

IRELAND / JUDGMENT

DPP -v- McDonagh [2008]

IESC 57 (16 October 2008)

[2008] IESC 57

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[2008] IESC 57 Supreme Court Record Number: 173/08 High Court Record Number : Date of Delivery: 16 October 2008 Court: Supreme Court Composition of Court: Denham J., Macken J., Finnegan J. Judgment by: Denham J. Status of Judgment: Approved Judgments by Result Concurring Denham J. Question answered in the negative Macken J. Finnegan J. Macken J. Outcome: Questions answered in the negative THE SUPREME COURT [Appeal No: 173/2006] Denham J. Macken J. Finnegan J. Between/ The Director of Public Prosecutions Prosecutor and Frank McDonagh Accused Judgment delivered the 16th day of October, 2008 by Denham J. 1. Case Stated This is a consultative case stated from Her Honour Judge Doirbhile Flanagan, Judge of the Circuit Court, of the Dublin Circuit, dated the 28th April, 2006, seeking the determination of the Court on two questions.

2. The opinion of the Court is sought on the following:-

- (i) On the evidence adduced am I entitled to hold that pursuant to section 13(1)(a) of the Road Traffic Act, 1994, there is no bar on a member of An Garda Síochána making a requirement under section 13(1)(a) of the Road Traffic Act, 1994 of an arrested person to provide two specimens of their breath, notwithstanding the provision by that arrested person of one incomplete breath specimen within a previous incomplete test result; (ii) Whether, in the circumstances of this case, the section 17 Certificate was admissible in evidence against the accused.

3. The facts proved, or admitted, or agreed, and as found by the learned trial judge, were as follows:- "(a) (i) Garda Martha Cleary was a member of An Garda Síochána, stationed at Dun Laoghaire Garda station. On the 9th February 2002, she took up duty at 14.00p.m. working the 14.00p.m.-22.00 p.m. shift. She was an observer in the official patrol car accompanied by Garda Mark Russell. At approximately 20.30 p.m. as a result of a call, she was made aware that a motor vehicle, registration number 02 D 5657 was allegedly being driven in a dangerous manner. She observed the vehicle 02 D 5657 on Coliemore Road, Dalkey, which is a public place, driving slowly in a bid to come to a halt on Coliemore Road. The vehicle came to a halt in the centre of the road. She spoke to the driver who gave his name and address as Frank McDonagh, 7, Avondale Road, Killiney, County Dublin and a date of birth of the 5th of February 1957. (ii) Garda Cleary stated that, on speaking to the driver, she noticed a strong odour of intoxicating liquor coming from Mr McDonagh whose eyes were also bloodshot. She stated that he appeared to be slumped over in a drowsy manner. His radio was also switched on to its maximum volume and she asked Mr McDonagh to turn off the radio, which he did. She asked Mr McDonagh where he was coming from and his reply was that he had driven from the Forty Foot Bar in Dun Laoghaire. She asked Mr McDonagh whether he had been drinking, he replied "red wine with his friend"; (iii) Garda Martha Cleary stated that she formed the opinion that Frank McDonagh was incapable of having proper control of a mechanically propelled vehicle in a public place due to the consumption of an intoxicant and had subsequently committed an offence, contrary to Section 49(1), (2), (3) or (4) of the Road Traffic Act, 1961/1994. She stated that she informed Mr McDonagh of her opinion. Garda Martha Cleary arrested Mr McDonagh at 21.00 p.m. on the 9th of February 2002 pursuant to the provisions of Section 49(8) of the Road Traffic Act, 1961 in the presence of Garda Mark Russell for an offence contrary to Section 49(1), (2), (3) or (4) of the Road Traffic Act, 1961/1994. She cautioned Mr McDonagh as follows:- "You are not obliged to say anything unless you wish to do so, but whatever you do say, will be taken down in writing and may be given in evidence." Mr McDonagh made no reply after caution. She then explained, in ordinary language to Mr McDonagh, that she was arresting him for drunken driving. (iv) Garda Martha Cleary then conveyed Mr McDonagh to Dun Laoghaire Garda Station along with Garda Mark Russell where they arrived at 21.15 p.m. She introduced Frank McDonagh to the Member in Charge, Garda John Cashman and was present when Mr McDonagh's details were entered into the custody record and when he was handed Form C72S, Notice of Rights.
- (v) She stated that at 21.20 p.m. she took Frank McDonagh to an interview room for the purpose of carrying out an evidential breath test. In the interview room, she explained to Mr McDonagh that he was to undergo a period of observation for 20 minutes which was for the purpose of the evidential breath test. She stated that during this time Mr McDonagh consumed nil by mouth. She explained that if a person consumed something during this time, it may effect the operation of the apparatus which was a machine designed to conduct a breath test. (vi) Garda Martha Cleary later informed Mr McDonagh that they were going to move from the interview room to the doctor's room for the purpose of conducting the

