Neutral Citation [2015] IEHC 580

THE HIGH COURT

[2015 No. 267 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 FRANCIS MCMAHON)

PROSECUTOR

AND

MIHAI AVADENEI

ACCUSED

JUDGMENT of Mr. Justice Noonan delivered the 21st day of September, 2015.

1. This matter comes before the court by way of consultative case stated by Judge Colin Gibbons, Judge of the District Court.

Background Facts

2. The accused appeared before Dublin Metropolitan District Court on foot of National Charge Sheet No. 144692042 to answer a complaint that he committed the following offence:

> "On the 21/04/2014 at Ellis Quay, Dublin 7 a public place in the said District Court area of Dublin Metropolitan District, did drive a mechanically propelled vehicle registration no. 01 KE 11842 while there was present in your body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in your breath did exceed a concentration of 22 micrograms of alcohol per 100 millilitres of breath, to wit 54 micrograms.
>
> Contrary to s. 4(4)(a) and (5) of the Road Traffic Act 2010."

3. The matter proceeded before the District Judge on the 2nd of July, 2014 at the Criminal Courts of Justice, Parkgate Street, Dublin
8. Two witnesses were called by the prosecution, Garda Francis McMahon and Garda Colm McCluskey. The District Judge found the following facts.

4. On the 21st of April, 2014, Garda McMahon was operating a speed check on Wolf Tone Quay, Dublin 7, a public place. At about 12.50 am, he detected a vehicle bearing registration no. 01 KE 11842 being driven by the accused driving at a speed of 80 kph in a 50 kph zone. He stepped out onto the road and signalled the vehicle to stop.

5. The vehicle came to a halt very late and pulled into the left hand side of Ellis Quay as directed by Garda McMahon. The driver was the accused. He gave his name and date of birth to Garda McMahon. He gave Garda McMahon his driving licence and address. Garda McMahon got a strong smell of alcohol from the accused's breath.

6. Garda McMahon made a demand under s. 9 of the Road Traffic Act 2010 to the accused to provide a specimen of his breath to indicate the presence of alcohol. He outlined the penalties of failing to comply with the demand. The accused provided a breath specimen in the Drager Alcotest approved apparatus for the taking of such specimens. The result of the test was "fail". Garda McMahon formed the opinion that the accused had committed an offence contrary to s. 4 of the Road Traffic Act 2010. He arrested the accused under s. 4(a) of the 2010 Act. He cautioned the accused and informed him of the reason for his arrest in ordinary language.

7. The accused was conveyed to Store Street Garda Station. There he was given his notice of rights which were read over to him. The accused was observed for twenty minutes nil by mouth by Garda McMahon. The accused had a good grasp of the English language but an interpreter was obtained nonetheless.

8. Garda McCluskey was trained in the use of the Evidenzer Irl evidential breath testing apparatus. He made a demand of the accused under s. 12(1)(a) of the Road Traffic Act 2010 to provide a specimen of his breath. He informed the accused of the penal consequences of failure to provide a sample. The accused confirmed to Garda McCluskey that there was no medical reason for him not providing a specimen. The accused provided a specimen.

9. Garda McCluskey complied with s. 13 of the Road Traffic Act 2010. The Evidenzer Irl produced a document which described a concentration of 54 micrograms per 100 millilitres of breath in the specimen produced by the accused. The document was signed by both the accused and Garda McCluskey as required. The completed document was tendered into court as a certificate under s. 13 of the Road Traffic Act 2010. A copy of the document is annexed to this judgment.

10. Under cross examination, Garda McCluskey stated that prior to the provision of the breath specimens, he inputted his details and that of the accused into the Evidenzer apparatus in English. Garda McCluskey stated that the only document which was produced from the machine was in English. He stated that the Evidenzer apparatus is capable of producing the printout in Irish.

