garda Station. Garda Myler introduced the Defendant to Dr. Beirne.*
> >
> > *In the examination room Garda Myler made the statutory requirement under Section 12 of the Road Traffic Act, 2010. I am satisfied that Garda Myler stated that she, Garda Myler, pursuant to Section 12 required the Defendant to provide for the Designated Doctor a specimen of her blood or, at her option, a specimen of her urine and that she indicated to the Defendant the consequences of failure or refusal to comply with the requirement. Garda Myler said that the Defendant opted to provide a blood specimen and that at 8.30 p.m. Dr. Beirne obtained a blood specimen, using the kit provided. He divided the sample into 2 glass phials which he sealed with white labels which were "initialled" by Dr. Beirne. The Defendant was provided (by Garda Myler) with an option to retain either of the containers but, she, the Defendant, declined to choose either.*
> >
> > *The samples were consigned to the Medical Bureau of Road Safety. In due course Garda Myler received a Certificate of Analysis with a reading of 101 milligrammes of alcohol per 100 millilitres of blood. The said certificate issued pursuant to Section 17(3) of the Road Traffic Act 2010, was produced to me and a copy is attached to this case stated. The said Section 17 (Medical Bureau) Certificate tendered in the case indicated that the nature of the specimen received by the Bureau was: "not stated - blood received". Garda Myler also handed in the Doctor's Certificate issued pursuant to Section 15(1) of the Road Traffic Act 2010, a copy of which is also attached hereto.*
>
> *4. Mr. Flynn asked Garda Myler, if she, Garda Myler, was satisfied with the Section 15 Doctor's Certificate. Garda Myler indicated that she was satisfied that the Doctor's Certificate had been duly and properly completed.*
>
> *5. No further evidence was called by the Prosecution.*
>
> *6. On the closing of the Prosecution case Mr. Flynn made a number of applications seeking a direction which I refused save for the following:-*

(a) It was pointed out by Mr. Flynn that paragraph no.2 of the Section 15 Doctor's Certificate, which requires the nature of the specimen, (either "blood" or "urine") to be completed had been left blank. Furthermore, Mr. Flynn submitted that this lacuna had not been rectified by virtue of the failure of the person completing the Certificate to delete either paragraph (a) or paragraph (b) at a later point in the Certificate. The proper completion of a Section 15 Certificate requires the Designated Doctor or Designated Nurse completing the document to delete either paragraph (a) or paragraph (b) to thereby indicate whether the specimen obtained from the subject was one of blood or urine. Mr. Flynn argued that failure of the person completing the Certificate to attend to completion of paragraph no.2 and his failure to delete the subsequent reference to either blood or urine represented a fundamental and fatal defect in the document such that it could not be deemed to be a "duly completed" certificate and accordingly should not be admitted in evidence against the Defendant.

Mr. Flynn advanced his argument in this regard by quoting, at some length, from D.P.P. v. Lloyd Freeman (2009) IEHC 179 (2008 1438SS), judgment of MacMenamin J. dated the 21st April 2009. Mr. Flynn argued that the Freeman case represents a coherent and up-to-date analysis of the law in relation to what form of document constitutes a "duly completed" certificate and what falls short of the standard required. Mr. Flynn conceded that if the only error in/omission from the Section 15 document in this case had been the failure to insert the word either "blood" or "urine" in paragraph no.2 thereof his argument would fail on the basis of the ratio decidendi in DPP v Somers [1999] 1 I.R. 115. However, the failure to subsequently delete either blood or urine in either paragraph (a) or paragraph (b) later in the form not only compounded the first omission but took the argument, when seen, in the round, to the point where the document could not be accepted as being "duly completed". This double error, failing twice in the document to identify the nature of the sample taken, took the case beyond the realm of a "mere slip".

` Moreover, Mr. Flynn cited and sought to adopt and rely upon the following paragraph from the Judgment of O'Higgins C.J. (D.P.P. v. Kemmy 1980 I.R. 160) where the former Chief Justice observed at page 164 (of that Judgment):-

"Where a statute provides for a particular form of proof or evidence on compliance with certain statutory 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 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."

