[2024] IEHC 144

THE HIGH COURT

[Record No. 2022/1356SS]

IN THE MATTER OF SECTION 52 OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA DECLAN O'BRIEN)

PROSECUTOR

AND

HANNAH O'CONNOR

DEFENDANT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 13 March 2024.

1. This is a consultative case stated from the District Court pursuant to the above-mentioned provisions dated 12 October 2022 wherein the President of the District Court posed the following questions to the High Court for determination: -

> "(1) Was Garda Sweeney otherwise entitled to amend the s.13 statements which were automatically produced where the amendment had been notified to the accused prior to her signing the statement and I found as a fact that the amendment caused no prejudice nor injustice to the accused?

(2) If the answer to question (1) is no, based on my findings, is the s.13 statement annexed to this case stated admissible in evidence?"

Background

2. The following detail has been furnished in the consultative case stated: -

a. these proceedings involve a prosecution under s.5(4) of the Road Traffic Act 2010 ("the 2010 Act") alleging that on 11 March 2019 at Buncrana, County Donegal, the defendant was in charge of a mechanically propelled vehicle registration number 11 DL 5094 with the intent to drive the said vehicle (but not driving or attempting to drive) when there was present in her body a quantity of alcohol which exceeded a concentration of 9mcg of alcohol per 100ml of breath contrary to s.5(4)(b) and s.5(5);

b. the matter came before the District Court sitting at Letterkenny on 11 March 2021 when the District Court heard evidence on behalf of both parties;

c. the prosecution tendered a certificate pursuant to s.13 of the 2010 Act, however on behalf of the defendant there was an objection to the production of same on the basis that Garda Sweeney had input into the Evidenzer apparatus prior to the defendant providing a breath specimen, the relevant provision alleged to have been contravened namely s.4(4) of the 2010 Act. Following the subsequent input of the defendant's breath sample the apparatus automatically printed two identical statements and at this point Garda Sweeney noticed that the

wrong provision allegedly contravened was recorded whereupon Garda Sweeney amended both statements by excising "s.4(4)" and writing "s.5(4)" on both statements. He then initialled the amendments, signed the statements and explained to the defendant what had occurred. The defendant then signed the statements, as she was obliged to do, as failure to sign when requested to do so is an offence under the legislation carrying a potential penalty of €5,000 and/or a maximum of three months in prison;

d. the District Judge made a number of findings following the hearing of the evidence and submissions made to the effect that: -
    i. the error was trivial in nature;
    ii. the purpose of the statement was to give a record of the analysis of the specimens provided;
    iii. Garda Sweeney had not tampered with the evidence by correcting the error;
    iv. the case of *DPP v Barnes* [2005] 4 IR 176 was distinguished; and
    v. the accused was not misled and the amendment had caused no prejudice or injustice to the accused; the statement was admissible in evidence;
e. The defendant made an application following the conclusion of the prosecution case for a direction on the basis of objecting to the admissibility of the s.13 statement. The defendant submitted that it was not a 'duly completed statement' and did not comply with the strict provisions under s.13(2) of the 2010 Act which provides:

> (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.

Submissions

3. The defendant relied on three cases namely the *DPP v Freeman* [2009] IEHC 179; *DPP v Avadenei* [2018] 3 IR 215 and *DPP (O'Reilly) v Barnes* [2005] 4 IR 176. The District Judge noted that in *Barnes* the High Court had held that it was inconceivable that a District Court Judge could purport to amend the statement which had been automatically produced by the apparatus. It was argued that on this basis likewise a garda could not amend.

4. In response submissions the prosecutor also relied on the above cases together with *DPP v Somers* [1999] 1 IR 115 and *DPP v Kennedy* [2009] IEHC 36.

