Neutral Citation Number: [2009] IEHC 361

THE HIGH COURT

2009 608 SS

IN THE MATTER OF THE SUMMARY JURISDICTION ACT 1857, SECTION 2, AND IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS 1961 TO 1991

AND IN THE MATTER OF RULE 11 OF ORDER 102 OF THE DISTRICT COURT RULES, 1997, AND ORDER 62 OF THE SUPERIOR COURT RULES, 1986.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

GERARD KENNEDY

RESPONDENT

JUDGMENT of Mr. Justice McMahon delivered on the 17th day of July, 2009

1. Introduction
This is a Case Stated by Judge Mary C. Devins of the District Court on a point of law to obtain the opinion of the High Court for determination in the above proceedings.

2. Case Stated Summary
At Westport on 19th February, 2009, Mr. Gerard Kennedy, the accused/respondent herein (hereinafter referred to as "the accused"), appeared before the learned trial judge charged with driving a mechanically propelled vehicle in a public place with an excess of alcohol in his blood contrary to s. 49(2) and (6)(a) of the Road Traffic Act 1961 as inserted by s. 10 of the Road Traffic Act 1994, and as amended by s. 18 of the Road Traffic Act 2006.

The relevant facts as agreed and found by her were set out (in part) by the learned judge as follows:

> *At 3.50am on the 5th July, 2008, Garda Brian Murphy, Westport Garda Station accompanied by Garda Siobhan McGowan were performing a routine patrol in Knockrooskey, Westport a public place.*
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> *While passing Knockrooskey National [School] Garda Murphy observed a vehicle, [driving]… in a very dangerous manner…[and when he provided a breath specimen he tested positive]*
>
> *Garda Murphy formed the opinion that the Accused had consumed intoxicating liquor to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place and informed the Accused of his opinion……*
>
> *Garda Murphy arrested the Accused under Section 49(8) of the Road Traffic Act, 1961/2006....The Accused was then conveyed to Westport Garda Station. …[where the accused was processed in compliance]… with the provisions of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987….*
>
> *At 4.22am Dr. Wilk arrived at the Garda Station. Dr. Wilk, Garda Murphy and the Accused went to the Doctor's Room at Westport Garda Station. Garda Murphy introduced Dr. Wilk to the Accused.*
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> *In the presence of Dr. Wilk, Garda Murphy..[.required the Accused … to permit Dr. Wilk to take from [him] a sample of[his] blood, or at [his] option to provide Dr. Wilk with a specimen of [his] urine. …*
>
> *The Accused opted to provide a sample of Blood. At 4.27am Dr. Wilk took a sample of Blood from the Accused…and divided it into two containers. Garda Murphy handed the pink form to the Accused and explained to him that the specimen of Blood provided by him had been divided by Dr. Wilk into two parts and placed by him into two sealed containers.*
>
> *Garda Murphy gave the accused the option to retain one of the containers, and informed him if he chose to retain one of the containers, the remaining container would be sent to the Medical Bureau of Road Safety and if he declined to retain one, both containers would be sent to the Medical Bureau of Road Safety. The accused chose to retain one of the containers.*
>
> *Garda Murphy went on to say that Dr. Wilk handed one of the containers to the accused and that he then placed the remaining sealed container in the box and sealed the box…The box was handed to Garda Murphy by Dr. Wilk…*
>
> *Garda Murphy placed the sealed box in his personal locker which was secured, where it remained until Monday, 7th July, 2008 when Garda Murphy posted the sealed box by registered post to the Medical Bureau of Road Safety.*
>
> *On the 17th July, 2008, Garda Murphy received a certificate of analysis from the Medical Bureau of Road Safety.*

Garda Murphy stated that the result of the analysis showed that the blood specimen of the accused contained a concentration of 197 milligrammes of alcohol per 100 millilitres of Blood. The Medical Bureau of Road Safety Certificate number is 083033sc.

The Certificate completed by the Doctor (Annex 2), together with the certificate of analysis from the Medical Bureau of Road Safety (Annex 3) and Certificate of Postage (Annex 4) were submitted in evidence.

This concluded the prosecution case.

Garda Murphy was then cross examined by Mr. Durcan on behalf of the Accused.

In particular he was cross examined on what took place in the doctor's room at Westport Garda Station following the taking of the specimen by Dr. Wilk and compliance with the doctor with Section 18(1) of the Road Traffic Act 1961/ 2006.

Mr. Durcan for the Accused requested to know what took place in relation to the offering of a specimen to the Accused. Garda Murphy informed the Court that he gave the option to the accused to retain one of the samples and further informed him if he chose to retain one of the samples, the remaining sample would be forwarded to the Medical Bureau of Road Safety and that if he declined to retain one, both samples would be forwarded to the Medical Bureau of Road Safety. In addition, Garda Murphy stated that he also handed the accused a pink slip outlining his rights.