In summary, on this point, Mr. Flynn argued that the decision in the Freeman case represents the law as it stands with regard to whether or not a document is "duly completed" and that the lacunae in the Section 15 Certificate in the instant case mean that the Section 15 Certificate was not "duly completed" and consequently could not and should not be received in evidence. Therefore, the prosecution must fail and the defendant Ms. Mullins should have the benefit of a direction.

Inspector Hughes did not respond to this submission although I did afford him the opportunity to do so.

I considered Mr. Flynn's submissions in the context of D.P.P. v. Kennedy [2009] IEHC 361; D.P.P. v. Egan [2010] IEHC 233 and D.P.P. v. David Hopkins [2009] IEHC 337.

I considered that there is a difference between failure to comply with a statutory requirement, as in the Freeman case and failure to comply, on the other hand, with a requirement which was not specifically statutory in origin. I considered whether, in the latter case (and therefore in the case of the defendant) it was necessary for the Defendant to demonstrate prejudice in order to succeed in an argument to exclude the document as I am satisfied as a fact that the defendant was at all times aware of the nature of the sample provided in this case and no case has been made by the defendant and I am satisfied as a fact that she was not in any way prejudiced by the error. However, I accept Mr. Flynn's submission that the form of the Section 15 Certificate is, in fact, prescribed by Statutory Instrument (in this case S.I. no. 540/2001 – Road Traffic Act 2010 (Sections 15 and 17) (Prescribed Forms) Regulations, 2011), and that section 15 of the Road Traffic Act, 2010 contains an imperative to the effect that the Designated Doctor shall complete the form prescribed (for the purposes of that section.)

I considered also D.P.P. v. Moorehouse [2006] 1 I.R. 421 in the context of whether prejudice must be demonstrated where a mistake occurs.

(b) A further application for a direction was made by Mr. Flynn relevant to the Section 15 Certificate submitting that there was a third discrete error or omission in the s. 15 Certificate. Mr. Flynn drew my attention to Section 43(8) of the Medical Practitioners Act, 2007 (effective from the 16th March, 2009 – S.I. 40/2009) which provides as follows:-

"A registered Medical Practitioner shall, as soon as may be after the person has received the Certificate referred to in sub-section (5), cause the registration number stated on that Certificate to be included on all medical prescriptions and all other documentation and records, whether in paper or electronic format, relating to that Practitioner's practice as a Medical Practitioner."

Mr Flynn also relied upon Section 109(1) and (2) of the same Act (effective from the 16th March, 2009 – S.I. 40/209) which provides that:-

(1) Subject to sub-section(2) every Certificate which is required for any purpose by or under any enactment or any Statutory Instrument to be signed by and Physician, Surgeon, Licentiate in Medicine and Surgery or other Medical Practitioner shall, on and after the commencement of Section 3, be signed by a registered Medical Practitioner and no such Certificate signed on or after that commencement by a person who is not a registered Medical Practitioner shall be of any validity or effect.

(2) Subsection (1) shall not operate to prevent a person who is not a registered Medical Practitioner from signing a certificate if any enactment or any statutory instrument requires or permits the person to sign the certificate in a

capacity other than the capacity of physician, surgeon, licentiate in medicine and surgery or other medical practitioner and that person is of that other capacity.

Section 3 of the said Act referred to in Section 109(1) above (effective from the 16th March, 2009 – S.I. 40/2009) does not affect the submission and is as follows:-

3. – (1) The Acts specified in Part 1 of Schedule 1 are repealed.

(2) The statutory instruments specified in Part 2 of Schedule 1 are revoked.

Mr. Flynn further relied upon Section 3 of the Road Traffic Act, 2010, which contains definitions of "Designated" and "Doctor" in the following terms:-

"Designated" means "designated by a member of the Garda Siochana".

"Doctor" means "a person registered in the General Register of Medical Practitioners established under Section 43(1) of the Medical Practitioners Act, 2007.

Mr. Flynn's argument in this regard is that while the Section 15 Certificate produced in evidence in this case bears what appears to be a signature the document does not contain any registration number. Mr. Flynn submitted that the absence of a registration number beneath or after the apparent signature, rendered the apparent signature, and hence the entire document itself null and void on the basis that it had not been completed in accordance with the mandatory requirements of Subsection 8 of Section 43 of the Medical Practitioners Act, 2007.

