

## THE HIGH COURT

2005 No.267 SS

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

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS  
(AT THE SUIT OF GARDA CATHAL A.O'REILLY)**

PROSECUTOR

**AND  
ANDREW BARNES**

ACCUSED

**Judgment of O'Neill J. delivered the 18th day of July, 2005.**

1. This is a case stated by Murrough Connellan a Judge of the District Court in which he poses two questions for the opinion of this court as follows:

(a) Whether the typographical error in the s.17 certificate is fatal to the successful prosecution of the accused.

(b) Whether the s.17 certificate can ever be amended by the court for obliteration or mistake.

2. The facts giving rise to this case stated are set out in the case stated and may be summarised as follows.

3. The accused appeared at the District Court in Bray on 8th December, 2003, to answer a charge set out in Shankill Charge Sheet No.188997 where it was alleged that on 29th June, 2003, at Holly Park Shankill Co.Dublin he was in charge of a mechanically propelled vehicle registration numbers and letters 92 WW 1840 in a public place with intent to drive the said vehicle (but not driving or attempting to drive it) when in his body there was present a quantity of alcohol such that within three hours of having been so in charge of the vehicle the concentration of alcohol in his breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath, contrary to s.50 (4) (6) (a) of the Road Traffic Act 1961 as inserted by s.11 of the Road Traffic Act 1994 as amended by the Road Traffic Act 1995 as amended by s.23 of the Road Traffic Act 2002.

4. On the 29th June, 2003, at approximately 1.00 am the prosecutor noticed the accused sitting in his car, in the driver's seat with the engine running and the front headlights switched on. He observed the accused's eyes to be bloodshot and that there was a strong smell of alcohol from him and his speech was slurred. The prosecutor formed the opinion that the accused had consumed intoxicating liquor to such an extent as to render the accused incapable of having proper control of a mechanically propelled vehicle in a public place and he had informed the accused that he was of the opinion that the accused had committed an offence under s.50 (1) (2) (3) or (4) of the Road Traffic Act 1961 as amended. He informed the accused that he was arresting him for being drunk in charge of a vehicle with intent to drive and this happened at 2.00 am. He arrested the accused and brought him to Bray Garda Station where he introduced him to the member in charge Sergeant John O'Driscoll. The accused was observed for 20 minutes prior to having the intoximeter test done. At 2.40 am the accused was taken to the intoximeter room for the purposes of an evidential breath test. Garda Joseph Keenan performed this procedure and was observed by the prosecutor. Garda Keenan proceeded to enter the accused's details into the machine, a Lion Intoxilyzer, and it is common case that in error he typed into the apparatus that the specimen was being taken into account for the purposes of s.49 (4) for the Road Traffic Act 1961 whereas he should have typed in, that the specimen was being taken into account for the purposes of s.50 (4) of the Road Traffic Act 1961. Garda Keenan then proceeded to carry out the test. That involved the accused providing two samples of his breath pursuant to s.13 (1) (a) of the Road Traffic Act 1994. The accused cooperated with the test and provided these two samples by exhaling twice into the machine. The intoxilyzer then printed off two identical copies of a statement. The intoxilyzer reading showed a concentration of 66 micrograms of alcohol per 100 millilitres of breath. Garda Keenan then provided the accused with both copies of the statement and requested him to acknowledge receipt by signing both copies. The accused complied with this request.

5. At the commencement of his evidence Garda Keenan drew the courts attention to the fact that he had in error typed into the intoxilyzer machine the wrong offence.

6. At the conclusion of the evidence Mr. McLoughlin, solicitor for the accused applied for a direction that the accused be acquitted on the grounds that the specimen of breath to be taken into account was for the purposes of s.49 (4) of the Road Traffic Act 1961 when in fact the accused had been charged with an offence contrary to s.50 (4) of the same Act. Mr. McLoughlin further submitted that the court had no power to amend the certificate which on its face was incorrect.

7. The learned District Judge declined to grant the application for a direction but agreed to state a case for the opinion of this court and posed the aforementioned two questions.

8. The following statutory provisions are relevant to this case.

9. Section 17 (2):

*"(2) Where the apparatus referred to in section 13 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 49 (4) or 50 (4) of the Principal Act, he shall be supplied forthwith by a member of the Garda Síochána with 2 identical statements, automatically produced by the said apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in the said specimen determined by the said apparatus..."*

*21.(1) A duly completed statement purporting to have been supplied under section 17 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts, 1961 to 1994, of the facts stated therein, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him by or under this Part prior to and in connection with the supply by him pursuant to section 17 (2) of such statement."*

10. Article 5 of the Road Traffic Act 1994 (s.17) Regulations 1999 S.I.No.326 of 1999 reads as follows:

*"For the purpose of completing the statements referred to in article 4, the member of the Garda Síochána who required the arrested person to provide two specimens of breath shall:-*

*(a) prior to the provision of the specimens, input the following information into the apparatus referred to in section 13(1) of the Act of 1994-*

*(i) the name and address of the person providing the specimens,*

*(ii) the section of the Road Traffic Act, 1961 (No.24 of 1961) which it is alleged that the person contravened,*

*(iii) his or her name and number, and*

*(c) following the automatic production of the statements by the apparatus, sign the said statements."*

11. As is apparent from the foregoing statutory provision, for a statement emanating from the apparatus in question to be admitted into evidence and to have evidential status pursuant to s.21 (1) of the Road Traffic Act 1994, the Statement must be "*duly completed*". There is no doubt that the statement in question was in the prescribed form but the first issue which arises in this case stated is whether or not having regard as to the error as to the offence mentioned in the statement, it can be considered to be duly completed.

12. This case is the latest in a long line of similar type cases which have come to this court generally as cases stated from the District Court, where there have been challenges to the admissibility of evidence of this kind in drink driving type cases. It is clear from the long line of authorities that has evolved that there are two guiding principles which must inform decisions as to the admissibility into evidence of certificates or statements which are admitted into evidence by virtue of statutory provision and in the absence of contradictory evidence prove their content. The following passage from the dissenting judgment of O'Higgins C.J. in the case of *Director of Public Prosecutions v. Kemmy* [1980] I.R.160 at p.164 illustrates the first of these principles where he says:

*"Where a statute provides for a particular form of proof or evidence in 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..."*

13. The following passage from the judgment of O'Flaherty J. in the *Director of Public Prosecutions v. Somers* [1999] 1 I.R.115 at p.119, illustrates the other operative principle where he says as follows:

*"I believe this case is all but ruled by the previous decisions of this Court in **Director of Public Prosecutions v. Kemmy** 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.*