Neutral Citation Number: [2024] EWHC 704 (Admin)

Case No: CO/1660/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2024

Before :

LORD JUSTICE LEWIS
and
MR JUSTICE SAINI

- -

Between :

LIAM CLARKE — **Appellant**

- and -

CROWN PROSECUTION SERVICE — **Respondent**

- -
- -

Matthew Donkin (instructed by **Mohammed Hussain Solicitors**) for the **Appellant**
Alexander Slater (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 19 March 2024

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Approved Judgment

This judgment was handed down remotely at 10am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS AND MR JUSTICE SAINI

Lord Justice Lewis and Mr Justice Saini:

1. This is the judgment of the Court, to which we have both contributed.

I. Overview

2. This is an appeal by way of Case Stated against the decision on 3 October 2022 of the Magistrates sitting at Harrogate Magistrates Court to convict Liam Clarke, the appellant ("Mr Clarke") of the following offences:

   (1) On 30 March 2022 at Skipton, North Yorkshire, Mr Clarke drove a motor vehicle, namely an Audi A4 motor car, registered number WJ09 XSR, on a road, namely Keighley Road, Skipton, North Yorkshire when the proportion of a controlled drug, namely cocaine, in his blood, namely 32 micrograms of drug per litre of blood, exceeded the specified limit. This was contrary to section 5A(1)(a) and (2) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988; and

   (2) On 30 March 2022 at Skipton, North Yorkshire, Mr Clarke drove a motor vehicle, namely an Audi A4 motor car, registered number WJ09 XSR, on a road, namely Keighley Road, Skipton, North Yorkshire when the proportion of a controlled drug, namely benzoylecgonine, in his blood, namely 800 micrograms of drug per litre of blood, exceeded the specified limit. This was contrary to section 5A(1)(a) and (2) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988.

3. The findings and conclusions of the Magistrates as set out in the Case were as follows:

> "4. On the 3rd October 2022 we heard the trial and found the following facts:
>
> a. The applicant drove the said vehicle on Keighley Road when the proportion of the specified drugs in his blood was over the prescribed limit as set out in the charges.
>
> b. The blood readings were not disputed following the service of the SFR2 and that evidence was agreed.
>
> c. The evidence of PC Conway was agreed and PC Conway arrested the applicant and confirmed the transportation to custody.
>
> d. The evidence of PC Steventon was agreed. He observed the roadside drug test where the applicant returned a positive result for cocaine, the arrest, and the transportation to custody. He conducted the evidential police station blood procedure, obtaining the consent to do so from the applicant. He observed the taking of the blood by the Health Care Professional and he completed the MGDD (A) (B) & (E) forms contemporaneously (MGDD Forms attached to this case for reference).

e. The procedure was undertaken correctly in accordance with s. 7 of the Road Traffic Act 1988 and the applicant was guilty of both offences charged.

f. The Defendant did not give evidence.

...

8. We were of the opinion that:

(a) The MGDD Forms were exhibited by PC Steventon by reference to the contemporaneous completion in his statement, and the attachment of the forms to his statement provided in the Initial Details Prosecution Case. PC Steventon's evidence was agreed at the case management hearing by the applicant. His statement and the attached MGDD Forms stood as unchallenged admissible evidence at trial.

(b) Section 11(4) Road Traffic Act 1988 was satisfied as the applicant consented to the taking of such a specimen from him and it was taken by a registered health care professional, as set out in the MGDD forms.

(c) Section 15(4) Road Traffic Offenders Act 1988 was also satisfied as the blood sample was taken from the accused with his consent (given to the officer) by a medical practitioner or a registered health care professional,

(d) At B21 MGDDB, when advised by PC Steventon, at 16:52 hours, that a blood sample was required the applicant replied 'I'll give you a specimen yeh', this was a positive answer in the affirmative. At B7 MGDDB, at 17:29 hours, again, he answered 'Yes' a further positive answer in the affirmative.

(e) Consent is not a two-stage process, the documents showed that consent was given for the sample to be taken. Once the defendant gave verbal consent the process of the blood taking procedure commenced. Everything that followed was part of the mechanism of taking the blood. Consent was never withdrawn.

(f) This case is distinguished from the Scottish case of Friel v Dickson [1992] RTR 366 as in that case when asked to give consent the accused did not speak or give his informed consent in the affirmative, he gave no response.

(g) This case is also distinguished from Persaud v DPP [2010] EWHC 52 for the same reason".

4. The questions for the opinion of the High Court are:

(1) Were the Magistrates correct to admit as evidence the contents of the Manual of Guidance, Drink and Drug Driving ("MGDD") Forms?