evidential breath test. She stated that Mr McDonagh was under the influence of an intoxicant and it took her some minutes to get him to understand that they had to move from one room to another. At 21.50 p.m. she took Mr McDonagh to the doctor's room for the purpose of conducting an evidential breath test along with student Garda John Hubbard who was present with Mr McDonagh's consent. (vii) Garda Cleary entered Mr McDonagh's details into the intoxilyzer apparatus. She noted the temperature and humidity as 23° and 63% respectively. At approximately 21.47 p.m. she made a requirement of Mr McDonagh, having informed him that she was of the opinion that he had consumed an intoxicant. She made a requirement under Section 13(1)(a) of the Road Traffic Act, 1994 for Mr McDonagh to provide two specimens of his breath by exhaling into the apparatus designed for determining the concentration of alcohol in the breath. She stated that a failure or refusal to comply with her requirement or failure or refusal to comply with her requirement in the manner outlined by her was a specific offence under Section 13(2) of the Road Traffic Act, 1994. She explained, that penalty on summary conviction would mean that he would be liable to a fine not exceeding £1,000 or a term of imprisonment not exceeding six months or to both. She stated that she outlined to Mr McDonagh the manner in which he was to exhale, that was that he should exhale in a slow, steady and continuous manner until she told him to stop. She displayed a new mouthpiece in a sealed transparent bag, which she showed to Mr McDonagh in its unused state. She stated that the tube of the intoxilyzer was warm to the touch. She attached the mouthpiece to the intoxilyzer. (viii) Garda Martha Cleary stated that Frank McDonagh attempted to complete the intoxilyzer test as outlined by her. She stated the test returned as incomplete at 21.54 p.m. on test number 356400865 (a copy of this test was attached to and formed part of the Case Stated). (ix) Garda Cleary then re-entered Frank McDonagh's details into the apparatus. She reminded him of the provisions of Section 13(1)(a) and removed the mouthpiece from the intoxilyzer. She displayed a second clean mouthpiece. Again, she outlined the manner in which Mr McDonagh was to exhale by sealing his mouth over the mouthpiece and blowing in a steady, slow and continuous manner until she indicated to him to stop. Mr McDonagh attempted to complete the test. The test returned incomplete on test number 356400866. (A copy of this test was attached to and formed part of the Case Stated).

- (x) Garda Cleary re-entered for the third time Frank McDonagh's details into the intoxilyzer. She removed the old mouthpiece and displayed a new mouthpiece in its unused state to Frank McDonagh which she attached to the blowing tube. She again reminded Frank McDonagh of the requirement under Section 13(1)(a) of the Road Traffic Act, 1994. Garda Cleary explained to Mr McDonagh to seal his mouth around the mouthpiece and to slowly and steadily exhale into the mouthpiece until such time as she indicated to him to stop. The third test was complete on test number 356400867. The intoxilyzer machine printed two identical statements, both of which were signed by Garda Cleary who then required Frank McDonagh, under Section 17(4) of the Road Traffic Act, 1994 to sign both statements. She outlined the penalties to him for failing to sign the statements. Mr McDonagh signed both statements and returned both of them to Garda Cleary. (A copy of the Section 17 Certificate bearing test

number 356400867 was attached to and formed part of the Case Stated). (xi) At 22.25 p.m. Garda Cleary and Frank McDonagh exited the room and Mr McDonagh was returned to the public office. At 22.35 p.m. Mr McDonagh was charged by Sergeant Timothy Walsh, as set out in Charge Sheet 39137. Mr McDonagh was cautioned, to which he made no reply and he was handed a true copy of the Charge Sheet. Mr McDonagh was released on station bail to appear before Dun Laoghaire District Court at 10.30 a.m. on the 11th February 2002. Mr McDonagh exited Dun Laoghaire Garda Station at 22.45 p.m. (xii) There was no evidence that Garda Cleary had informed Mr McDonagh that she required both specimens of breath to be provided on the one operating cycle of the intoxilyzer. No evidence was adduced to the effect that Mr McDonagh was in any way attempting to avoid providing two breath specimens or frustrate the Garda in any way.

- (b) Garda Martha Cleary was cross examined by Counsel on behalf of the Appellant. She confirmed that at 21.59 p.m. Mr McDonagh provided a specimen of breath which on analysis gave a reading of 88 micrograms of alcohol per 100ml of breath. The second specimen was incomplete. The test returned incomplete on test number 356400866. Garda Cleary confirmed that she was not relying on this specimen. She confirmed that at 22.13 p.m. on test number 356400867, Mr McDonagh provided his first specimen of breath which, on analysis, contained a concentration of alcohol of 88 micrograms of alcohol per 100ml of breath. She confirmed that at 22.16 pm on test number 356400867 he provided a second specimen of his breath which, on analysis, contained a concentration of 87 micrograms of alcohol per 100ml of breath. The result of the completed test was 71 micrograms of alcohol per 100ml of breath. The section 17 statement was handed in to Court. The prosecution accepted that the last test was the only complete test and the result being relied upon by the prosecution."
4. At the end of the prosecution case counsel for the appellant applied for a direction on the grounds that the section 17 Certificate relied upon by the prosecution was inadmissible in evidence and that accordingly the prosecution case should fail.
5. Submissions were made by counsel to the learned trial judge. The case was adjourned from time to time. On the 16th March, 2005 the learned trial judge indicated her intention to rule that the section 17 Certificate was admissible. Counsel for the appellant then requested this consultative case stated for this Court. 6. Law The questions for determination arise on s.13 of the Road Traffic Act, 1994, which states as follows:- " 13. —(1) Where a person is arrested under section 49 (8) or 50 (10) of the Principal Act or section 12 (3) , or where a person is arrested under section 53 (6), 106 (3A) or 112 (6) of the Principal Act and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, 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 breath and may indicate the manner in which he is to comply with the requirement, (b) require the person either—

- (i) to permit a designated doctor to take from the person a specimen of his blood, or (ii) at the option of the person, to provide for the designated doctor a specimen of his urine, and if the doctor states in writing that he is unwilling, on medical grounds, to take from the person or be provided by him with the specimen to which the requirement in either of the foregoing subparagraphs related, the member may make a requirement of the person under this paragraph in relation to the specimen other than that to which the first requirement related." The relevant portion of the section at issue in this case stated is s.13(1)(a). Reference was made also to s.17(1) of the Road Traffic Act, 1994, which provides:- "Where, consequent on a requirement under section 13 (1)(a) of him, a person provides 2 specimens of his breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen— (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 49 (4) and 50 (4) of the Principal Act and the other specimen shall be disregarded." 7.