11. At the conclusion of the prosecution case, the accused's solicitor applied for a "direction" of no case to answer on the grounds that the document submitted to the court was not a duly completed statement within the meaning of s. 13 of the Road Traffic Act 2010 because it did not comply with the requirements of the Road Traffic Act 2010 (s.13) (Prescribed Form and Manner of Statements) Regulations 2011 (S.I. 541/2011), which require that the relevant statement should be produced in both the English and Irish languages. Accordingly, the defence submitted that the document was not a duly completed statement and thus not admissible in evidence.

12. The case was adjourned to allow for written submissions and on the 2nd of October, 2014, the District Judge delivered a written judgment in which he acceded to the defence application and held that the document which purported to show the concentration of alcohol in the breath of the accused was not a "duly completed" certificate within the meaning of the relevant section above.

Question For Determination
13. Arising from the foregoing, the District Judge referred the following sole question to this court for determination:

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

The Legislation
14. Chapter 2 of the Road Traffic Act 2010 deals with intoxicated driving offences. Section 4 of the 2010 Act provides for the maximum permissible concentration of alcohol in blood, urine and breath specimens respectively. Section 4 (4) which is relevant in this instance, provides:

> "(4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her breath will exceed a concentration of—
>
> (a) 22 microgrammes of alcohol per 100 millilitres of breath, or
>
> (b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.
>
> (5) A person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both…
>
> (8) A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

15. Chapter 4 of the 2010 Act provides for the procedure in relation to providing relevant specimens at garda stations. Section 12 insofar as relevant here, provides as follows:

> "12.— (1) Where a person is arrested under section *4 (8), 5 (10), 6 (4), 9 (4), 10 (7)* or *11 (5)* of this Act or *section 52(3), 53(5), 106(3A)* or *112(6)* of the Principal Act, a member of the Garda Síochána may, at a Garda Síochána station, do either or both of the following—
>
> (a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his or her breath and may indicate the manner in which he or she is to comply with the requirement…"

16. Section 13, which gives rise to the issue in this case, provides:

> "13.— (1) Where, consequent on a requirement under section 12 (1)(a) of him or her, a person provides 2 specimens of his or her breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen —
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> (a) in case the apparatus determines that each specimen has the same concentration of alcohol, either specimen, and
>
> (b) in case the apparatus determines that each specimen has a different concentration of alcohol, the specimen with the lower concentration of alcohol,
>
> shall be taken into account for the purposes of *sections 4 (4)* and *5 (4)* and the other specimen shall be disregarded.
>
> (2) Where the apparatus referred to in *section 12 (1)* determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened *section 4 (4)* or *section 5 (4),* he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in that specimen determined by that apparatus.
>
> (3) On receipt of those statements, the person shall on being requested so to do by the member—
>
> (a) immediately acknowledge such receipt by placing his or her signature on each statement, and
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> (b) thereupon return either of the statements to the member.
>
> (4) A person who refuses or fails to comply with *subsection (3)* commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both.
>
> (5) *Section 20 (1)* applies to a statement under this section as respects which there has been a failure to comply with *subsection (3) (a)* as it applies to a duly completed statement under this section."

17. Section 20 of the Act deals with the evidential effect of s. 13 statements:

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

18. The relevant provisions of the Road Traffic Act 2010 (s. 13) (Prescribed Form and Manner of Statements) Regulations 2011 (S.I. 541/2011) are as follows:

> "3. The form set out in the Schedule is prescribed as the form of the statements to be automatically produced for the purposes of section 13(2) of the Act of 2010 by an apparatus referred to in section 12(1)(a) of that Act.
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> 4. For the purposes of completing the statements referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—
>
> (a) before the person provides a specimen of his or her breath in accordance with section 12(1)(*a*) of the Act of 2010, input into the apparatus referred to in that section—
>
> *(i) the name, address, date of birth and gender of the person providing the specimens,*
>
> *(ii) the provision that it is alleged the person has contravened, namely, section 4(4) or 5(4) of the Act of 2010, and*
>
> *(iii) his or her name and number,*
>
> and
>
> (b) following the automatic production of the statements referred to in section 13(2) of the Act of 2010, sign the statements."

