THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 103

[2019 No. 270]

The President

McCarthy J.

Kennedy J.

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA CONOR GORN)

RESPONDENT

AND

ANTHONY MCGRATH

APPELLANT

JUDGMENT of the President delivered on the 16th day of April 2020

1. The defendant/appellant was charged with an offence contrary to s. 4(4)(b) and 4(5) of the Road Traffic Act 2010, the offence of driving a mechanically-propelled vehicle when there was present in his body a quantity of alcohol such that the concentration of alcohol in his breath exceeded the prescribed limit. The defendant/appellant contested the charge. In the course of the hearing in the District Court, the prosecution sought to rely on a photocopy of a statement generated by an 'Evidenzer'. The prosecution sought to do so in circumstances where the original certificate had apparently been mislaid. The question that arose in the District Court and caused the judge there to state a case was whether the presumption, provided for by s. 20 of the Road Traffic Act 2010 applied where the prosecution relied on a photocopy as opposed to the original statement. The

judge of the District Court formulated the consultative case stated to the High Court in the following terms:

> "[i]n the circumstances of the present case, where the original s. 13 statement is not available, but a photocopy of that statement has been tendered in evidence by the prosecution, does the evidential presumption of validity under s. 20(1) of the Road Traffic Act 2010 apply to that photocopied statement?"

The High Court answered the question in the affirmative and the matter now comes before this Court on appeal.

2. In the District Court, the prosecution indicated that they would be relying on s. 30 of the Criminal Evidence Act 1992 which, they contended, supported the introduction of the photocopy statement and the placing of reliance on it. In the District Court and in the High Court, in both cases unsuccessfully, and before this Court, it has been argued by the appellant that s. 30 of the Criminal Evidence 1992 has no application and, if in fact it did have any application, would not assist the prosecution in any event.

3. Before considering the arguments in greater detail, it is convenient at this stage to refer to the main statutory provisions which appear to be in issue. The relevant sections of the Road Traffic Act 2010 provide as follows:

> "4.—[…] (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—
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> (a) 22 micrograms of alcohol per 100 millilitres of breath, or
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> (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. […]
>
> Provision Regarding Certain Evidence in Proceedings Under Part 2
>
> 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."

The relevant provisions of the Criminal Evidence Act 1992 provide:

"Copies of Documents in Evidence

30.—(1) Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made […]"

4. The appellant contends that the appropriate starting point for consideration of the issue that arose in the District Court was to engage in an analysis of the evidential presumptions created by s. 20(1) of the Road Traffic Act 2010. It is contended that the trial judge fell into error in giving only limited consideration to this aspect of the appellant's case. It is argued that on close examination, it becomes clear that s. 20 applies only to an original s. 13 statement i.e. a statement printed out by the Evidenzer breath testing machine, duly completed by a Garda and has no application to a copy thereof.

5. It is said that further support for the interpretation contended for, that s. 20(1) applies only to a duly completed certificate generated by the breath testing machine, duly completed by a member of An Garda Síochána, and not to a photocopy, is to be found from a holistic reading of the Act. Attention is drawn to other sections of the 2010 Act which deal specifically with the option of making use of copies. Particular attention is drawn to s. 10 which deals with the establishment of mandatory alcohol testing checkpoints. Section 10(9) provides:

"(9) An authorisation or a copy expressing itself to be such authorisation 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 a person entitled under subsection (2) to sign it." (Emphasis as placed by the appellant)

Attention is also drawn to s. 81 of the 2010 Act which deals with the offence of speeding and provides for an evidential presumption in respect of records produced by an electronic or other apparatus (including a camera) capable of providing a permanent record. Section 81(2) provides inter alia:

"[in proceedings for a speeding offence] a document purporting to be, or to be a copy of, a record referred to in subsection (1)(a) […] shall be prima facie evidence in those proceedings of the indications or measurements contained in the record. It shall not be necessary to prove, as the case may be, the signature on the document or that

the signatory was a member of the Garda Síochana or that the document was so issued." (Emphasis as placed by the appellant)