(2) Were the Magistrates correct to determine that giving consent to the taking of the blood sample to the police officer alone was sufficient to satisfy consent requirements of Section 11(4) of the Road Traffic Act 1988 and section 15(4) of the Road Traffic Offenders Act 1988?

5. The MGDD forms referred to in the Case are documents produced by the Department for Transport to standardise procedures amongst police forces in England and Wales. They are intended to record in a common form the police process, including blood or urine sample taking, in cases of alleged driving under the influence of drink or drugs. There is no challenge in this case to the interpretation of the blood samples taken from Mr Clarke or to the fact that, if the correct process for obtaining consent was followed and admissible evidence of this was before the Magistrates, he was rightly convicted of the two offences.

II. Statutory Framework

6. Section 5A(1) and (2) of the Road Traffic Act 1988 ("the 1988 Act") provides that a person is guilty of an offence where he drives a motor vehicle on road with a controlled drug in his body and the proportion of the drug in his blood or urine exceeds the specified limit.

7. Insofar as relevant, Section 7(1) of the 1988 Act provides that, in the course of an investigation into whether a person has committed an offence of driving when unfit through drink or drugs, a constable may require him to provide two specimens of breath for analysis or a specimen of blood or urine for a laboratory test. Subject to exceptions which are not material, Section 7(3) provides that a requirement under that section to provide a specimen of blood or urine can only be made at a police station or a hospital. Section 7(6) makes it an offence for a person to without reasonable excuse refuse to provide a specimen when required to do so in pursuance of the section. And section 7(7) provides that a constable must, on requiring any person to provide a specimen under section 7, warn him that failure to provide it may render him liable to prosecution.

8. Section 11 of the 1988 Act makes provision for the interpretation of sections 4 to 10 of the 1988 Act. Section 11(4) provides that:

> "A person provides a specimen of blood if and only if: (a) he consents to the taking of such a specimen from him; and (b) the specimen is taken from him either by a medical practitioner or by a registered healthcare professional."

9. Section 15(4)(a) of the Road Traffic Offenders Act 1988 ("the RTOA") provides:

> "A specimen of blood shall be disregarded unless it was taken from the accused with his consent by a medical practitioner or registered healthcare professional."

10. Section 9(7) of the Criminal Justice Act 1967 ("the 1967 Act") provides that where a written statement has been admitted:

> "…any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this

> section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement".

11. Section 114(1)(c) of the Criminal Justice Act 2003 ("the 2003 Act") provides:

> "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if... all parties to the proceedings agree to it being admissible".

12. For completeness, we note that section 16 of the RTOA also makes provisions dealing with the admissibility of documentary evidence of the proportion of alcohol or a drug in a specimen of breath, blood or urine. Evidence that a specimen of blood was taken from the accused with his consent by a medical practitioner or registered health care professional may be given by a document certifying that fact and signed by the practitioner or professional.

III. Proceedings below

13. Mr Clarke appeared before Magistrates sitting at Skipton on 17 June 2022. On that day he entered not guilty pleas to both charges and the Magistrates conducted a case management hearing. In the Preparation for Effective Trial Form ("the PET Form") submitted by Mr Clarke's legal representatives in advance of the hearing they identified that the issue for trial was:

> "Challenging procedure as does not accept Prosecution scientist findings. Pros to prove procedure complied with, statutory warning, blood taken in accordance with guidance. Pros to prove consent obtained in accordance with guidance. Proper amount of blood taken, not contaminated and continuity. SFR1 not accepted for reasons given above".

14. The evidence of both relevant police officers (PCs Conway and Steventon) was "agreed" at the case management hearing, and marked to be read at trial, which was fixed for 3 October 2022.

15. As to that evidence, PC Conway had arrested the Appellant after stopping him in his Audi A4 on the road. PC Steventon had observed the positive roadside drug test and was present when Mr Clarke was taken to custody. In custody, PC Steventon was present at the blood-taking procedure, including the taking of a sample by a health care professional. PC Steventon recorded the relevant steps on the MGDD Forms, to which we now turn.

The MGDD Forms

16. PC Steventon referred to the MGDD Forms in terms in his statement. He said that the blood procedure "*was recorded contemporaneously on forms MGDDA, MGDDB and MGDDE all marked 'Liam Clarke'*". The Magistrates annexed the MGDD forms to the Case and, as we identify at [3] above, they found that they had been "attached" to PC Steventon's statement.