Mr. Flynn again invoked the previously quoted passage from the O'Higgins judgment in Kemmy. Moreover, he pointed to the fact that it was adopted by MacMenamin J. (at paragraph 17) in his judgment in Freeman.

My initial view of this point was that the absence of a registration number might not be fatal in circumstances where I do not immediately see any criminal sanction for a registered Medical Practitioner or a Designated Doctor who fails to include his or her registration number with his or her signature to a Certificate or document. The requirement appears to me to be regulatory and administrative the breach of which may only lead to a disciplinary action against a medical practitioner. I am satisfied however that a Certificate pursuant to Section 15 of the 2010 Act is a document to which the provision of Section 43(8) of the Medical Practitioners Act, 2007 apply.

7. Having adjourned the matter to consider the submissions made to me the case was again listed on the 20th May, 2014. On that date having considered the submissions made on behalf of the defendant I advised that I proposed seeking the decision of the High Court in relation to a number of questions and that I was accordingly sending the matter forward to the High Court by way of a Consultative Case Stated and I accordingly adjourned the matter to the 8th July, 2014 on which date I further adjourned the matter to the 14th day of October 2014 and thereafter to the 11th day of November, 2014.

8. Arising from the foregoing I now seek the opinion of the High Court on the following questions of law:-

(a) Is the combined effect of the two errors in the completion of the Doctor's Certificate issued under Section 15(1) of the Road Traffic Act 2010, wherein the doctor failed to complete paragraph 2 of the said certificate and also failed to delete either paragraph (a) or paragraph (b) later in the certificate such that the certificate cannot be deemed to be duly completed?

(b) Is the effect of the failure of the doctor to enter his registration number with the Medical Council of Ireland on the Section 15 Certificate such that the Certificate cannot be deemed to be duly completed?

(c) If the answers to questions (a) and (b) are no, is the effect of the combination of the three failures in the completion of the Section 15 Certificate such that the certificate cannot be deemed to be duly completed?

Statutory provisions

3. Section 15 of the Road Traffic Act, 2010 reads in full as follows:

"15.— (1) Where under this Chapter a designated doctor or designated nurse has taken a specimen of blood from a person or has been provided by the person with a specimen of his or her urine, the doctor or nurse, as the case may be, shall divide the specimen into 2 parts, place each part in a container which he or she shall immediately seal and complete the form prescribed for the purposes of this section.

(2) Where a specimen of blood or urine of a person has been divided into 2 parts under subsection (1), a member of the Garda Síochána shall offer to the person one of the sealed containers and inform the person that he or she may retain either of the containers.

(3) As soon as practicable after subsection (2) has been complied with, a member of the Garda Síochána shall cause to be forwarded to the Bureau the completed form referred to in subsection (1), together with the relevant sealed container or, where the person has declined to retain one of the sealed containers, both relevant sealed containers.

(4) In a prosecution for an offence under this Chapter or under section 4 or 5 , it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with."

4. The form prescribed for the purposes of s. 15 is set out in the regulations referred to in the case stated. The matters required to be recorded on it are: -

(i) the personal details of the person from whom the specimen was taken;

(ii) the nature of the specimen (i.e. blood or urine);

(iii) the place at which the specimen was taken;

(iv) the date on which it was taken;

(v) the time at which it was taken; and

(vi) the garda station from which it would be forwarded.

5. The medical practitioner must then complete and sign a section requiring him or her to declare that he or she took a specimen of blood or urine, deleting whichever is inappropriate; that he or she divided the specimen into two parts and put each part in a container; and that he or she sealed and labelled each container with the name of the person and the date and gave both containers to a member of the Garda Síochána.

6. Section 20(2) of the Act provides as follows:

> *"(2) A duly completed form under section 15 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 designated doctor or designated nurse concerned with the requirements imposed on him or her by or under Chapter 4."*

Submissions on behalf of the prosecutor
7. The prosecutor relies on the finding of the learned District Judge that the defendant was not prejudiced in any way, and submits that the errors in the form were inconsequential and did not have the potential to mislead or confuse the defendant.