19. Thereafter, there immediately follows in the Statutory Instrument the "***SCHEDULE***". The Schedule commences on p. 3 of the S.I. and the requisite form is set out thereafter in the English language on pp. 3 and 4 with a space for the signature of the relevant garda and below that of the person providing the specimens of breath. At the top of p. 5 of the S.I., the words "***AN SCEIDEAL***" appear and thereafter on pp. 5 and 6, the same form appears to be reproduced as appears on pp. 3 and 4 but this time in the Irish language.

20. Accordingly, the document produced by the Evidenzer machine in this case corresponds to the form at pp. 3-4 of the S.I. but not pp. 5-6 thereof.

Submissions

21. The essence of the case made on behalf of the accused is that the s. 13 statement in this case produced by the Evidenzer machine is neither in the prescribed form or duly completed because it is in English only. The 2011 Regulations provide for one form only in the Schedule to the S.I. and the single Schedule prescribes a form in English and Irish on pp. 3-6 of the S.I. The accused in particular relies on the judgment of the High Court (MacMenamin J.) in *DPP v. Freeman* [2009] IEHC 179 and the authorities therein referred to. It was submitted that these authorities establish that where a penal statute provides for evidence to be tendered by way of certificate, strict compliance with the requirements of the statute as to form is necessary. In the absence of compliance, the certificate cannot be admitted in evidence.

22. The prosecutor argued that it is plain from reading the regulations that there is a Schedule in English which is simply reproduced in Irish rather than being a single Schedule in two languages. The prosecutor further submits that if the form were required to be printed in two languages, there are then two places where the person giving the sample must sign it (one in English and one in Irish) where the person giving the sample must sign it. However, the 2010 Act does not provide for either signing in both places or electing between the two. It clearly envisages one signature only. The same applies to the requirement for the garda to sign the form.

23. The prosecutor further contended that the form had no potential to mislead the accused or work any prejudice. The prosecutor relied on a number of authorities in relation to drunken driving legislation which held that small mistakes or technical slips in completion of a form which did not mislead or prejudice the accused did not invalidate the form.

Relevant Case Law

24. In *DPP v. Kemmy* [1980] I.R. 160, the accused was prosecuted for driving a motor vehicle when there was present in his urine an unlawful concentration of alcohol. The relevant form in that case was completed by a medical practitioner who filled out a document which had beneath it an identical carbon copy which was simultaneously completed. The lower duplicate form or carbon copy was sent to the Medical Bureau of Road Safety. The defendant contended that the Act required that the "completed" form be sent to the bureau and since the form that was actually sent was merely a copy and thus not completed by the doctor, it was invalid. The Supreme Court rejected this proposition holding that the doctor had in fact completed both forms and the one sent to the bureau was a duplicate original rather than a copy.

25. In a dissenting judgment, O'Higgins C.J. said the following (at p. 164):

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

26. This passage has been frequently cited with approval in subsequent decisions – see for example *DPP v. Freeman* [2009] IEHC 179 and *DPP v. Egan* [2010] IEHC 233.

27. In *DPP v. Collins* [1981] I.L.R.M. 447, another drunken driving prosecution, the doctor signed the bottom of the form as required but omitted to insert his name in another part of the form. The Supreme held that although form was incomplete, it was "duly completed" in accordance with the statute and thus admissible. The court held that the insertion of the doctor's name added nothing to the form and there was no confusion or prejudice arising.

28. In *DPP v. O'Neill* (Unreported, Supreme Court, 30th July, 1984) the doctor completing the form gave a time of 12.30 in it without specifying am or pm. The Supreme Court held that other evidence could establish the time at which the specimen was taken and there was thus no confusion or prejudice arising.