Submissions

On behalf of the appellant it was submitted that the appellant was required to provide a third specimen of his breath and that there was no power conferred on a member of An Garda Síochána to require a person in the situation to provide a third specimen. Two specimens of breath were all that an arrested person could be required to provide. That s.13(1)(a) was a restriction of the appellant's rights and should be construed strictly. If the third specimen was taken in breach of the appellant's right to bodily integrity then the trial court had no discretion but had to rule that the section 17 Certificate was inadmissible. On behalf of the prosecution it was submitted that there was a single requirement. Further it was submitted that had the appellant been charged with failure to comply after the first attempt it would have been argued that he should have been given a further attempt to comply with the requirement of the Garda. 8. Decision As to the issue of whether more than one requirement was made, on the facts I am satisfied that Garda Cleary made a single requirement of the appellant under s.13(1)(a) of the Road Traffic Act, 1994, to provide two specimens of his breath by exhaling into the apparatus. Subsequently three attempts to provide the specimens were made, and it is this which gives rise to the questions in issue.

9. Three attempts were made by the appellant to provide specimens. The first attempt returned a statement as "incomplete". This was test number 356400865. There was no number beside specimen 1 and no further statement other than the word "incomplete". It appears that no specimen was recorded on the intoxilyzer. The Garda then gave the appellant a second clean mouthpiece and the appellant made a second attempt to complete the test. This was test number 356400866. Having given details, such as the appellant's name and address, the analysis stated, of specimen, 1 "88". There was no number by the words "specimen 2", merely the letters "XXX", indicating that there was no second specimen. So, the test was not completed. There were not two specimens. Thus on these two attempts to provide

specimens, no specimen was obtained on the first attempt, and only one specimen was obtained on the second attempt, and both tests were marked as "incomplete". The Garda allowed a third attempt. This option could be perceived as being to the benefit of the appellant as an alternative was that the appellant be charged with an offence under s.13(2) of the Act of 1994. This subsection provides:- "Subject to section 23 , a person who refuses or fails to comply forthwith with a requirement under subsection (1)(a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both."

10. The intent of s.13(1)(a), expressed in the words of the subsection, is to require a person to provide by exhaling into an apparatus for determining the concentration of alcohol in the breath, two specimens of his breath.
11. In summary, the appellant first attempted to provide breath specimens, but the test was incomplete. On the second attempt he provided one specimen, but the test was returned incomplete. On the third attempt he succeeded in giving two specimens.
12. It is necessary that the specimen of breath is such that it can be measured. As Kearns J. said in *D. P. P. v. Moorehouse*

[2006] 1 IR 421 at p.446:- "I agree with the submission of counsel for the prosecutor that the specimen of breath provided must be such as to enable the concentration of alcohol in the breath to be measured. That is the purpose for which the specimen is provided. If it does not so enable or permit, there is non-compliance with the requirement under the section, ..." In that case McCracken J. stated at p.436:- "... the purpose of the requirement is to enable the Gardaí to determine the concentration of alcohol in a person's breath. This is the purpose for which the two specimens of breath are required. If a person exhales into the apparatus in a manner which does not allow the concentration of alcohol to be determined, presumably because not a sufficient quantity of the person's breath enters the apparatus, then I do not think the person can be said to have provided the two specimens of breath." While Murray C. J. was in dissent on the main issue in *D. P. P. v. Moorehouse* he analysed the Act at pp.431-432 as follows:- "It is quite obvious from an examination of the Road Traffic Acts that one of their objects is to control and regulate the use of mechanically propelled vehicles in public places. It is equally obvious that among the objects of the Acts in question is the prohibition on driving a motor car by a person who has an excess of alcohol in his or her blood. To that end provision is made for the arrest of drivers suspected of driving with an excess of alcohol and for the carrying out of tests, including breath tests, for the purpose of establishing the level of alcohol in the driver's blood. It is probably trite to say but it is within the objects of the Act that persons who are obliged to provide a specimen of their breath should be subject to prosecution should they fail or refuse to provide such samples including should they try to evade providing a sample in a manner which enables the authorities to carry out an effective and reliable test."

13. The method of analysis of the specimens is that two specimens are analysed by the machine, and, as required by s.17 of the Act of 1994, it takes the lower sample, and then makes a 17.5% deduction. This process was considered in *D. P. P. v. Curry*
- [2002] 3 I. R. 131. It is a process which gives benefits to an accused. For this process to work the machine requires two specimens in a single cycle. It is from such a cycle that a section 17 Certificate may issue.
14. In this case on the second attempt a single specimen was recorded. The test was then marked "incomplete". On the third attempt there were two specimens and a section 17 Certificate was issued on foot of these two samples.
15. The issue raised on behalf of the appellant is that the two relevant samples should be the single sample on the second attempt and the first sample on the third attempt, and that it is only on those two specimens that any valid section 17 Certificate should issue. It was argued that simply because the machine can not operate on such two samples does not mean that those two samples are the two samples upon which the decision should be made.
16. Counsel on behalf of the appellant submitted the following scenario. An arrested person on one cycle provides one breath specimen that was measured as containing a concentration of 41mgs of alcohol per 100mls of breath. If, as the appellant here, that person was unable to provide a second specimen within the three minute cycle allowed then this test would be determined. If the accused then provided two breath specimens within a subsequent same cycle, as did the appellant here, and the readings were slightly higher (as can occur) and measured at 44mgs and 45mgs of alcohol per 100mls of breath respectively, once the 17.5% reduction is made as is the usual method, to the lower of the two readings on the second cycle, the accused would find himself over the legal limit of 35mgs of alcohol per 100mls of breath. If, however, the first specimen, on the first attempt, and the first specimen on the second attempt were taken as the figures, and it was argued that they should, then a 17.5% deduction to the first specimen provided (i.e. 41mgs) would place that person below the legal limit and so not liable for prosecution. It was submitted that the disregarding of the actual first sample would be an injustice.
17. Even if the facts of the case were not such that the actual first and actual second specimen were not lower than the two specimens in the second attempt, a flaw in the system, which is technical, has been identified.
18. Counsel submitted that when two breath specimens are successfully provided on the one operating cycle (as in the third attempt of the appellant), the Lion Intoximeter automatically produces the final reading for the purpose of s.49(4) of the Road Traffic Act, 1961. In the appellant's case the final reading was 71mgs of alcohol per 100mls of breath. It was submitted that the fact that the Lion Intoximeter calculates a final reading by a simple mathematical deduction of 17.5% from the lower of the two readings on the sample cycle cannot in itself be sufficient reason for disregarding the actual first breath specimen provided. The calculation could be done by a person, rather than the machine.