Mr. Durcan, for the Accused, further cross examined Garda Murphy as to where the samples were when outlining the options to his client. Garda Murphy accepted under cross examination that both samples were in the Doctor's hand and that the Accused took one of the samples.

Mr. Durcan for the Accused in making submissions to me, stated that there was not strict compliance with Section 18(2) of the Act. He submitted that Garda Murphy did not 'offer' one of the samples to his client and that in fact it was Dr. Wilk who made the offer to his client.

He further stated that Dr. Wilk's involvement ceased on compliance with Section 18(1) of the Act.

Mr. Durcan for the Accused further submitted that there was a contradiction between the evidence of Garda Murphy in relation to the sample in that he said 'Dr. Wilk handed one of the containers to Gerard Kennedy', whereas Dr. Wilk in the form completed by him under Section 18 of the Act stated 'I gave both containers to a member of An Garda Síochána.'

Mr. Durcan, for the Accused also submitted that the offer of the container was a mandatory requirement and that same must be performed by a member of An Garda Síochána.

Superintendent Doyle on behalf of the prosecutor submitted that it was Garda Murphy who offered one of the samples to the accused. Superintendent Doyle submitted that Garda Murphy, by words, made the offer and it was further Garda Murphy that handed the accused the pink slip which he deemed to be sufficient compliance with Section 18(2) of the Road Traffic Act 1994.

I adjourned the matter to Westport District Court on the 5th March, 2009 to give the Prosecutor and the Accused time to consider the matter with a view to making further submissions in the case.

On the adjourned date, the 5th March, 2009, Mr. Durcan for the accused made further submissions. He stated that the certificate completed by the doctor contained the following sentence at the bottom of the form 'I gave both containers to a member of An Garda Síochána'. He further referred to the case of D.P.P. v. Kemmy [1980] I.R. 160 and cited the words of O'Higgins C.J.:

> *'Where a statute provides for a particular form of proof or evidence in compliance with certain provisions, in my view it is essential that 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 a trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes.'*

I brought to his attention the judgment of Denham J in D.P.P. v. Fanagan, (Unreported, High Court decision of the 18th December, 1991), outlining:

> "The Statute should be interpreted reasonably but strictly, as it is a penal statute and as it affects the fundamental rights of the person."

Superintendent Doyle on behalf of the Prosecutor submitted that there was ample case law relative to errors or omissions in the completion of the Doctor's form. He further stated that there was compliance with Section 18(2) of the Road Traffic Act, 1994. He stated that the dictionary definition of the word 'offer' was 'to present or proffer for acceptance or rejection'.

He further stated that if both samples were left on a bench and a garda outlined orally the options to the Accused, as in this case, in addition to providing the statement in writing outlining his rights, who is making the offer? He queried was it the 'bench' or the 'Garda'. He stated it is clear that it is [the] garda.

I reserved my decision on the said complaint pending the determination of this Case Stated. The opinion of the High Court is respectfully sought on the following questions:-

> *'On the basis of the evidence in this case was there sufficient compliance with Section 18(2) of the Road Traffic Act, 1994?'"*

3. The Question

In submission to this Court there was some criticism of the form of the Case Stated and the opinion was expressed that the question posed should be reformulated to address the real issue for this Court. Perhaps a better formulation would be as follows:-

(i) Does the true meaning of s. 18(2) of the Road Traffic Act 1994 necessitate a physical proffering or tendering of the container by the Garda Síochána for an "offer" to be made within the meaning of the sub-section?

(ii) What is the legal effect of the error made by the doctor in completing the form set out in the First Schedule referred to in Regulation 3 of Statutory Instrument No. 351/1994?

4. Section 18
Section 18 of the Road Traffic Act 1994 reads as follows:-

"(1) Where under this Part a designated doctor has taken a specimen of blood from a person or has been provided by the person with a specimen of his urine, the doctor shall divide the specimen into 2 parts, place each part in a container which he shall forthwith 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 pursuant to subsection (1), a member of the Garda Síochána shall offer to the person one of the sealed containers together with a statement in writing indicating that he 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 Part or under Section 49 or 50 of the Principal Act, it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with."

5. Section 18(2) Analysis
The relevant part of the subsection ("shall") obliges the garda (i) to offer to the accused one of the sealed containers together with (ii) a statement ["the pink form"] in writing indicating that he may retain either of the containers.