6. The appellant placed and continues to place reliance on DPP v. Kemmy [1980] IR 160. There, at 164, O'Higgins CJ had observed:

> "[w]here 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. The Act of 1978 is a penal statute. The whole basis for the evidential value given by the Act to the Bureau's certificate depends upon the Bureau receiving a specimen 'forwarded to it under section 21.' It is such a specimen that it may analyse and in respect of which it may certify the result. Section 21, sub-s. 3, specifically provides that what is to be forwarded to the Bureau is the completed form together with the relevant sealed container. A sealed container unaccompanied by any form could not be regarded as being received by the Bureau under section 21. The case is no different, in my view, if what accompanies the sealed container is a copy of the form. While this copy is exact in all respects and contains a true impression of what was entered on the form completed by Dr. Mulvihill, it is not that form and it was not signed by him as such. It is, therefore, not 'the completed form' provided for by section 21.

High Court Judgment

7. As noted above, the High Court answered the consultative case stated in the affirmative, holding that an authenticated copy of a s.13 statement was admissible in evidence as if it were the original statement, and thus the relevant presumptions under s.20 applied. Given that the submissions of the Director rely heavily upon the rationale outlined in the judgment of the High Court, it is appropriate to refer to it in some detail. Simons J was of the view that the broad nature of s.30 of the 1992 Act permitted the admission of copies of documentary evidence. Particular importance was given to the fact that once authenticated, the copy of a document was said to have the same legal effect as the original. Simons J highlighted that the copy contained the details of the person providing the specimen, the name and number of the member of An Garda Síochana, the level of alcohol in the breath specimen, and a facsimile of the signatures of both the relevant Garda Sergeant and the Defendant. Consequently, the argument that the copy did not amount to a "duly completed statement" was misconceived in circumstances where there was an authenticated copy proffered.

8. Mr. McGrath's fair trial rights were said not to have been infringed because there was a requirement to have any copy relied upon authenticated and any questions as to its accuracy could be tested by the defendant comparing the copy with the "duplicate original" supplied to him at the time the breath specimens were taken. Further, Simons J noted that it was open to the defendant to seek to rebut the presumption under s. 20 of the 2010 Act by highlighting a breach of the underlying procedural requirements. The determination of such an issue would be a matter for the trial judge having reference to the principles outlined in DPP v. Avadenei [2017] IESC 77 as to the exercise of a statutory power of compliance. The High Court noted that Mr. McGrath had not argued that the member of An Garda Síochána failed to complied with the s.13 procedure and that, even if it such an argument had been advanced, the admission of a copy the s.13 statement would not have undermined same.

9. Simons J distinguished Kemmy from the present case for two reasons. First, the majority judgments therein accepted that a carbonised or imprint copy of a form completed by a medical practitioner could be admitted as evidence. It could therefore be extrapolated that the modern equivalent of a carbon copy i.e. a photocopy would equally be admissible. Second, the legislative framework was changed post-Kemmy by the enactment of s.30 of the 1992 Act.

10. The High Court found Mr. McGrath's reliance on the principle of *expressio unius est exclusion alterius* framed the legal issues too narrowly by failing to appreciate the need to considered the interaction between the 1992 and 2010 Acts respectively. The general provision, applicable in all criminal proceedings, for the use of copies outlined in s.30 of the 1992 Act could not be overridden by the omission identified in s.20 of the 2010 Act per the canon of *generialia specialibus non derogant*.

11. Finally, the High Court made what it felt were obiter comments as to how the phrase "duly completed statement" might be defined. Simon J was of the view that some separate evidence would not be necessary to prove the s.13 statement was "duly completed" where a copy of the said statement was relied upon. Rather, once the document contained the requisite information required of it then the evidential presumptions applied. In that event, it would still be open for a defendant to challenge the prosecution by seeking to rebut that presumption on that basis that there had been a breach of the underlying procedural requirements.