17. On the subject of consent, the material parts of these forms read as follows-

(1) MGDD/B, page 1, boxed guidance notes, point (vi):

> "The procedures set out in Forms MG DD/A and B allow for cases of excess alcohol, excess specified drugs (Road Traffic only) ... to be investigated with, in most cases, a single specimen being obtained with the necessary consents for both provision and analysis."

(2) MGDD/B, page 15, section B21: Mr Clarke having provided a positive roadside drugs test, section B21 was the first point at which the police were to seek his consent for the blood taking procedure. At 16:52 hours, in the police station, the following exchange occurred and was recorded:

Officer: "*I require you to provide a specimen of blood which will be taken by a doctor or a healthcare professional... do you consent to provide a specimen?*"

Mr Clarke: "*I'll give you a specimen, yeah*."

(3) Consent having been obtained, PC Steventon was directed to MGDD/B, page 5, section B7. That section was completed at 17:29 hours. The section required PC Steventon to speak to Mr Clarke "*in the presence of the doctor or healthcare professional"* (underlining provided within Form MGDD/B). In the presence of that person, the following exchange occurred (again in the police station):

Officer: "*As I have decided that the specimen shall be of blood, I am asking the doctor/healthcare professional to take the specimen from you. Do you still consent to provide a specimen of blood for drug analysis?*"

Mr Clarke: "*Yes*".

(4) Mr Clarke's specimen of blood was then provided at 17:38 hours. Thereafter the MGDD forms recorded that Mr Clarke was bailed or released under investigation (while blood testing was completed). The form was signed and dated by PC Steventon.

18. Although a number of points were raised in the PET Form, at trial the issue in the case came down to a single matter: the argument on behalf of Mr Clarke that the prosecution had failed to prove that he consented to his blood being taken in the manner required by the relevant statutory provisions. The Magistrates relied on the fact that the MGDD Forms were exhibited by PC Steventon by reference to their contemporaneous completion in his statement. The Magistrates found that PC Steventon's evidence had been "agreed" during case management at the first hearing and further found that his statement and the "attached" MGDD Forms stood as "unchallenged admissible" evidence at trial: see para [3] above.

19. Accordingly, they held that Section 11(4) of the 1988 Act was satisfied as Mr Clarke had consented to the taking of such a specimen from him and it was taken by a registered health care professional, as set out in the MGDD Forms. They further held that Section 15(4) of the Road Traffic Offenders Act 1988 was also satisfied as the

blood sample was taken from the accused by a health care professional with his consent (given to the officer). Mr Clarke did not give evidence at trial. He was convicted on 3 October 2022 and sentenced on 3 November 2022.

IV. The submissions

The first question: the MGDD Forms

20. Mr Donkin for Mr Clarke submits that the Court below was wrong to admit the MGDD Forms into evidence because they were inadmissible hearsay. Strong reliance is placed on guidance issued by the Crown Prosecution Service ("the CPS Guidance") which has a specific provision relating to the use of MGDD forms as evidence in criminal proceedings. The CPS Guidance provides (insofar as material) as follows:

> "In the event of a not guilty plea to a summary drink/drive offence, you should try to obtain a formal admission under Section 10 of the Criminal Justice Act 1967 as to the contents of the Form. Such an admission must include the name of the defendant, the date and place of the offence and the results of the breath test or of the laboratory test. If such an admission cannot be secured then the officers conducting or witnessing the sampling procedure will normally have to be called to give evidence in person. The Form MGDD contains assertions of fact. It is a document made out of court and is inadmissible under the hearsay rule. Section 9 Criminal Justice Act 1967 only permits that the evidence contained in a witness statement is admissible were the maker of it in the witness box. If the officer who filled out the Form were in the witness box, he could not produce the Form in chief as an exhibit, though he could refer to it as a memory-refreshing document. The production in evidence of that Form attached to a short s.9 CJA statement will not render the content admissible. The only way in which the information contained on a Form MG DD can be produced in documentary form as admissible evidence is if that information is extracted from the form and incorporated into a s.9 CJA statement made by the officer. This course must be followed in the event of a prosecution under s.3A of causing death by careless driving when under the influence of drink or drugs".

21. It was argued that this legal analysis and published guidance is correct. Mr Donkin submitted that every record entered on the MGDD Forms is a statement made out of court and therefore hearsay pursuant to section 114 of the 2003 Act. It was said that the witness statement of PC Steventon which read "*The blood procedure was recorded contemporaneously on forms MGDDA, MGDDB and MGDDE all marked 'Liam Clarke'*" was inadequate as a means of proving what was said and done and then recorded.