29. In *DPP v. Greely* [1985] I.L.R.M. 320, the accused had voluntarily attended at a garda station where he was arrested. A requirement for a specimen of blood was made at the station. However, the statute envisaged that the accused would already have been arrested prior to his arrival at the station. In the course of his judgment, Barrington J. said (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 section 23 of the Road Traffic Act, 1978 (now section 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 presupposes that the appropriate legal procedure culminating in the issue 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 section 23 of the Road Traffic Act, 1978 and has no status as evidence in a court of law."

30. In *DPP v. Somers* [1999] 1 I.R. 115, the doctor taking a blood sample from the defendant failed to complete a section of the statutory form indicating whether the sample was blood or urine. The Supreme Court held that this did not invalidate the procedure. In the course of his judgment, O'Flaherty J. said (at p. 119):

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

31. In *McCarron v. Judge Groarke* (Unreported, High Court, *Ex Tempore*, Kelly J., 4th April, 2000) the prosecuting garda had not complied with the statutory requirement to offer a specimen to the accused person. Kelly J. found that the failure to comply with the provision was an actual failure of compliance with the statutory provision in mandatory terms where the term "shall" appeared in the relevant subsection. Thus, there was more than a mere technical slip involved. The court held that this was capable of constituting a prejudice to the defendant. Kelly J. referred to the remarks of O'Flaherty J. in *Somers* above and said (at p. 6):

> "One can understand why the Supreme Court in [*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 for Road Safety without further proof."

32. He went on to say (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."

33. Accordingly the prosecution failed.

34. In *Maguire v. Ardagh* [2002] 1 I.R. 385, the Supreme Court considered the evidential presumption regarding a "consent" under s. 3 of the Committees of the Houses of the Oireachtais Compellability, Privileges and Immunities Of Witnesses Act 1997. Section 3(9) of that Act provided that the relevant consent "shall" be in writing. Although the relevant section was not penal, the court was nonetheless emphatic as to the effect of non compliance with the statute. Denham J. (as she then was) stated (at para. 35):

> "The point is clear. Non compliance vitiates the evidential presumption."

35. In *DPP v. Keogh* (Unreported, High Court, *Ex Tempore*, Murphy J., 9th February, 2004), the court had to consider a certificate under s. 17 of the Road Traffic Act 1994. The statutory instrument that dealt with the relevant form under s. 17 specified that the certificate was required to be signed by the garda first and subsequently signed by the accused. In that case, the order of signing had been reversed.

36. Murphy J. contrasted a situation where the defect was purely technical with that arising under s. 17, even in the absence of prejudice. He said:

> "In my opinion it does seem that the other cases referred to by the prosecutor namely *DPP v. Somers, DPP 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 s. 17 certificate.

2. There is a penal element involved which must be dealt with in a strict manner."

37. He went on to conclude that the certificate was inadmissible in evidence and the accused was entitled to have the charges dismissed.

38. In *DPP (O'Reilly) v. Barnes* [2005] 4 I.R. 176, a drunken driving prosecution, the garda typed into the Intoximeter apparatus particulars of the wrong offence. The High Court (O'Neill J.) held that where a statute provided for a particular form of proof or evidence, the precise statutory provisions must be complied with. However, the error here was of such an obvious nature that it did not give rise to any confusion or misleading of the accused or impose any prejudice on him or expose him to any injustice. Accordingly, the certificate was valid.

39. A similar result ensued in *Ruttledge v. District Judge Patrick Clyne* [2006] IEHC 146 where a garda inserted the name of the prosecuting garda in the relevant form where the name of the accused should have been placed. Dunne J. refused an order of *certiorari*, albeit on discretionary grounds, in circumstances where no misleading had occurred and thus no prejudice accrued to the accused.