There is no dispute re (ii), subject to what arises later in relation to the compliance by the doctor of his role in relation to same. The question canvassed by the defendant's solicitor in the District Court was whether what happened in the doctor's room that morning complied with the requirements of (i): that is, did the garda offer [the accused] one of the sealed containers?

The salient facts established by the learned judge in the District Court are first, "that Garda Murphy gave the option to the accused to retain one of the samples" and second, that at the time "both samples were in the doctor's hands" and the accused took one of the samples directly from the doctor. On the assumption that that is the evidence accepted by the District Court judge my comments are as follows.

After a careful analysis of the language and purpose of the subsection, I am of the view that it would be wholly artificial to accept the argument advanced on behalf of the accused in this regard.

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. I accept the primary definition of "offer" given in the *Concise Oxford English Dictionary* where it says that to offer is to "to present (something) for (someone) to accept or reject". Within that definition there can be little doubt that what the garda did complied with the subsection: he gave the accused the option to retain one of the containers, and the word retain necessarily involved a taking by the accused in that context. In other words, he made the offer required by s. 18(2). It is not essential that he uses the word "offer" to comply with s. 18(2), or that he has the container in his hand at the time of the offer.

Anticipating an argument that will be addressed below in another context, I am also of the view that to make "an offer" as mandated in s. 18(2) it is not necessary for the garda to have both containers in his hands. The statutory requirement is met even if the containers are on a table in another part of the room and there is no ambiguity about what the garda intends to proffer. In ordinary language, and also in the context of contract law an "offer" does not necessarily involve a physical proffering of the items from the very hands of the officer. The "offer" is no less an "offer" because at the time the containers are in the doctor's hands. I reject the applicant's argument on this ground.

Counsel for the accused argues that the subsection in effect contains two separate though related obligations. The first obliges the garda to offer the containers to the accused and the second involves the giving of a written statement indicating that the accused may retain the container. Since the second obligation must indicate in writing that the accused may retain one container, the first obligation, according to the argument, must refer to something else. This construction invites the question: what does "offer to [the accused]" mean if it is divorced from the rest of the sentence? Is it an offer to take the container? To hold the container? To put the container in his pocket? To examine the container? To inspect the seal on the container? To look at the container and give it back? If the argument advanced for the accused is properly understood it may mean any of these, but according to counsel for the accused it cannot mean an offer "to retain the container" as this is specifically mentioned in the next clause which refers to what the written statement must contain. I do not subscribe to this view. A plainer interpretation and more sensible one in the context of the section is that the garda's offer is "to take and retain" one container to do with it as he wishes. 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. The purpose of the second part of subs. (2) is to ensure that there is evidence in writing of the fact that the accused was given this choice.

Another and more reasonable construction can be put on s. 18(2). This would suggest that the garda shall offer to the accused (i) one of the sealed containers and (ii) shall give the accused a statement in writing both of which must indicate

that he may retain either of the containers. This interpretation would mean that the garda offer is specific (as opposed to being unspecific if it is divorced from the rest of the subsection), and that the written statement, intended to provide evidence in the event of a subsequent dispute, relates to the same issue. What would be the point of requiring a written statement if it related to something other than what was in the offer? This construction of the subsection also avoids absurdity.

The second argument advanced on behalf of the applicant before me is one that did not feature strongly in the District Court hearing. It is argued in this Court that the form completed by the doctor mandated by s. 18(1) of the Act and S.I. No. 351/1994 – Road Traffic Act 1994 (Part III) Regulations 1994, did not reflect the truth of what happened on that occasion. Regulation 3 of this Statutory Instrument provides that:-

> "The form to be competed under s. 18 of the Road Traffic Act 1994 by a designated doctor shall be in the form set out in the First Schedule to these Regulations."

At the end of this form, the doctor is obliged to make, *inter alia*, the following averment:-

> "I gave both containers to a member of the Garda Síochána."

Although the doctor signed the form containing this last statement, the uncontradicted evidence in this case, however, is that the doctor did not hand both containers to An Garda Síochána but gave one to the accused and the other to the garda.

In one sense, there was no breach of s. 18(1) of the Act or of the Regulations as the doctor filled in the form as mandated in the First Schedule. There was no question of the doctor failing to complete the form. However, in doing so, he made a statement which is contradicted by the evidence before the District Court. The question for determination is what is the effect of the error made by the doctor in this regard? When one reads the entire paragraph which the doctor must sign, one gets the clear impression that the form signed by the doctor sets out in some detail the procedure which he must follow according to the Regulations. The relevant paragraph in the First Schedule which the doctor must complete reads as follows:-

> "I, the undersigned designated doctor
>
> (a) Took from the person named at 1 above the specimen of blood or (delete whichever is not appropriate)
>
> (b) Obtained from the person named at 1 above the specimen of urine to which this form relates.
>
> I divided the specimen into two parts. I placed each part in a container, which I forthwith sealed. I labelled each container with the name of the person and the date. I gave both containers to a member of the Garda Síochána."