19. However, the machine is programmed, and can operate only on the two breath specimens in a single attempt. It is thus a matter of convenience, for the machine.
20. However, the consequence of the machine operating on such samples is that a s.17 Certificate may be printed out.
21. Section 21(1) of the Road Traffic Act, 1994 provides a presumption in favour of a s.17 Certificate. This is to the advantage of the prosecution. It is a policy decision by the Oireachtas to address the problem of drunken drivers.
22. Such legislation is penal and is required to be construed strictly. The appellant, and any accused, has the right not to incriminate himself. But there are exceptions. As Finlay C. J. stated in *Director of Public Prosecutions v. McGarrigle*, [1996] 1 I. L. R. M. 271 at p.273:- "The obligation to give a specimen which may establish the committing of a serious offence is a significant though not unique exception to the general principles of our criminal code which protect accused persons against involuntary self-incrimination."
23. This method of creating a s.17 Certificate should conform with due process. The process in this case is that, because of the configuration of the machine, the machine does not analyse the actual first specimen (in the second attempt) and the actual second specimen (the first breath on the third attempt). Rather, because of the way the machine is set, it works only if it records two specimens in a single attempt. This is already a process in ease of the prosecution. It arises for social and community reasons, to fight the scourge of drunk drivers. The process must be "due process", in accordance with constitutional rights. However, in effect the process elects samples which may not be the first and second samples, and which may enable a prosecution when the actual first and second samples would not.
24. Legislation creating such processes in ease of a prosecution are part and parcel of modern road traffic legislation. They signify a social policy. However, they must be fair. A process which could produce a s.17 Certificate in a situation where the actual first and second specimens would not warrant a s.17 Certificate is not due process. The Certificate in this case refers to the actual second and third specimens given. The machine is not configured to give a certificate on foot of the actual first and second specimens in this case.
25. I would answer the questions posed in the Case Stated in the negative. In this case there was one requirement made by the garda to the appellant, under s.13(1)(a) of the Road Traffic Act, 1994, to provide two specimens of his breath. The appellant made three attempts to blow into the intoxilyzer. On the first attempt no breath specimens were recorded. On the second attempt one specimen only was obtained, and the test was not completed. On the third attempt the appellant provided two specimens. The system operated by the machine requires two samples, the lower is chosen, and a 17.5% deduction taken from that. If three samples are given in two cycles (as here) and the lower is in fact on the earlier cycle (the second attempt here) then the machine is not in fact operating on the lowest sample. This system is technical. The consequence from the machine's operation may be a s.17

Certificate. This may be very detrimental to an accused. It is not an impenetrable process - the sums would be done on the readings given. However, the machine only issues the s.17 Certificate on foot of two samples from the same attempt. The injustice which may occur if the first sample is in fact below the limit, but is not considered, has been described in paragraph 16. The right to due process requires a fair system. A system which may ignore a lower sample in favour of two subsequent higher samples is not fair. Consequently, the manner of obtaining samples should reflect this situation. Thus, in this case the first attempt failed to give any sample, and the second attempt was incomplete as only one specimen was given. In such a circumstance, there may not be a third attempt if only the specimens on the third attempt are the basis for a s.17 Certificate. Therefore, I conclude that the questions posed be answered in the negative. Judgment of Mr Justice Finnegan delivered on the 16th day of October 2008 This is a Case Stated by a judge of the Circuit Court pursuant to section 16 of the Courts of Justice Act 1947 in which two questions are asked of this court concerning the interpretation of section 13(1)(a) and (2) of the Road Traffic Act 1994. The accused was charged that he did on the 9th February 2002 at Colliemore Road, Dalkey, Co. Dublin, in the Dublin Metropolitan District drive a mechanically propelled vehicle registration no. 02 D 5657 in a public place while there was present in his body a quantity of alcohol such that within three hours after so driving the concentration of alcohol in his breath exceeded a concentration of 35 micrograms of alcohol per 100 millilitres of breath contrary to section 49(4) and 60(a) of the Road Traffic Act 1961 as inserted by section 10 of the Road Traffic Act 1994. The Case Stated The Case Stated recites the appearances at the hearing before the Circuit Court, the circumstances leading to the arrest of the accused and the proceedings at Dun Laoghaire Garda Station none of which are in issue. Relevant to the questions raised by the learned Circuit Court judge and the issue before this court are the facts set out in the Case Stated as follows:- 1. "(3)(vii) Garda Cleary entered Mr McDonagh's details into the intoxilyser apparatus. She noted the temperature and humidity as 23% and 63 degrees respectively. At approximately 21.47 p.m. she made a requirement of Mr McDonagh having informed him that she was of the opinion that he had consumed an intoxicant. She made a requirement under section 13(1)(a) of the Road Traffic Act 1994 for Mr McDonagh to provide two specimens of his breath by exhaling into the apparatus designed for determining the concentration of alcohol in the breath. She stated that a failure or refusal to comply with her requirement or failure or refusal to comply with her requirement in the manner outlined by her was a specific offence under section 13(2) of the Road Traffic Act 1994. She explained that the penalty on summary conviction would mean that he would be liable to a fine not exceeding £1,000 or a term of imprisonment not exceeding six months or to both. She stated that she outlined to Mr McDonagh the manner in which he was to exhale, that was that he should exhale in a slow, steady and continuous manner until she told him to stop. She displayed a new mouthpiece in a sealed transparent bag, which she showed to Mr McDonagh in its unused state. She stated that the tube of the intoxilyser was warm to the touch. She attached the mouthpiece to the intoxilyser. (viii) Garda Martha Cleary stated that Frank McDonagh attempted to complete the intoxilyser test as outlined by her. She stated the test returned as incomplete at 21.54 p.m. on test number 356400865 (A copy of this test is