40. The accused herein places particular reliance on the judgment of MacMenamin J. in *Freeman* on the basis that it considered the then relevant statutory regime, almost identical to that initial in this case, under s. 17 of the Road Traffic Act 1994 and the regulations made thereunder. The facts in *Freeman* replicated those that had arisen in *Keogh* in that the accused had signed the relevant documents and they were subsequently signed by the garda, reversing the order necessitated by section 17. MacMenamin J. conducted an extensive analysis of the cases I have referred to above and in particular *Keogh* and concluded that he was bound to follow it, despite considering that the accused had no merits and the point was, as he described it, "wafer thin". It is notable that he was of the view that there was no evidence that anyone had been confused or misled by what had occurred. Despite that finding, he went on to say (at p. 22):

> "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."

40. He went on take the view that there was nothing to suggest that *Keogh* was wrongly decided and he was accordingly obliged to apply it.

41. Some three months later, the High Court again had to consider the same legislation in *DPP v Kennedy* [2009] IEHC 361. An issue arose as to whether the accused had been offered one of the samples by the garda, as the Act required, or by the doctor. There was also a question in relation to whether the doctor had accurately completed the relevant form insofar as it stated that the sample had been offered by the garda when the evidence suggested otherwise. McMahon J. considered that there was a statutory requirement that the form be completed but no requirement that it be completed accurately or "duly". His view was that the error that occurred was not fatal and distinguished *Freeman* on the basis that the form in *Freeman* had not been "duly completed" in accordance with s. 17 but in this instance, there was no similar mandatory statutory requirement. He said (at p. 16):

> "It is my view of the law that when 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."

42. Accordingly, McMahon J. appears to have reached the conclusion that the error that occurred in *Kennedy* was of a kind that had been held to be non fatal in cases such as *Somers* and *O'Neill*.

40. The nature of certificate evidence was considered in *Power v. Hunt* [2013] IEHC 174 where O'Malley J. observed (at p. 5):

> "The sole point [*of a certificate*] is to make admissible what would otherwise be hearsay. In such cases, the certificate covers the admissibility of its own contents. In the context of a drink or drug driving case that means that the prosecution does not have to call witnesses from the Bureau to prove how the analysis was carried out or what the findings of the analysis were, along with other issues such as, for example, the chain of custody of the sample within the Bureau and thereafter."

41. Similar views were expressed by Clarke J. in *DPP (Moyles) v. Cullen* [2014] IESC 7 where he noted (at pp. 3-5):

> "Evidence concerning alcohol concentration is not normally (or, in practice at all) established at the hearing of a drunk driving case in a way which corresponds with the ordinary rules of evidence. In many cases, of course, forensic evidence forms an important part of the prosecution case. However, in order to establish facts by forensic evidence in the ordinary way, a series of witnesses frequently have to be called. For example, fingerprint evidence is normally established by calling a witness who took fingerprints from a crime scene, a witness who can verify the fingerprints of the accused and expert testimony to suggest that the respective fingerprints come from the same person. Further evidence may, in an appropriate case, be necessary to ensure that there is no doubt but that the fingerprint examples on which the expert proffers an opinion are truly the same as those found at the crime scene and those taken from the accused. In theory, there is no reason why, for example, evidence of the concentration of alcohol in a drivers blood, urine or breath could not be given in the same way. Evidence establishing the relevant sample could be given. Evidence demonstrating the custody of the sample between it being taken and it being tested in a laboratory could be added. An expert from the laboratory could be added. An expert from the laboratory could be called to give an expert view as to the relevant concentration. All of this would, of course, be very cumbersome and make the prosecution of drunk driving cases very difficult. It was, for

that reason, that, from the earliest times when drunk driving was defined by reference to alcohol concentration, the relevant legislation provided for the use of a certificate to prove such alcohol concentrations. However, it is important to emphasise that such a certificate would not, in an ordinary case and in the absence of enabling legislation, be evidence. It is only because the statutory regime permits such a certificate to be given as evidence that it is admissible at all. Thus compliance with the statutory regime is in the nature of a condition precedent to the admissibility of the evidence in the first place, for in the absence of such compliance, the certificate simply would not be evidence in the ordinary way. Thus the distinction between certificate evidence in a drunk driving case and the vast majority of other forensic evidence which might be tendered at a criminal trial is that alcohol concentration evidence by certificate is not evidence at all unless the statutory requirements have been met. Other forensic evidence will ordinarily be admissible although it might be excluded, under the exclusionary rule, if it were obtained in circumstances which were in breach of the accused's constitutional rights. Such evidence remains evidence but it is excluded for constitutional reasons. Evidence by certificate in alcohol concentration cases does not even get to the point of being admissible evidence unless the statutory regime is complied with."