Jurisprudence

5. In *DPP v Barnes* [2005] 4 IR 176 O'Neill J in the High Court answered the case stated by the District Court as to whether a typographical error in s.17 certificate (similar to the current s.13 certificate) was fatal to a successful prosecution and whether the certificate could ever be amended by the court for obliteration or mistake. In that matter the garda had input the wrong offence into the apparatus. O'Neill J was of the view that if the error in the statement is obvious or trivial or inconsequential so that there could be no confusion or misleading of the accused or any prejudice or injustice to the accused the statement would be admissible. In his conclusion O'Neill J stated: -

> "I feel it appropriate to observe that I cannot conceive of any circumstances in which it would be permissible for any court to alter evidence and in particular evidence such as a statement of the kind in issue in this case produced in purported compliance with a particular statutory provision."

6. In *Rutledge v Kline* [2006] IEHC 146, the matter came before Dunne J in the High Court on the basis of a judicial review. There the garda had typed in his own name in lieu of that of the accused. The accused had been found by the District Court guilty of the offence charged. At the hearing before the High Court both parties accepted that the garda could not amend the statement produced by the apparatus. Dunne J was satisfied that the error did not vitiate the proceedings and the accused was refused judicial review in the exercise of the court's discretion. The court did note that both sides had agreed that the obiter comments aforesaid of O'Neill J in *Barnes* represented a correct statement of the law.

7. In the *DPP v Freeman* [2009] IEHC 179 the matter came before MacMenamin in the High Court on a case stated from the District Court, when the questions posed were: -

> "(1) Having found the fact that the accused signed a s.17 certificate first, was I correct in law in holding that the s.17 certificate was not a 'duly completed statement' within the meaning of … and
>
> (2) Was I correct in law in dismissing the charge?"

MacMenamin J answered both questions in the affirmative. In that matter the accused had signed the two statements produced by the apparatus in advance of the garda signing same.

MacMenamin J made reference to the prior cases of *Barnes* and *Rutledge.* At para. 20 he noted that it is important to underline that O'Neill J in *Barnes* was identifying the evidential context in which he upheld the District Court's decision to refuse the application for a direction. The Court also made reference to the statement of O'Neill J concerning the second question raised of the High Court in *Barnes* and noted that O'Neill J's views on same were subsequently accepted in *Rutledge* as being a correct statement of the law. *Rutledge,* MacMenamin J noted, was a judicial review matter in which the court's discretion had a bearing.

8. MacMenamin J was satisfied that the words 'duly completed' meant full compliance. Non-compliance vitiates the evidential presumption (which is now contained in s.20(1) of the 2010 Act) providing that a duly completed statement purportedly under s.13 shall, until the contrary is shown, be sufficient evidence of the facts stated therein, without proof of any signature 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 An Garda Síochána with the requirements imposed under Chapter IV prior to and in connection with the supply by the garda under s.13 of such statement.

9. Under Regulation 4 of Statutory Instrument No. 398 of 2015 the manner in which a statement is to be completed under s.13(2) was identified. The garda 'supplying the statement shall', before the accused provides a specimen, input *inter alia* the provision which is alleged to have been contravened namely s.4(4) or s.5(4) of the 2010 Act. Regulation 4 is subdivided into para. (a) and (b) with 'and' between them. In Regulation 4(b) it is provided that following the automatic production of the statements referred to in s.13(2) the Garda shall sign the statements.
MacMenamin J in *Freeman* was satisfied that the issue was technical only. MacMenamin J in his judgment at para. 39 expressed the view that to interpret the provisions in a purposive way constitutes judicial legislation and a court should lean against the creation or extension of penal liability by extension.

10. *Freeman* was appealed to the Supreme Court. In an *ex tempore* judgment, on 25 March 2014, the Court upheld the judgment of MacMenamin J in the High Court. In referencing the then statutory provision as to the circumstances in which certificates of fact can be produced in court for the purposes of proving the facts set out there in the Supreme Court indicated that the corollary of that is that the statutory procedures must be strictly complied with to ensure the correct legal basis upon which such certificates are entitled to be introduced. In response to an argument on behalf of the DPP to the effect that there was a basis for overlooking a defect or a statutory non-compliance which is merely technical and where no prejudice arises the court was

satisfied that the court was not at liberty to ignore statutory requirements if it concludes that there has been such non-compliance.