22. In response, Mr Slater for the Respondent submitted that the MGDD Form became admissible in this case as an "exhibit", as it was treated as if it had been produced as an exhibit and identified in court by the maker of the statement, pursuant to s.9(7) of the

1967 Act. He accepted that PC Steventon did not explicitly use the word "exhibit" in his statement, but submitted that the effect of the wording in his statement was "tantamount" to exhibiting the MGDD forms. Reliance was placed on the fact that PC Steventon had "attached" them to his statement (a finding made by the Magistrates: see [3] above), that PC Steventon used the Appellant's name, and it was clear that PC Steventon was referring to the MGDD forms as an extension of his evidence of the sample-taking procedure. In those circumstances, given the Appellant agreed PC Steventon's evidence, the MGDD forms (attached to the statement) were argued to be admissible exhibits. In support of his arguments in relation to admissibility, Mr Slater relied on DPP v Sugden [2018] EWHC 544 (Admin). In that case a District Judge wrongly refused permission to a police officer to refresh his memory from a copy document (an MGDD form) recording the outcome of a breath test (the original having been lost). The Divisional Court (Sir Brian Leveson PKBD and Kerr J) allowed the DPP's appeal, holding that memory refreshing from a copy document in such circumstances was permissible, and an accused could cross-examine on any suggested deficiencies. We did not find Sugden of assistance in relation to the legal issue before us which is concerned with the route to admissibility of the MGDD Forms when the officer referencing them in his statement has not been called to give oral evidence.

23. Mr Slater submitted that even when treated as hearsay, the MGDD Forms were additionally admissible by agreement, pursuant to s.114(1)(c) of the 2003 Act. Again, reliance was placed on the facts that the MGDD Forms were explicitly referred to by PC Steventon and they were produced in the case papers in full and found by the Magistrates to have been "attached" to the officer's statement. It was submitted that at the point of agreeing PC Steventon's evidence at the first hearing, Mr Clarke could not have been in any doubt about the forms' contents and the effect of agreeing PC Steventon's evidence was to agree that the documents produced and attached to it were admissible by agreement. It was said that if there were matters in these Forms with which the Appellant disagreed, PC Steventon was the only person who could have been cross-examined on them. This option was available to Mr Clarke, but he instead chose to agree PC Steventon's evidence and did not challenge it at trial.

The second question: consent

24. Mr Donkin submitted that there is a requirement for the prosecution to prove that consent was given both to the police officer and to a medical practitioner/health care professional ("a medical professional"). He called this a "two-stage" process. He submits that the first consent is to be sought at the time of the section 7(7) warning (see [8] above) that a failure to provide a specimen may be an offence, and the second consent is to be sought before a blood specimen as actually taken by the medical professional. At one point in the written arguments it was submitted that this second consent had to be given following a request from the medical professional themselves (and not from an officer even if the medical professional was present). It was however clarified at the hearing that the second consent (to a medical professional) could be given in response to a question from an officer if the medical professional was present. That clarification was significant because as we describe below it renders the second question academic on the facts found by the Magistrates.

25. In support of his arguments that there were two stages for consent, Mr Donkin made reference to the fact that the MGDD documents themselves provide that there are two

separate occasions when consent of the suspect is to be sought (the second being sought in the presence of a medical professional). He argued that this two-stage process is consistent with case law. Reliance is placed on Friel v Dickson [1992] R.T.R. 366 ("Friel"), and Persaud v DPP [2010] EWHC 52 (Admin) ("Persaud").

26. In response, Mr Slater's primary argument was that what was required by the legislation was that an accused consents to a sample of his blood being taken and that he continues to consent at the point in time when a medical professional attends to take the same. Whether a consent given to a police officer earlier in the process continued to be operative at the time that the sample was taken was a question to be determined on the facts and what was said, or done, or signified by the accused, at the time that the sample was taken. Mr Slater submitted that the Magistrates were right therefore to determine that the seeking and giving of consent is not a "two-stage" process and a single continuing consent given to an officer is sufficient. So, it was argued that even though a second consent was sought and given at 17.29 hours (in the presence of a medical professional) the earlier consent sought and given when an officer asked at 16.52 hours, was sufficient and "operative" on the facts (which did not indicate any withdrawal or uncertainty as to Mr Clarke's continuing consent). Alternatively, even if Mr Clarke were right to contend that consent must be provided explicitly both to a police officer and to the relevant medical professional, such consent was in fact provided in this case to both those parties.

V. Discussion

27. In our judgment, in respect of each of the two questions, the Magistrates were correct in their ultimate conclusions, based on the facts they found. However, as we explain in relation to the second question, we approach matters differently to the Magistrates.