8. It is submitted that there was no doubt as to the fact that a blood sample was taken, given the other evidence available to the court. No prejudice was caused by the omission to record that fact, and the form must be regarded as having been duly completed.

9. The failure of the doctor to include his or her registration number is, it is submitted, entirely irrelevant for the purposes of this prosecution having regard to s.20(2) of the Act.

Submissions on behalf of the defendant
10. It is accepted on behalf of the defendant that there is no "direct" prejudice in the case but reliance is placed on the mandatory nature of the requirement to complete the form. The case is made that there were three errors in the one form, which cannot therefore be said to have been duly completed.

The authorities
11. The parties have referred to a number of authorities. I propose to deal with them in chronological order, with the exception of Treacy v. Young (Supreme Court, 13th July, 1983). The court has been furnished with a copy of the order made in that case, a consultative case stated, in which the following question was answered in the affirmative:

> *"Is the production and proof of a 'Doctor's form' under Section 21 of the Road Traffic (Amendment) Act, 1978, an essential proof in a prosecution under Section 49(3) of the Road Traffic Act, 1961 as inserted by Section 10 of the Road Traffic Act, 1978?"*

12. It appears that the Court did not give a written judgment in the case.

13. The passage relied upon by the defendant from the judgment of O'Higgins C.J. in *DPP v. Kemmy* [1980] I.R. 160 is set out above in the case stated. It may be noted that while the Chief Justice was dissenting in that case, this particular passage has always been regarded as a correct statement of law.

14. *DPP v. Collins* [1981] I.L.R.M. 447 involved the statutory formulation under the Road Traffic Act, 1961 as amended. One of the points raised by the defence was that the medical practitioner had not filled in his name in the space provided for that purpose, although he had signed the form where required so to do. It was argued that this meant that the form had not been *"duly completed".* Giving the judgment of the Supreme Court on a case stated, Henchy J. said at p. 4499:

> *"I find neither force nor merit in this submission. The blank line was probably intended to have inserted in it the name (but not necessarily the signature) of the designated medical practitioner. But it was an optional entry. In terms of syntax, clarity of meaning and verification of conduct, nothing would have been gained if Dr. Lundon's name had been inserted in the blank line. If it had been inserted, the form would have looked more complete, but the insertion would have made only a visual difference. 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)."*

15. The judgment also refers to the fact that in deleting the reference in the form to urine, the doctor had not deleted the whole of the sentence. This was described as being *"no more than a technical slip"*, which would not prevent any reader of the form from realistically concluding that it was a completed form in respect of a blood sample.

16. The significance of the requirement to record accurately on the form the time at which the sample was taken was considered in *DPP v. O'Neill* (unrep., Supreme Court, 30th July 1984). The doctor had written down the time as 12.50, without indicating whether it was a.m. or p.m. The District Judge considered that this was a defect rendering the form incomplete. The Supreme Court held that this proposition was unsustainable.

> *"The time as set out in the form is a matter of which the accused must have been well aware. Further the District Justice had evidence of all the facts leading up to the bringing of the Defendant Respondent to the Garda Station from the time of his arrest until after the completion of the form by the Doctor…*

> *…Whilst ordinarily the time 12.50 might be referable to either 12.50 a.m. or 12.50 p.m., in the circumstances of this case it is and can only be referable to 12.50 a.m., the time at which, as established by the evidence, the sample of blood was taken from the defendant. The defendant cannot have been under any misapprehension as to whether 12.50 a.m. or 12.50 p.m. was in issue, not could he be in any way prejudiced by the omission (if such it be) to state on the relevant form whether it was a.m. or p.m."*

17. In *DPP v. Somers* [1999] 1 I.R. 115, the designated doctor had not specified the nature of the specimen at the first part of the form, but had deleted the reference to urine in the declaration. The Supreme Court held the error did not entitle the accused to a dismiss of the charge. Giving the judgement of the Court, O'Flaherty J. said that

> *"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 document as completed, but that it was a blood sample that was to be forwarded to the Medical Bureau of Road Safety….*
>
> *If courts were to allow such flimsy points 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 observe. It is impossible to seek perfection at all stages of life and where there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possible 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 is concerned."*