Summary of the Submissions

The Appellant

12. Counsel for the appellant puts forward a rather nuanced argument. A "duly completed" s.13 statement is said to carry with it two separate evidential presumptions or has two separate evidential impacts. The first is that the breath specimens contained the concentration of alcohol noted in the certificate without needing to further prove the

scientific basis or accuracy of the machine used to take/measure same. The second evidential presumption is that the relevant procedural requirements in relation to the preparation and supply of the s. 13 statement have been complied with. The distinction between the two is that unlike the breath analysis there is nothing on the face of the s.13 statement that speaks to the procedural requirements. It is the appellant's position that if either presumption becomes non-operative, for whatever reason, then that will be fatal to the prosecution case in the absence of other additional evidence to prove matters of a technical nature.

13. Reliance is placed in this regard on the case of DPP v. Freeman [2009] IEHC 179 which dealt with a situation where the order in which the s.13 statement was to be signed was reversed resulting in the defendant in that case signing the statement prior to the member of An Garda Síochána. Accordingly, it was held that the s. 13 statement was not "duly completed" and as such the evidential presumptions which would normally attach did not apply. In this case, the appellant does not seek to challenge the procedure that was followed per se, but rather highlights what he sees as a gap in the prosecution's proofs which absent a "duly completed" s.13 statement would have to be rectified through oral evidence. The appellant's submissions do not address the impact of the evidence given by Sergeant Duggan in the District Court which would seem to have provided a clear basis for concluding that the statutory procedures were followed at all relevant times.

14. Counsel for the appellant engaged in an extensive exploration of what amounts to a "duly completed" s.13 statement, the underlying position being that only the original, or co-original document, will suffice and not a copy thereof. In the first instance, it was argued that a literal interpretation of s.20(1) of the 1992 Act precludes the use of a copy of a s .13 statement no matter how faithful a copy it may be. If this interpretation is to be given effect only the original statement produced by a breath-testing machine and then signed by a member of An Garda Síochána may be relied upon by the prosecution for the purposes of benefiting from evidential presumptions. The logic underpinning this view is that it is only the original which has been "duly completed" through having been signed by a member of An Garda Síochána. A copy will only ever contain a facsimile of that signature, it having not been signed or completed in the strictest sense. A statement is not "duly completed" simply because it contains the requisite information, the additional statutory process must be followed.

15. This literal interpretation is said to be by no means absurd in light of the limited circumstances in which it is permissible to subvert evidential norms in favour of the prosecution. Further, the appellant argues that the emphasis on the role of original documents in such cases is a manifestation of the "best evidence" rule which remains good law. While it is accepted that there may be some "undesirable results" emanating from the interpretation advanced that cannot be a factor used to justify a deviation from the plain meaning of a disputed provision [see, DPP v. Breheny (SC, 3 March 1999)]. The appropriate avenue for addressing an anomaly or undesirable result of this kind is through the Oireachtas and not through creative statutory interpretation.

16. The appellant submits that further support for this position is to be found in the case of Kemmy mentioned previously which concerned s. 21 of the Road Traffic (Amendment) Act 1978. The provision in question dealt with situations where a medical practitioner was required to a complete a proscribed form having taken a specimen of blood or urine from a person arrested for drink-driving. A member of an Garda Síochana was thereafter required to forward that specimen along with what was referred to as the "completed form" to the Medical Bureau of Road Safety for testing. The case turned on whether the term "completed form" could also refer to a copy of the original document. The issue arose in circumstances where the document forwarded to the Medical Bureau, a yellow imprint copy, had been created at the same time as the original by writing on white surface paper. Everything on the surface paper was replicated on the underlying yellow imprint paper. The Supreme Court held that, rather than being a copy of the original, the yellow form was a "co-original" and was compliant with the legislation on that basis.