The first question

28. As to the first question, in our judgment the MGDD Forms were exhibits to PC Steventon's agreed statement and thus were admissible under section 9(7) of the 1967 Act. Insofar as material, that provision defines an exhibit as a "document" referred to as an exhibit and "identified in a written statement tendered in evidence". The documents were identified in the statement. The Forms used were identified by name and it was made clear that they had been marked with Mr Clarke's name. There was no doubt on the facts below that the MGDD Forms concerned Mr Clarke. PC Steventon referred to the MGDD forms in his statement and attached them to that statement. On the facts as found, the Magistrates were entitled to conclude that he referred to them as part of his evidence of the sample-taking procedure concerning this specific person and a specific occasion. They were entitled therefore to conclude that the Forms were exhibits to the statement and so were admissible under section 9(7) of the 1967 Act.

29. Further, we consider that the findings of the Magistrates establish that these Forms were admitted by agreement to hearsay as part of the evidence. The Forms were being put forward to establish the truth of their contents: the issue at trial had become solely the matter of consent which was recorded in the Forms. As they state in the Case, the Magistrates expressly found that PC Steventon's evidence was "…agreed at the case management hearing by the applicant. His statement and the attached MGDD Forms stood as unchallenged admissible evidence at trial": see [3] above. On a fair reading of the stated Case, the Magistrates found that PC Steventon's evidence comprised the

statement and the MGDD Forms and it was that evidence which was agreed. Nor was that a surprising conclusion. The principal argument before the magistrates, as recorded in the stated Case, was that the accused had to give consent to the medical professional (not only to the police officer). The dispute about the evidence was the absence of any evidence from the medical professional that consent had been given to him. That issue is not now pursued. There was no issue about the consent that had been given to the police officer.

30. We make two further observations. First, the CPS Guidance does not represent a definitive legal statement of the position governing the admissibility of evidence. We say nothing further about it. It does not seek to address the way in which the relevant issues as to admission of the Forms arose in this case. Secondly, the complications caused in this case would have been avoided if PC Steventon had simply described the Forms as an "exhibit" in his statement.

The second question

31. The second question asked by the Magistrates is not entirely clear. In paragraph 8(c) the Magistrates state their opinion that section 15(4) of the RTOA was satisfied as the blood sample was taken from the accused with his consent (given to the police officer) by a medical professional. In paragraph 8(d) of the stated Case, the Magistrates refer to the fact that consent was given to the police officer at 16.52 and again at 17.29. In question (2), the Magistrates ask if they were correct to determine that giving consent "to the police officer alone" was sufficient to satisfy the statutory requirement. It is not clear whether that is intended to be a reference to the consent being given to the police officer (and not to the medical professional) as originally argued below. If so, it is no longer submitted that consent has to be given both to a police officer and, separately, to the medical professional.

32. It may be that the question was intended to ask whether the consent given to the police officer at 16.52 (when the medical professional was not present) was sufficient or whether it was only the later consent, given at 17.29 to the police officer (but in the presence of the medical) that satisfied the relevant statutory requirements. If so, as counsel now accept, it is not necessary to answer that question.

33. As Mr Donkin conceded, if the Magistrates correctly admitted the MGDD Forms as evidence, on the facts found by the Magistrates this question does not arise. That is because the Forms show that there was consent given at 17.29 hours by Mr Clarke to the taking of his blood in the presence of a medical professional. That was, on the Appellant's own case, satisfactory consent for the purposes of Section 11(4) of the 1988 Act and Section 15(4) of the RTOA.

34. In our judgment, the issue as to whether consent of the type given at 16.52 hours at the station in the presence of the police officer alone would be sufficient should be determined in a case where it would affect the outcome. Each case will be fact specific. Both Friel and Persaud do not assist because they are, as agreed by all Counsel, best seen as cases of doubtful consent far removed from the present facts. We also observe that the likelihood is that if the procedure set out in the MGDD Forms were followed (as happened in this case) then consent will have been obtained in accordance with the relevant statutory requirements. It is only if that procedure were not followed would it be likely to be necessary to consider whether on the facts of a particular case the giving

of consent following some different procedure satisfied the relevant statutory requirements.

V. Conclusion

35. We dismiss the appeal and answer the questions as follows:

(1) The Magistrates were correct to admit as evidence the contents of the Manual of Guidance, Drink and Drug Driving ("MGDD") forms.

(2) The Magistrates Court were correct to determine on the facts of that case that giving consent to the taking of the blood sample to the police officer alone was sufficient to satisfy consent requirements of Section 11(4) of the Road Traffic Act 1988 and section 15(4) of the Road Traffic Offenders Act 1988.