This is then followed by the doctor's signature.

It is significant to note that this statement to a large extent reflects the provisions set out in s. 18(1) of the Road Traffic Act 1994, but s. 18(1), significantly, does not mandate that the doctor hands the specimens to the garda. This requirement is only to be found in the *form* to be signed by the doctor as per the First Schedule of the Regulations. The requirement, if such it be, that the doctor gives both containers to a member of An Garda Síochána is, therefore, not a statutory requirement but a statement introduced only in the form mandated in the Regulations.

The relevant Regulation in Statutory Instrument No. 351/1994 is Regulation 3 which reads as follows:-

> "3. The form to be completed under s. 18 of the Road Traffic Act 1994, by a designated doctor shall be in the form set out in the First Schedule to these Regulations."

This merely obliges the doctor to exercise his statutory duty under s. 18(1) of the Act by using the format of the form set out in the First Schedule. Once the doctor uses the proper form he has complied with his duty under the Regulation. Again it is important to note that the Regulation itself does not say that the doctor must hand the containers directly to the Garda Síochána.

Once the form is completed by the doctor it is, of course, sufficient evidence of the facts stated therein (s. 21(2) of the Act). This is significant from a proof point of view. But it is to be noted that this assumption of sufficiency prevails only "until the contrary is shown". If there is evidence that the facts are not as the doctor averred to in the form, as is the case here, then the court may depart from the evidence offered by the doctor in the form. It does not invalidate the form or the other matters averred to therein, much less lead to the conclusion that the Regulation has not been complied with.

What is the effect, therefore, of the doctor's error when he states that he handed both containers to the garda? This failure is clearly not a breach of s. 18(1) of the Act. Further, it is not a breach of any mandatory provision in the Regulation. It amounts merely to a mistaken statement in respect of a non-essential requirement and, having been recognised as such by the Court, it is not accepted as evidence of that fact. The only repercussion, as I see it, is that it loses its evidentiary status under s. 21(2) of the Act.

For these reasons, it is not in my view fatal to the process required by the legislation.

We may further ask whether this error creates a substantive injustice for the accused in the circumstances of this case? If it creates an injustice then the Court may decide that the error is a significant one and may take a sympathetic stance favouring the accused. An examination of the facts in this case, however, suggests that it does not result in any injustice to the applicant here.

The facts in this case are that the three parties, that is, the doctor, Garda Murphy and the accused, were in close proximity to each other in the doctor's room in the garda station. Even if it is true that the doctor physically handed one of the containers to the accused, it must be assumed that he did so on the authority of Garda Murphy who was present and controlling the situation. It was on Garda Murphy's authority therefore that the doctor handed the bottle to the accused. In that sense, the handing over by the doctor to the accused was of little significance. Moreover, as already stated, s. 18(1) does not require the doctor to hand the container directly to the garda. This statement by the doctor was introduced by the drafter of the form which appears in the First Schedule of the Regulations.

Counsel on behalf of the accused argues that the onus under the legislation rests on the State to prove its case beyond reasonable doubt at all times. Section 21(2) of the Act, however, eases the onus of the State somewhat in these types of cases when under the heading "Provisions regarding certain evidence in proceedings under the Road Traffic Acts 1961 to 1994", it provides:-

> "(1) A duly completed form under section 18 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 designated doctor concerned with the requirements imposed on him by or under this Part." (Emphasis added).

The crucial phrase in that provision as far as the present proceedings are concerned is the phrase "until the contrary is shown". If the contrary is proved, then the completed form shall not be "sufficient evidence… of the facts stated therein". It is common case that the doctor did not hand the two containers to the garda and accordingly the accused argues that the relief relating to proof is withdrawn and the case against the accused is not proved. This of course is true.

In reply to this, the State argues that in the circumstances of this case where all three parties were around the same table in the same room, the fact that the doctor gave one container directly to the accused makes no difference whatsoever, since the offer was made by the garda and the whole procedure was at all times under the control of the garda.

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 by 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. The error does not for that reason prejudice the accused.

Furthermore, I do not consider this decision weakens in any way the general rule that penal statutes are to be interpreted strictly in favour of the accused.

Several cases were opened to me by counsel in their submissions to the Court. It is appropriate that I should briefly open these authorities although an examination of them confirms the view of the law I have expressed above. In particular the Supreme Court decisions in *Somers* and *O'Neill* confirm the view that errors in the relevant forms are not always fatal to the prosecution in such cases.