17. Counsel for the appellant notes, however, that neither the judgments of Henchy nor Griffin JJ. disagreed with the premise of the defendant's argument in Kemmy i.e. that a copy was insufficient and that the saving grace was the recognition of the document as being a "co-original". It is this aspect of the case which Simons J is said to have failed to properly appreciate.

18. The appellant accepts that s.30(1) of the Criminal Evidence Act 1992 allows for the admission of copies as documentary evidence but draws a distinction between doing so and a court being automatically entitled to assume the truth of its contents. Counsel submits that s.30(1) is silent on the general question of whether evidential presumptions attach to copies as they do original statements. It is said that such a question can only be answered by looking at the underlying legislation providing for the presumption which in this case is s.20(1) of the 2010 Act. As such, the appellant's position is that only the original s.13 statement will suffice.

19. Counsel for the appellant suggests that Simons J's reliance on the cases of Fitzpatrick v. DPP [2007] IEHC 383 and the aforementioned Avadenei are misplaced. In respect of the former, it is submitted that the comments made as to the effect of s.30 of the 1992 Act were obiter in nature given the court had not been asked to address the question and were nonetheless limited to a discussion of whether copies were admissible, not whether they were entitled to the same evidential presumption as an original. As for the latter, the argument advanced is that the judgment of O'Malley J concerns itself with the failure of members of An Garda Síochana to comply with the procedural requirements of the Road Traffic Act 2010 vís-a-vís the provision of certain documents in the Irish and not with whether any evidential presumption were triggered. Moreover, the Supreme Court in Avadenei cited the case of Kemmy upon which the appellant relies and counsel contends that nothing in its decision is at odds with the underlying principles being relied upon in this case.

The Respondent's Submissions

20. The respondent argues that reliance may be placed on a copy of a "duly completed" s. 13 certificate just as much as an original. It is said that as far as the question of compliance with the statutory procedures by the member of An Garda Síochána is concerned, there was no evidence in the case, whether through cross-examination of the Garda, the calling of evidence, or otherwise to support a suggestion that there had been any failure in this respect. The respondent says the situation is to be contrasted with that which prevailed in Freeman, where there was clear and specific evidence of non-compliance, in the sense that the sequencing of the appending of signatures was incorrect.

21. It is submitted that the approach of Simons J is supported by authority and is also in accordance with position expressed by leading authors in the area. In Carey v. Hussey [2000] 2 ILRM 401, Kearns J was dealing with a photocopy of an original safety order in the context of a prosecution under the Domestic Violence Act 1996. In the course of his judgment, he had commented:

> "[t]he Criminal Evidence [Act], 1992, seems to me to confer on a judge a very wide discretion to accept copies, be they photocopies or facsimile copies as admissible evidence in criminal proceedings."

It is said that the approach in the High Court also draws implicit support from the case of Fitzpatrick. This was a case where no application had been made to seek to admit a copy of the certificate or to introduce oral evidence establishing compliance with the relevant procedures. In the course of his judgment, O'Neill J had observed that if the prosecution were relying on a copy of the original, they could of course have availed of s. 30 of the Criminal Evidence Act 1992. The Director also draws attention to a passage from Drunken Driving (Round Hall 2015) by David Staunton at para. 629 where it was stated:

> "[t]here are many instances in practice where evidential certificates may be unavailable. The prosecution may seek to admit a copy of the relevant document into evidence when application is made under s. 30 of the Criminal Evidence Act 1992."

22. In the course of her submissions, the Director is dismissive of the emphasis placed on s. 10(9) in the context of mandatory alcohol testing checkpoints and s. 81 speeding records, pointing out that in both cases, multiple copies of the records were always likely to be required.

23. The respondent says that the approach in the High Court is consistent with the approach taken by the Supreme Court in Avadenei. It is said that what the appellant is contending for is in the teeth of the judgment of the Supreme Court.