18. In *DPP (O'Reilly) v. Barnes* [2005] IEHC 245, the garda operating an intoxilyzer referred to the wrong section of the Road Traffic Act when typing into the apparatus the purpose for which a breath specimen was being taken. Dealing with a consultative case stated as to the significance of the error, O'Neill J. referred to the two guiding principles which must inform a decision as to the admissibility of certificates or statements which, by virtue of a statutory provision, prove their own content in the absence of contradictory evidence. The principles were those embodied in the judgment of O'Higgins C.J. in *Kemmy* and O'Flaherty J. in *Somers*.

19. O'Neill J. considered that this meant that a court must, in the first instance, require to be satisfied that there has been strict compliance with the relevant statutory provision before admitting the statement into evidence. However, he continued (at p. 8) as follows:

> *"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."*

20. O'Neill J. held that the error in question did not detract from the due completion of the form. The charge against the accused was clearly identified in the charge sheet and the evidence in the case established strict compliance with the relevant statutory requirements. There was no possibility that the accused had been confused or misled.

21. In *Ruttledge v. District Judge Clyne* [2006] IEHC 146 the respondent District Judge, under a misapprehension as to the law, purported to exercise a jurisdiction to amend a certificate where the garda had entered his own name instead of that of the accused. In declining to grant an order of *certiorari* quashing the subsequent conviction of the accused, Dunne J. accepted that the judge had had no power to take such a course. However, in the exercise of her discretion she adopted the approach of O'Neill J. in Barnes and held that the error on the certificate would not have been fatal to the successful prosecution of the accused. It was of such an obvious or trivial or inconsequential nature that it could not have caused any confusion or prejudice.

22. The judgment of MacMenamin J. in *DPP v. Lloyd Freeman* [2009] IEHC 179 is referred to in the case stated as being relied upon by the defendant. It concerned an intoxilyzer case, where the procedure involved the analysis of breath specimens by the apparatus, which would then print out statements of the concentration of alcohol in the specimens. The statutory provisions required the garda to sign the statements and then request the person concerned to sign the *"duly completed"* statements. Refusal or failure to comply with the request was an offence. The statements were, by virtue of the Act, proof of their contents. The evidence in the case established that the garda signed the statements after rather than before the accused, giving rise to an issue as to whether they were *"duly completed"*.

23. In determining that they were not, MacMenamin J. laid emphasis, firstly, on the fact that the requirement to proffer "duly completed" statements was mandatory in nature. Secondly, he held that the fact that the section created an offence of refusal to sign meant that it had to be strictly construed and applied. In so doing he followed a decision of Murphy J. in DPP v. Keogh (Murphy J., ex tempore, 9th February, 2004).

24. *DPP v. Hopkins* [2009] IEHC 337 was an appeal by way of case stated against an acquittal. The issue arose from the fact that the doctor had written the accused's date of birth, rather than the date on which the sample was taken, on the container provided to the accused. The District Judge concluded that this was a breach of the labelling requirement, for which no explanation had been given, and acquitted. Holding that she should not have done so, Hedigan J. noted that the certificate itself was free from error. He considered that the objection raised was one of a technical nature where the proper approach was to require the accused to show some form of prejudice. He distinguished *Freeman*, since the flaw in that case had related to the central piece of evidence in the prosecution. No adequate evidence of prejudice had been adduced.

25. The final case cited before this court is *DPP v. Kennedy* [2009] IEHC 361. The debate centred on the fact that the doctor had signed the declaration to the effect that he had handed both containers to the garda. The oral evidence was that he still had both of the containers in his hand when the garda informed the accused of his right to take one. When the accused opted to take a sample, the doctor handed him one. The main submission was that the sample had not been *"offered"* by the garda, as required under the Act. This submission was rejected by McMahon J. on the basis of the proper interpretation of the statute. It had also been argued that this evidence demonstrated that there was an error in the doctor's form. At p. 16 of his judgment he said:

> *"It is my view of the law that where an error occurs in the completion of the form by the doctor, relating to a non-essential proof not required either in the legislation itself or in the Regulation, but introduced only in the form referred to*

in the Regulation, its effect is not inevitably fatal to the prosecution's case. The effect of the error must be examined in light of the circumstances of each case. In some cases it may well be fatal, but for reasons I have outlined it does not appear to have any significance to the prosecution of the accused in this case."