attached to and forms part of the Case Stated). (ix) Garda Cleary then re-entered Frank McDonagh's details into the apparatus. She reminded him of the provisions of section 13(1) (a) and removed the mouthpiece from the intoxilyser. She displayed a second clean mouthpiece. Again she outlined the manner in which Mr McDonagh was to exhale by sealing his mouth over the mouthpiece and blowing in a steady, slow and continuous manner until she indicated to him to stop. Mr McDonagh attempted to complete the test. The test returned incomplete on test no. 356400866. (A copy of this test is attached to and forms part of this Case Stated).

- (x) Garda Cleary re-entered for the third time Frank McDonagh's details into the intoxilyser. She removed the old mouthpiece and displayed a new mouthpiece in its unused state to Frank McDonagh which she attached to the blowing tube. She again reminded Frank McDonagh of the requirement under section 13(1)(a) of the Road Traffic Act 1994. Garda Cleary explained to Mr McDonagh to seal his mouth around the mouthpiece and to slowly and steadily exhale into the mouthpiece until such time as she indicated to him to stop. The third test was completed on test no. 356400867. The intoxilyser machine printed two identical statements both of which were signed by Garda Cleary who then required Frank McDonagh, under section 17(4) of the Road Traffic Act 1994 to sign both statements. She outlined the penalties to him for failing to sign the statement. Mr McDonagh signed both statements and returned both of them to Garda Cleary (A copy of the section 17 certificate bearing test no. 356400867 is attached to and forms part of this Case Stated). (xii) There is no evidence that Garda Cleary had informed Mr McDonagh that she required both specimens of breath to be provided on the one operating cycle of the intoxilyser. No evidence was adduced to the effect that Mr McDonagh was in any way attempting to avoid providing two breath specimens or frustrate the Garda in any way." Provisions of the Statute and Regulations The relevant provisions of the Road Traffic Act 1994 are as follows:- "Section 13(1) Where a person is arrested under section 49(8) or 50(10) of the Principal Act or section 12(4), or where a person is arrested under section 53(6), 106(3A) or 112(6) of the Principal Act and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, 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 breath and may indicate the manner in which he is to comply with the requirement, ` (b) (Not relevant).
 - (2) Subject to section 23, a person who refuses or fails to comply forthwith with the requirement under section (1)(a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or both.
 - (3) Subject to section 23, a person who, following a requirement under subsection (1)(b):
 - (a) refuses or fails to comply with the requirement, or

- (b) (not relevant).
- (4) In a prosecution for an offence under this Part or under Section 49 or 50 of the Principal Act it shall be presumed, until the contrary is shown, that an apparatus provided by a member of the Garda Síochána for the purpose of enabling a person to provide 2 specimens of breath pursuant to this section is an apparatus for determining the concentration of alcohol in the breath.” “17(1) Where, consequent on a requirement under section 13(1)(a) of him, a person provides 2 specimens of his breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen –
- (c) 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 section 49(4) and 50(4) of the Principal Act and the other specimen shall be disregarded.
- (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. 23(1) In a prosecution of a person for an offence under section 13 for refusing or failing to comply with a requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine.” The Road Traffic Act 1994 section 3(1) provides for the making of regulations. The Road Traffic Act 1994 (Section 17) Regulations 1999 S. I. No. 326 of 1999 in regulation 4 provides as follows:- “The statements to be produced pursuant to section 17 of the Act of 1994, shall be in the form set out in the Schedule to these regulations.” The Schedule to the Regulations sets out the prescribed form in the following terms:- “Road Traffic Act 1994 section 17 – statement. Apparatus: Serial No.: Garda Síochána Station: Test Number: Date of start of test: Person who provided specimens Name: Address:

Analysis

Test ug/100ml Time Blank Simulator check 1 Blank Breath specimen 1 Blank Breath specimen 2 Blank Simulator check 2.” The specimen to be taken into account for the purposes of section of the Road Traffic Act 1961 is specimen above. The concentration of alcohol in the breath for the purposes of that section is micrograms of alcohol per 100 millilitres of breath. Member of the Garda Síochána Name: Number: Signature:

I the undersigned hereby acknowledge receipt of this statement

Signature of person who provided specimens of breath The Questions The Case Stated seeks the opinion of this court on the following questions:-