Discussion

24. For my part, I regard it as appropriate to begin consideration of this issue by examining what is provided for in s. 20 of the Road Traffic Act 2010, and then examining the certificate/copy certificate. Section 20, set out earlier in this judgment, provides that a duly completed statement purporting to have been supplied under s. 13 shall, until the contrary is shown, be sufficient evidence of the facts stated in it, without proof of any signature on it, or that the signatory was the proper person to sign it. Secondly, it provides that a duly completed statement shall, until the contrary is shown, be sufficient evidence of compliance by a member of An Garda Síochána concerned with the particular requirements imposed on him or her.

25. In this case, the question posed in the case stated asks whether the evidential presumption of validity under s. 20(1) of the Road Traffic 2010 apply to the photocopied statement. The photocopied statement contains information including details of the Evidenzer utilised, the Garda Station at which the test was taken, the date of the start of the test and the test number, details of the person providing the statement (it was Anthony McGrath of 73, Whitestown Park, Dublin 15, whose Date of Birth was 7th July 1982) details of the analysis, and a statement of the concentration of alcohol in the breath for the purposes of the Road Traffic Act (it was 74mg of alcohol per 100 ml of breath). The certificate is signed by Mr. McGrath as the person who provided the specimen of breath and signed by Sergeant P. Duggan whose Garda Number is given, acknowledging receipt of the statement.

26. It seems to me that insofar as the case stated is posing questions as to the evidential presumption of validity, it is posing a question in relation to the information that is set out on the face of the certificate. In my view, the presumption of validity clearly applies to that information and the question posed in the case stated was correctly answered in the affirmative by the High Court.

27. The situation in relation to compliance by the member of An Garda Síochána is, I acknowledge, less clear-cut. The information set out on the certificate is largely silent as to the procedure followed. I say largely silent because it is possible to infer that certain things occurred, that a particular Evidenzer was utilised, that the person providing the sample signed the sample, and that the Sergeant conducting the test signed in acknowledgement of the receipt.

28. In a situation where I do not believe that the question posed by the judge of the District Court related to the compliance aspect, and where the question of compliance was not the subject of controversy in the District Court and seems to have been put beyond doubt by the evidence of Sergeant Duggan, I acknowledge that what I have to say may be regarded as obiter. A duly completed certificate has impacts, one of those impacts is that it provides evidence, until the contrary is shown, of compliance. The certificate contained information which was admissible in evidence, and by virtue of s. 30 of the Criminal Evidence Act 1992, the prosecution was in a position to have that information given in evidence. It seems to me that once the prosecution were entitled to adduce and place

reliance on a photocopy, as they were, that the photocopy certificate was good for all purposes, as the original would have been.

29. In my view, the decision of the Supreme Court in Avadenei provides very considerable assistance when considering this question. The penultimate judgment of O'Malley J is in these terms:

> "[t]he second question is whether, notwithstanding that defect [the fact that there was not an Irish language version], the Court can apply s. 12 of the Interpretation Act 2005. Again, I agree with the analysis of the Court of Appeal. The ' substance' of the prescribed form is the information intended to be proved in evidence by means of the statutory status accorded to the form, and all of the required information is present in this case. The content is in no way misleading, confusing or unfair. No right of the appellant is violated by its admission. Accordingly, whether the matter is looked at solely through the prism of the authorities on this type of prosecution or in the light of the general principles of the criminal law, I can see no reason why the form should not be admitted into evidence."

30. In my view, the observations of O'Malley J apply with full force to the present situation. The substance of the form produced was the information intended to be put in evidence by means of the statutory status according to the form. All of the required information was present in this case. The content is in no way misleading, confusing or unfair. No right of the appellant is violated by its admission. In summary, then, I would answer the question in the case stated, in the circumstances of the present case, as follows:

> Q: Where the original s. 13 statement is not available, but a photocopy of that statement has been tendered in evidence by the prosecution, does the evidential presumption of validity under s. 20(1) of the Road Traffic Act 2010 apply to that photocopied statement?
>
> A: Yes.

I would therefore dismiss the appeal. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

McCarthy J:

I agree.

Kennedy J:

I also agree.