26. McMahon J. then set out a review of the relevant case-law and summarised the applicable principles as follows:

> *(i) If there is a mandatory provision in the relevant statute or in the Regulations, the prosecution must in normal situations comply with it.*
>
> *(ii) Failure to complete a form accurately, where the Regulation only obliges the doctor to "complete the relevant form", will not be fatal to the prosecution if it does no injustice to the party being prosecuted and if it is a minor or technical error.*
>
> *(iii) Where the Regulation itself provides that the statements averred to in the form are to be taken as proof of the facts averred to, then failure to complete the form in a non-essential matter only means that the evidentiary presumption is lost and may be proved independently by the prosecution if it has alternative ways of doing so.*

27. The case of *DPP v. Egan* [2010] IEHC 233 is relevant in so far as it deals with rebuttal of the statutory presumption. The doctor had given evidence that he had labelled the sample containers with the name of the accused. The certificate from the Bureau stated that there was no name on the container received by it. In cross-examination the doctor accepted that he had not labelled it, and could give no explanation for the situation. The prosecution contended that it was entitled to rely on the presumption that the Act had been complied with, in circumstances where the garda had not been cross-examined. The District Judge found as a fact that the section had not been complied with and acquitted.

28. On an appeal by way of case stated, Kearns P. held that the District Judge had been entitled to rule as he did. Since the doctor accepted that he had not complied with the requirement, there was sufficient evidence to lift or remove the presumption.

Discussion and conclusions

29. On the facts of this case it is, I think, necessary to remember what the purpose of s.15 of the Act is. Where the statutory requirements are complied with, it renders a written statement by the medical practitioner admissible in evidence as proof of the truth of its contents. Without the statutory provision, the form would be no more admissible than a letter to the same effect from the doctor or nurse. The statute also provides that where the form is *"duly completed"* it is, unless the contrary is shown, *"sufficient evidence of compliance"* by the practitioner with the requirements of the Act.

30. In my view, the form in this case has failed in a fundamental way, going well beyond the description of a mere technical slip, to fulfil the evidential objective of the statute. Despite the two opportunities offered in what is a short and relatively simple form, the doctor has entirely omitted to say whether he took either of the two specimens mandated by the Act. The taking of one of those samples is his central role under the Act. If the form were to be admitted as proof of the truth of its contents, it would not prove that he carried out that role. I bear in mind here that the form does declare that he divided *"the specimen"*, put it into containers and labelled the containers. However, where the Act provides that one of two types of sample must be taken, it is in my view essential that the form must indicate which if it is to be of evidential use.

31. It is true that this case has been argued on the basis of non-compliance with the statutory requirements, rather than adequacy of evidence. However, in circumstances such as these the two concepts may merge. I do not see how the form can be held to be *"duly completed"*, and thus raise the presumption that the doctor's obligations in respect of the taking of a sample have been complied with, where he has failed to record what sample he took. This is not, therefore, a case where it is necessary to show prejudice but is one where an essential element is missing.

32. The answer to the first question posed is therefore in the affirmative.

33. Whether that is fatal to the prosecution is, at least potentially, another matter and one that is not raised in the questions asked. I therefore express no view on it but simply observe that, despite the ruling in the case of *Treacy v. Young*, it appears from some of the authorities cited above that on occasion it has been found proper to look outside the certificate for evidence that particular procedures have been properly carried out.

34. Although it is rendered moot by the answer to the first question, I would answer the second question in the negative. I think that the view formed by the learned District Judge, as recorded in the case stated, is correct. The failure by a registered medical practitioner to include his or her registration number on the form does indeed appear to be a breach of his or her obligations under s. 43 of the Medical Practitioners Act, 2007. However, I cannot see that it would have the effect of rendering void a document that is expressly given a particular legal status by another enactment, where the registration number is not required by the terms of that other enactment. Section 43 does not purport to have such an effect.