1. On the evidence adduced am I entitled to hold that pursuant to Section 13(1)(a) of the Road Traffic Act 1994, there is no bar on a member of An Garda Síochána making a requirement under Section 13(1)(a) of the Road Traffic Act, 1994 of an arrested person to provide two specimens of their breath, notwithstanding the provision by that arrested person of one complete breath specimen within a previous incomplete test result.
2. Whether, in the circumstances of this case, the Section 17 Certificate was admissible in evidence against the Accused. The Certificates in the Present Case The information contained in the Case Stated as to proceedings in the Garda Síochána Station in relation to the taking of breath samples from the accused is augmented by the three certificates attached to and forming part of the Case Stated. These three certificates contain sequential test numbers namely 356400865, 356400866 and 356400867: for ease I will refer to these hereafter as tests 5, 6 and 7 respectively. The apparatus employed is the intoximeter EC/IR. The apparatus is so designed that on a breath sample being provided it will within a very short space of time carry out two separate analyses and provide two measurements. In the event that only one satisfactory reading is obtained it will not produce a prescribed certificate but will record as the case may be “Specimen 1 incomplete” in which case it will carry out one analysis only or “Specimen 2 incomplete” in which case it will record the measurement of the first specimen but not the second specimen. In the present case on test 5 the apparatus recorded specimen 1 as incomplete and gave no measurement. Where one or both specimens are incomplete the apparatus will not produce a certificate in the prescribed form. On test 6 in relation to specimen 1 the apparatus carried out an analysis and recorded a measurement of 88 micrograms of alcohol per 100 millilitres of breath but recorded in relation to specimen 2 that it was incomplete. No certificate in the prescribed form was produced. On the third occasion on which the accused gave a sample of breath, test 7, both specimens were analysed, the measurements being 88 micrograms of alcohol per 100 millilitres of breath on specimen 1 and 87 micrograms of alcohol per 100 millilitres of breath on specimen 2: the apparatus automatically produced a certificate in the

prescribed form. The prosecution proceeded on the basis of test 7 only tests 5 and 6 being disregarded. Submissions on behalf of the accused It is submitted on behalf of the accused that relevant in these proceedings are tests 6 and 7. On test 6 the accused successfully provided one specimen which was analysed and produced a measurement of 88 milligrams of alcohol per one hundred millilitres of breath. On test 7 he successfully provided two specimens the first of which was analysed and provided a measurement of 88 milligrams of alcohol per one hundred millilitres of breath. At this point he had successfully complied with the requirement to provide two samples of breath. The second specimen on test 7 provided a measurement of 87 milligrams of alcohol per 100 millilitres of breath. There was no evidence that the accused had been informed by Garda Cleary that she required two specimens of breath to be provided on one operating cycle of the apparatus. There was no evidence that the accused was in any way attempting to avoid providing two breath samples or to frustrate the Garda. Reliance is placed on the judgment of Kearns J. in the Director of Public Prosecutions v Bridget Moorehouse

[2006] 1 IR 421 where in relation to section 13(1)(a) at page 446 he said:- “I agree with the submission of counsel for the complainant (the Director of Public Prosecutions) that the specimen of breath provided must be such as to enable the concentration of alcohol in the breath to be measured. That is the purpose for which the specimen is provided. If it does not so enable or permit, there is non-compliance with the requirement under the section, so that the arrested person thereafter will in the ordinary way only have such defence to a charge of refusing or failing to comply forthwith with the requirement as may arise under s. 23 of the Act.” The obligation on a requirement being made is to provide two specimens of breath such as to enable the concentration of alcohol in the breath to be measured. This the accused did. There is no requirement in the statute or the regulations requiring the two specimens to be provided within a single cycle of the apparatus. The apparatus employed in the present case carries out two tests in a single cycle through samples being taken and analysed on a single exhalation of breath. The design of the apparatus is such that if the first sample is not such as to enable the concentration of alcohol in the breath to be measured the second specimen is not measured and the test is recorded as incomplete. However if the first specimen is such as to enable the concentration of alcohol to be measured but the second specimen is not then the apparatus will measure the first specimen but return no measurement for the second specimen and record the test as incomplete without automatically producing a certificate in the prescribed form. In the present case test 5 was incomplete, the first specimen not enabling the concentration of alcohol to be measured. Test 6 was also incomplete but the first specimen was measured. Test 7 was complete both specimens being measured. Having provided two samples which were measured albeit in two different cycles of the operation of the apparatus, that is the first specimen on test 6 and the first specimen on test 7, the accused had complied with the requirement made of him under section 13(1)(a). In terms of the design of the machine test 6 may have been incomplete but nonetheless the accused had provided a specimen of breath which enabled the concentration of alcohol therein to be

measured. In the United Kingdom the Road Traffic Act 1972 constituted an offence similar to that contained in the Road Traffic Act 1994. Section 8 of that Act (as substituted by the Transport Act 1981 section (25) provides:- “(1) In the course of an investigation whether a person has committed an offence under...section 6 of this Act a constable may...require him:

- (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State.
- (6) Of any two specimens of breath provided by any person in pursuance of this section that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded...” In *Howard v Hallett*

[1984] R. T. R. 353 a requirement was made of the defendant pursuant to section 8 and he provided a first specimen of breath. In error the Constable did not require the defendant to provide a second specimen. Realising his mistake he repeated the procedure taking two further specimens and on foot of the same the defendant was prosecuted for an offence. A Divisional Court of the Queen's Bench Division held that section 8(1)(a) empowered a constable to require a person to provide no more than two specimens of breath and that in the circumstances outlined the relevant specimens were the first and second specimens taken from the defendant and that accordingly his conviction on the evidence of the results of the tests on the second and third specimens was in error. In the course of his judgment Robert Goff L. J. said:- “However, Mr Lofthouse had further alternative submissions to make. The first one which, I hope with all respect to Mr Lofthouse, I have understood, was that the provision of a specimen, pursuant to a request made by a constable under section 8(1), must be in accordance with the operating procedure under which the machine operates. As I understand the submission, since the machine was designed to test two specimens of breath and, on the first round, only tested one, then one must disregard the first specimen altogether. The only specimens of breath, on Mr Lofthouse's construction, which were given pursuant to the request, would be tests 2 and 3. They were specimens given in accordance with the operating procedure of the machine. I hope I have not done any injustice to Mr Lofthouse's submission, but I have to say that, if I have understood it correctly, it turns the law on its head. It seems to me that, as Mr Sellick put it, that the machine must follow the act and not the act follow the machine. Mr Lofthouse's argument is trying to tailor the act to a particular device which happens to be approved by the Secretary of State. That cannot be right.” That, it is submitted on behalf of the accused, in effect is what the prosecutor seeks to achieve in the present case – to have the construction of section 13(1)(a) tailored to the apparatus used. Section 13(1)(a) provides that a member of the Garda Síochána may indicate the manner in which the requirement is to be complied with. The first question in the Case Stated in *Director of Public Prosecutions v Moorehouse* was as follows:- “Where following an arrest under s. 49 of the Road Traffic Act 1961 the arrested person is required to provide two specimens of his breath pursuant to s. 13(1)(a) of the Road Traffic Act 1994, and where the member of