Analysis

40. It seems to me that the foregoing cases establish in effect two lines of authority with regard to defective certificates in drunk driving prosecutions under the Road Traffic Acts. The first can be said to arise in cases where certificate evidence is sought to be adduced in circumstances where there has been a technical error in the completion of the relevant certificate which does not breach a mandatory statutory provision and does not result in any misleading and thus prejudice to the accused. Although each case turns to a significant extent on its own facts, it is probably nonetheless true to say that such a technical flaw does not normally invalidate the certificate or deprive it of the evidential presumption it otherwise enjoys.

41. The second line of authority exemplified by the dicta of O'Higgins C.J. in *Kemmy* would appear to suggest that where the relevant statute mandates the adoption of a particular procedure, a failure to adhere to that procedure will deprive the relevant certificate of any evidential value irrespective of whether or not the accused has been in any way misled or has suffered any prejudice as a result.

42. The language of s. 13(2) of the 2010 Act is clearly mandatory. Once the breath specimen has been given which indicates a possible contravention of s. 4(4) or 5(4), the person providing the specimen "*shall*" be supplied immediately by a member of the Garda Síochána with two identical statements automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner…" (my emphasis).

43. There is no ambiguity about this. The garda must supply the two statements, they must be in the prescribed form and they must be duly completed in the prescribed manner.

44. The prescribed form is to be found in the 2011 Regulations. Again mandatory language is used in Regulation 3 – "*the form set out in the Schedule is prescribed…"*.

45. It is to be noted that "form" singular is referred to as is "the Schedule". The Regulations make no provision for alternative forms in Irish and English to be produced by the Evidenzer machine. The Regulations make no provision for the person providing the breath specimen opting to receive the relevant statements in English or alternatively in Irish. Accordingly, it seems to me that the Schedule to the Regulations can only be construed as the entirety of the form that appears at pp. 3-6 inclusive of the Regulations after the word "***SCHEDULE***". Even if there were any ambiguity about this, and I do not believe there is, the section is penal or associated with a penal section in the manner described by MacMenamin J. in *Freeman* and therefore must be construed strictly. Accordingly, it is not in my view permissible to speculate that it may have been intended by the draftsman to simply reproduce the same form in both Irish and English or perhaps infer that the accused may opt for either. That would be to adopt a purposive approach for which there is no warrant in either the Act or the Regulations and would amount to judicial legislation of the type disapproved in *Freeman*.

46. I do not think any assistance in this regard can be gained from s. 12 of the Interpretation Act 2005, as urged by the prosecutor, which provides:

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

47. In my view, what arises in this case, being a failure to reproduce an entire half of the prescribed form, could not be regarded as a mere "deviation" from the form prescribed.

48. It must follow that if the form produced by the Evidenzer in this case is not the prescribed form within the meaning of s. 1(2) of the 2010 Act, neither can it be a "duly completed" form.

Conclusion

49. Accordingly, I am of the opinion that the document relied upon by the prosecution in this case does not comply with the requirements of s. 13(2) and thus enjoys no evidential presumption by virtue of s. 20(1). In the event, it is not evidence at all and cannot be admitted.

50. Accordingly, I propose to answer the question posed by the District Judge as follows:

> (i) Yes – the document in issue is neither in the prescribed form or duly completed within the meaning of s. 13(2) of the 2010 Act or Regulation 3 of the 2011 Regulations.