Submissions

11. On behalf of the DPP it has been argued that *Freeman* can be distinguished because there is no issue in this matter as to the execution of the document in the correct sequence therefore any compulsion on an accused to sign the document when asked to do so will not have the same bearing on this matter as it did in *Freeman*. However, that does not appear to me to be a valid argument when one considers the following quote from MacMenamin J in para. 39: -

> "I do not think s.17(3) which creates the offence can be divorced or looked at in isolation from the strict procedures for compliance laid down in s.17 as a whole, or from the regulations to which reference has been made. The imposition of a penalty liability for failure of compliance by an accused to my mind renders the provision penal."

The DPP further argues that the word 'and' between Regulation 4(a) and Regulation 4(b) provides scope for *inter alia* a handwritten amendment where necessary by the Garda. In my view this argument ignores Regulation 4(b) to the effect that following the automatic production of the statement the garda is obliged to sign same. Furthermore, the inclusion of 'and' is included for the purpose of identifying the various obligations on An Garda Síochána in supplying a statement referenced in s.13(2).

12. A prior argument of the DPP to the effect that *Freeman* did not survive the decision of the Supreme Court in *Avandenei*, fails as it is clear from the subsequent decision of the Court of Appeal in *DPP v Hodgins* [2023] IECA 174 that the decision in *Freeman* has in fact survived the decision of *Avandenei* in 2017.

13. It appears to me that *Avandenei* did identify that *Freeman* applied to a limited bracket of circumstances only with the absence of prejudice rule applying to the balance of circumstances, nevertheless, the within matter comes squarely within the *Freeman* rule, that is, strict compliance with the relevant statutory provision.

14. I am also of the view that O'Neill J in *Barnes* distinguished between:

a. A duly completed certificate/statement which contains an error which is trivial or inconsequential without prejudice or injustice to the defendant. In those circumstances the statement/certificate may be admitted with the benefit of *inter alia* s.20 of the 2010 Act (see para 8 hereof); and
b. An automatically produced statement/certificate which is altered or otherwise not in strict compliance with the legislation prior to being tendered in evidence which does not have the benefit of s.20 of the 2010 Act and therefore insufficient evidence to ground a prosecution.

15. MacMenamin J also made reference to *Maguire v Ardagh* [2002] 1 IR 385. S.3(9) of the Committee of the Houses of the Oireachtas Compellability, Privileges and Immunity of Witnesses Act 1997 provides that the consent of the sub-committee shall be in writing with s.9(c) providing for a presumption that a document produced

in line with the provision aforesaid shall unless the contrary is shown be evidence of the consent of the sub-committee. In that matter the Supreme Court was satisfied that oral consent was not referenced in the provision and therefore the presumption did not apply.

16. The DPP has argued that the within document was amended prior to execution and it achieving evidential status. In this argument it is suggested that once the document was signed by the accused it was duly completed and entitled to the benefit of the presumption in s.20. That argument however does not appear to me to have regard to Regulation 4(b) which requires that the garda would sign the document following the automatic production of the statements from the apparatus.

17. In the events, I am satisfied that the instant certificate was not of the type contemplated by the relevant legislation and accordingly notwithstanding that the accused has not been confused, misled or suffered prejudice or injustice based on the *Freeman* decision of both the High Court and the Supreme Court, the statement was not duly completed and therefore there is no statutory presumption of compliance.

18. The answers to the questions posed by the District Court are: No; and No.

19. As this judgment is being delivered electronically, with regards to the issue of costs, as the defendant has been entirely successful, it is my provisional view that she should be entitled to her costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words

within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.