An Garda Siochána indicates the manner in which the arrested person is to comply with the requirement, does s. 13(2) of the Road Traffic Act 1994 make it an offence to refuse or fail to comply with the requirement in the manner outlined by the member of An Garda Siochána making the requirement? Kearns J. held that the words “and may indicate the manner in which he is to comply with the requirement” do not form part of the offence created by section 13(2) but are merely enabling words whereby a Garda may and should indicate how a breath test is to be performed. The offence created was that of failure or refusal to provide two specimens provided that the same are such as to enable the concentration of alcohol in the breath to be measured. There is no offence of failing to comply with the requirement in the manner indicated by a member of the Garda Siochána created by section 13(2). In short pursuant to the requirement made of him the accused had provided two specimens capable of enabling the alcohol in his breath to be measured namely the first specimen on test 6 and the first specimen on test 7. Any prosecution of the accused must be on the basis of these two tests there being no statutory power to require a third or subsequent test. To hold otherwise would require the manner in which the apparatus functioned to regulate the construction of the statute. Submissions on behalf of the Prosecutor The prosecutor firstly made submissions as to the manner in which the court should approach the construction of the relevant legislation. In *Scully v Director of Public Prosecutions*

[2005] 1 IR 242 Hardiman J. said:- “Applications on this basis must be discountenanced in the interest of the public right to prosecute, but also in the interests of the integrity of the jurisdiction, in a proper case, to restrain a prosecution on the basis that significant evidence has been ignored or destroyed.” While that case concerned an application to restrain a prosecution where evidence had not been preserved it is submitted that the comments apply equally to the present case: regard should be had to the public interest in having crime prosecuted. Reliance was also placed on dicta of Denham J. in *B v Director of Public Prosecutions*

[1997] 3 I. R. 140 which concerned delay in the prosecution of sexual offences where at pages 195-196 she stated:- “It is not the applicant’s interests only which have to be considered. It is necessary to balance the applicant’s right to reasonable expedition in the prosecution of the offences with the community’s right to have criminal offences prosecuted.” Again in *Director of Public Prosecutions v McNeil*, Supreme Court, unreported 22nd July 1998 O’Flaherty J. said:- “In relation to the charge of drunk driving, that is notorious for throwing up technical points – and very often specious technical points – we do well to remind ourselves that courts of law exist to do justice between the parties and not to act as disciplinary tribunals over the conduct of litigation.” The well-known dicta of Scarman L. J. in *R v Sang*

[1980] AC 402 are also relied on:- “When asked to rule, (judges) should bear in mind that it is their duty to have regard to legally admissible evidence, unless in their judgment the use of the evidence would make the trial unfair. The test of unfairness is not that of a game; it

is whether...the evidence, if admitted, would undermine the justice of the trial...For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society both are needed.” The section 17 certificate relied on in the present case is such legally admissible evidence and it is appropriate that regard should be had to the same. Turning to the facts of the present case only one requirement pursuant to section 13(1) was made of the accused. His first two attempts to comply with the same were unsuccessful: the third attempt was successful and accordingly the measurements on this attempt are the relevant ones for the prosecution of the offence. There is no restriction placed by section 13(1) on the number of attempts to comply with the requirement. Director of Public Prosecutions v Moorehouse is concerned with two specific issues: the questions raised on the Case Stated were as follows:- “

1. Where, following an arrest under s. 49 of the Road Traffic Act 1961, the arrested person is required to provide two specimens of his breath pursuant to s. 13(1)(a) of the Road Traffic Act 1994, and where the member of An Garda Síochána indicates the manner in which the arrested person is to comply with the requirement, does s. 13(2) of the Road Traffic Act 1994, make it an offence to refuse or fail to comply with the requirement in the manner outlined by the member of An Garda Síochána making the requirement? If the answer to this question is “no”, then,
2. Where following an arrest under s. 49 of the Road Traffic Act 1961, the arrested person is required to provide two specimens of his breath pursuant to section 13(1)(a) of the Road Traffic Act 1994, and does so by exhaling into the apparatus designed for determining the concentration of alcohol in his breath, is that sufficient compliance with the “requirement” under the section so as to provide the arrested person with a defence to a charge of refusing or failing to comply forthwith with the requirement under s. 13(1)(a) of the Road Traffic Act 1994?” In that case the accused made three unsuccessful attempts to provide a sample of her breath in that she did not exhale sufficient breath in order to provide a breath specimen capable of being measured. On all three attempts specimen 1 was incomplete and no second test was carried out. On the first question Kearns J. considered that the phrase “and may indicate the manner in which he is to comply with the requirement” in section 13(1)(a) to be merely an enabling provision and not to form part of the requirement. The accused was charged that she did “fail to comply forthwith with the said requirement in the manner indicated by the said member of the Garda Síochána contrary to section 13(2) of the Road Traffic Act 1994” and it was held that no such offence was created by section 13(2) and accordingly the question was answered “no”. As to the second question it was held that merely exhaling into the apparatus is not sufficient compliance with the requirement under the section unless it enables the concentration of alcohol in the breath to be determined. In considering dicta in the judgments the court should have regard to the context, namely the specific questions raised. In the course of his judgment dealing with the second question Kearns J. said:- “The answer now given is purely directed to the issue of what is or is not compliance by the person of whom the requirement is made.” In the present case the specimens of breath provided on the first two attempts were not sufficient to enable the