In *D.P.P. v. Somers* [1999] 1 I.R. 115, the Supreme Court heard that the doctor who had taken the specimen of blood from the defendant had not completed para. 2 of the form prescribed by the Road Traffic Act, 1994 (Part III) Regulations, 1994, which contain the requirement to insert "blood" or "urine" as appropriate. The doctor had, however, deleted sub-para. (b) from the declaration at the end of the form. O'Flaherty J. (Lynch and Barron JJ. concurring) stated that:-

> "I believe this case is all but ruled by the previous decisions of this Court in *Director of Public Prosecutions v. Kemmy* [1980] I.R. 160 and *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447. 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. 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 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 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."

In *D.P.P. v. O'Neill*, (Unreported, 30th July, 1984) the Supreme Court considered the contention that the omission from the designated medical practitioner's form of the letters a.m. or p.m. after the figure 12.50 was a defect rendering the presented form incomplete. The Court held that this contention could not be sustained: the defendant could not have been under any misapprehension as to whether 12.50 a.m. or p.m. was in issue, nor could he have been in any way prejudiced by the omission to state on the relevant form whether it was a.m. or p.m.

In *D.P.P. v. McPartland* [1983] I.L.R.M. 411 the medical certificate in question had an incorrect address, leading the District Court judge to find that there was no evidence that the defendant was the person named in the certificate. O'Hanlon J. held that this was an error in law, noting that although the summons served on the defendant contained identical descriptive particulars, he appeared in court on foot of this summons, making no objection to these particulars.

In *D.P.P. v. Barnes* [2005] I.E.H.C. 245, O'Neill J., also in a Case Stated, held that the typographical error in the s. 17 certificate was not fatal to the prosecution of the accused, there being no lack of certainty or prejudice for the accused. The issue in that case was whether the fact that the garda had in error typed in the wrong offence into the intoxilyzer machine which produced the statements was fatal to the prosecution as not being "duly completed" as required by s. 17 of the Act. In the course of his judgment, O'Neill J. stated:-

> "A court therefore confronted with an application such as was made by Mr. McLoughlin the solicitor for the accused in the District Court must approach the matter on the basis of being satisfied that there has been a strict compliance with the relevant statutory provision before admitting the statement into evidence against an accused.
>
> 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).
>
> In essence therefore what has to be decided in this case is whether the error that was made is one which was plain or palpable or clear and which did not mislead or confuse or cause prejudice or injustice to the accused bearing in mind that, as was said by Barron J. the accused is entitled to certainty as to the nature of the offence and the nature of the evidence with which he is confronted."

Similarly, in *Ruttledge v. Judge Clyne* [2006] I.E.H.C. 146, Dunne J. held that the s. 17 certificate's reference to the garda's name, rather than the name of the accused, was an error which, in comparison with the error in the *Barnes* case "...would attract the same answer that was given by O' Neill J. in that case namely that the error in the certificate was not fatal to the successful prosecution of the accused."

By contrast, in *DPP v. Freeman* [2009] I.E.H.C. 179, MacMenamin J. held that the incorrect order in which the accused and the garda had signed the s. 17 certificate meant that the certificate had not been duly signed. MacMenamin J. stated that the previous High Court case (*DPP v. Keogh*, Unreported, High Court, Murphy J., 9th February, 2004) was *prima facie* "on all fours" with *Freeman*, and concluded that he had not been persuaded that the decision in *Keogh* contained a manifest error.

In my view, this case can be distinguished from that before this Court as, in our case, there was no breach of either a statutory provision or a statutory Regulation, as there appears to have been in *Freeman*. In *Freeman,* the garda signed the statement after the accused instead of before him and this meant that the form in question was not "duly completed" in accordance with s. 17 of the Act. In our case, as already noted, there was no statutory provision or regulatory requirement other than that the doctor should complete the form set out in the Schedule. This he did and there was no requirement in the Regulation that it should be done "accurately" or "duly" or otherwise. It is also noteworthy that most of the authorities opened by counsel for the accused related to s. 17 of the same Act where different wording is used. Though useful on the principles, these authorities are not helpful when s. 18 is to be interpreted and applied. There is nothing in *DPP. v. Freeman* which alters the validity of the Supreme Court line of authority on other, non-fatal, errors as set down in cases such as *Somers* and *O'Neill*.

My conclusion from a study of these authorities is that:-

> (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.

Answer to the question:-
The answer to the question posed by Judge Devins, therefore, is: Yes.

The answers to the reformulated questions are:

(i) No; (ii) it is not fatal to the prosecution's case.