apparatus to measure the concentration of alcohol in two specimens of breath and accordingly until the third successful attempt the accused had not complied with the requirement. Decision I agree fully with the approach adopted by Kearns J. in *Director of Public Prosecutions v Moorehouse* to the interpretation of section 13(1)(a) where he said:- “It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and a further requirement to interpret strictly words setting out the elements of an offence (Maxwell on the Interpretation of Statutes, 12th ed, (pp 239-240)). If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus in construing a penal statute, the court should lean against the creation or extension of penal liability by implication.” I also consider it important to bear in mind the dicta of Goff L. J. in *Howard v Hallett* quoted above – “the machine must follow the act and not the act follow the machine”. In construing a penal statute, as any other statute, the literal rule should be applied but it should not be applied if this would lead to an absurd result which is pointless and which negates the intention of the legislature derived from the construction of the section within its context: where appropriate a purposive interpretation may be applied. In *McDonnell and Others v Attorney General and Another*, Supreme Court, unreported,

[2006] IESC 64 the appellants challenged the constitutionality of the procedures provided for in the 1994 Act and contended that they had been denied the opportunity of receiving a breath sample which could be independently tested. In his judgment the learned High Court judge set out the safeguards which the statutory provisions provide for an accused. Among those safeguards listed by the learned High Court judge and referred to in the judgment of this court is the statutory requirement in section 17(1) of taking the specimen with the lower concentration of alcohol for the purposes of section 49(4). While the precise wording of the legislation with which the court in *Howard v Hallett* was concerned differs from the provisions of the Road Traffic Act 1994 I find the approach there adopted persuasive. It would be inappropriate to allow the manner in which a particular apparatus operates to regulate the construction of the section but rather the apparatus in its operation should correspond with the requirements of the section. Section 13(1) empowers a member of the Garda Síochána to require a person to provide by exhaling into apparatus for determining the concentration of alcohol in the breath two specimens of his breath: they must be such as will enable the concentration of alcohol in the breath to be measured. In terms it does not permit a requirement for more than two such specimens. Section 13(3) creates an offence – refusing or failing to comply with a requirement under section 13(1)(b). Failure to provide a third such specimen could not in my view constitute the offence. That only two samples should be taken is important as

otherwise one of the safeguards afforded by section 17(1) would be lost. Thus if, in a marginal case, three specimens should be tested the measurements being 34 micrograms, 36 micrograms and 37 micrograms respectively then whether or not an offence had been committed would depend upon whether the first and second specimens or the second and third specimens were appropriate to be considered. On a literal reading of section 17(1) two specimens only are envisaged the lower of which shall be taken into account for the purposes of section 49(4) and 50(4) the other being disregarded. On a literal reading of section 17(1) what must be taken into account are the first two specimens which are such as to enable the concentration of alcohol in the breath to be measured. In the present case that is specimen 1 on test 6 and specimen 1 on test 7. It seems to me irrelevant that the apparatus used by reason of its design could not produce a certificate in the prescribed form in relation to those two specimens. In the course of his judgment in *The Director of Public Prosecutions v Moorehouse McCracken J.* held that the requirement in section 13(1)(a) is to provide two specimens of breath and if the subsection had intended that the manner of compliance was also a requirement this would have been clearly stated. He went on to say:- "This is a penal statute, providing for a term of imprisonment in the event of the commission of an offence. In such circumstances, if an offence is to be created by the statute that offence must be clearly specified and defined. It is not something to be implied from the wording of the statute. In the present case the statute is quite clear that the offence is failure to comply with 'a requirement', and I can see no justification for any construction of that section which would extend the offence beyond that status. Account must also be taken of the purpose of the section which is to enable the Garda concerned to determine the concentration of alcohol in the person's breath. If the construction as put forward by the complainant is accepted, then if the person concerned does supply specimens of breath sufficient to determine the concentration of alcohol, but does so in some manner other than that indicated by the Garda who makes the requirement, in the absence of some very specific provision I find it difficult to see how that could possibly be construed as an offence. Equally, if the member of the Garda Síochána indicated a manner of compliance with the requirement which is very difficult, surely the person cannot be penalised for giving the specimens of breath in some much simpler manner. I would therefore answer the first question in the Case Stated as 'no.'" In short, where two samples are given which are capable of enabling the amount of alcohol in the breath to be measured a requirement under section 13(1)(a) is complied with. Having regard to the decision of this court in *Director of Public Prosecutions v Moorehead* section 13(1)() requires that two specimens of breath should be provided but not that they be provided in a manner indicated by a Garda. The specimens must each be such as to enable the concentration of alcohol in the breath to be measured. The first specimen on test 6 and the first specimen on test 7 were in fact measured by the apparatus. However the manner in which the apparatus is designed to function is such that it could not automatically produce a certificate certifying the results of these two tests. This circumstance cannot regulate the construction of the statute - the design of the apparatus cannot regulate the construction of the statute. A consequence of this is that certificate 7 which is based on

the second and third specimens actually measured cannot ground a prosecution for an offence under section 13(1)(a). As the apparatus used, by virtue of its design, is incapable of automatically producing a certificate in the prescribed form in respect of the two relevant specimens there is not in existence a certificate capable of grounding a prosecution. The certificate sought to be relied upon, which is in the prescribed form, relates to the second and third specimens measured by the apparatus and which are not the specimens relevant for the purposes of the offence with which the accused is charged. Having regard to the foregoing I would answer the questions raised in the Case Stated as follows:- Question 1: No Question 2: No. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S57.html>

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