AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2023:000120

[2024] IESC 36

Charleton J.
O'Malley J.
Hogan J.
Murray J.
Collins J.

Between

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE PROSECUTION OF GARDA ROBERT O'GRADY)

Appellants

AND

ROBERT HODGINS

Defendant/Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 29th day of July 2024

Introduction

1. In this appeal the Court is asked to consider what the consequence of the failure of a member of An Garda Síochána to sign a statement provided for by s. 13(2) of the Road Traffic Act 2010 ("the 2010 Act") in the correct sequential order ought to be. The essential facts have already been set out in the judgment which O'Malley J. has just delivered, the details of which I gratefully adopt.

2. In summary, however, Mr. Hodgins was initially arrested on suspicion of drink driving pursuant to a. 48(2) of the 2010 Act and he was then conveyed to a Garda station. At the Garda station he was required pursuant to s. 12 of the 2010 Act to provide two specimens of breath by exhaling into an intoxilyser apparatus. The apparatus registered a "fail" result.

3. The accused was then supplied with two identical statements which were produced by the intoxilyser apparatus in accordance with s. 13(2) of the 2010 Act. Section 13(2) requires that the statements shall be "in the prescribed form and duly completed by the member [of An Garda Síochána] stating the concentration of alcohol in that specimen determined by that apparatus." Section 13(3)(a) of the 2010 Act then requires that the statements shall then be signed by the person supplying the breath samples.

4. It is accepted that the breath samples in the present case were signed in the wrong order in that the member in question did not sign the statement prior to requiring Mr. Hodgins to do so. It is further accepted that this is a breach of the sequence prescribed by both s. 13(2) of the 2010 Act and the Road Traffic Act 2010 (Section 13 (Prescribed Form and Manner of Statements) Regulations 2015 (S.I. No. 398 of 2015). As I have just indicated, the question before the Court is whether the effect of this non-compliance with these statutory requirements such is as to render the s. 13 statements inadmissible in evidence as against Mr. Hodgins in the Road Traffic Act prosecution for drink driving.

5. As it happens, this precise question was considered by this Court in *Director of Public Prosecutions v. Freeman* (Unreported, Supreme Court, 25th March 2014). Here the sequencing of signatures was also incorrect. And while it is true that this case arose under the corresponding provisions of the (the applicable) Road Traffic

Act 1978, it has not been suggested that there is any material difference between the corresponding provisions of s. 17 of the 1978 Act and the provisions of the 2010 Act, so that on the face of it at least, *Freeman* is – unless it were to be overruled – a binding authority of this Court which would be dispositive of this appeal in favour of Mr. Hodgins.

The decision in *Freeman*

6. In the High Court in *Freeman,* MacMenamin J. had stated that given that the form had not been signed in the correct sequential order, it had not been "duly completed". It followed that the statutory presumption in favour of the admissibility of the statements (and its evidential status) could not apply to it: see *Director of Public Prosecutions v. Freeman* [2009] IEHC 179.

7. As O'Malley J. has explained in her judgment, this decision was approved on appeal by this Court in an *ex-tempore* judgment delivered by Murray J. (Hardiman and McKechnie JJ. concurring) on 25th March 2014. Murray J. noted that when the intoxilyser statements were handed to the accused in that case they had not already been signed by the Garda in the manner required. Murray J. then concluded that: "...form was not duly completed. The failure to do so is a breach of a statutory duty and the DPP has not established grounds for setting aside the High Court judgment".

8. While the earlier case-law was not, as such, discussed by Murray J. in his ruling, the Court nonetheless endorsed the judgment of MacMenamin J. who did examine this earlier case-law. Here MacMenamin J. followed an earlier judgment of the High Court, *Director of Public Prosecutions v. Keogh* (Unreported, High Court, 9th February 2004) which was directly in point. This was an *ex tempore* decision of which only a note was available. In that case Murphy J. agreed that in the light of this Court's decision in *Director of Public Prosecutions v. Somers* [1999] 1 IR 115

(a case I will presently discuss) that the issue here (i.e., signature in the wrong sequence) was “merely technical”. Murphy J. nonetheless gave two reasons why the certificate should be deemed to be inadmissible:”

> “In this case for two reasons I have to interpret the section more strictly. 1. The purpose of the signature is to authenticate the s. 17 certificate. 2. There is a penal element involved which must be dealt with in a strict manner.”

9. Having discussed various decisions of this Court and High Court decisions which post-dated *Keogh,* MacMenamin J. observed [at paragraphs 30-31]:

> “The resonance and resemblance of the phrase ‘duly completed’ to the facts of this case is difficult to ignore. Can it be said that what occurred here was any more than a ‘technical slip’? Perhaps not. But the essential rationale [of other case-law] is that where there has been a clear failure to comply with a mandatory requirement which according to the statute must be followed, what follows is that the certificate is ‘not evidence’.
>
> This must be seen in the light of *Keogh*, a decision which is *prima facie* on all fours with the instant case, which should be binding unless it is shown that the decision was clearly wrong and should not be followed.”

10. MacMenamin J. then went on to say that he regarded himself bound by the earlier decision in *Keogh* unless it could be shown to have been delivered *per incuriam* or was clearly wrong. He was not satisfied that *Keogh* fell into either category. I will return presently to consider the High Court judgments in *Keogh* and *Freeman.*

11. I agree that the judgment of this Court in *Freeman* bound the Court of Appeal which dutifully – and correctly - followed that decision: see *Director of Public Prosecutions (O’Grady) v. Hodgins* [2023] IECA 174. In her careful and thoughtful judgment for that Court, Donnelly J. held that the statutory statement would

accordingly have to be excluded from the evidence against the accused. The question for this Court presented by this appeal is whether *Freeman* should now be followed.

<u>Precedent and statutory interpretation</u>

12. The doctrine of precedent is, of course, at the heart of our legal system. It is essential to maintaining order in that system. It contributes to the protection of legal certainty and the rule of law by enabling the citizens to order their own affairs in reliance on these past precedents. A judicial unwillingness to re-visit past precedent also reflects the inherent limitations in the judicial process, since quite often change is best left to the Oireachtas which can legislate freely and comprehensively and by reference to wider policy considerations in a manner which is denied to the judicial process. As Henchy J. observed in *Mogul of Ireland Ltd v. Tipperary (N.R.) County Council* [1976] IR 260 at 278:

> "When such decisions, questionable though their rationale may be, become embedded in the legal system with the passage of time, and when people have ordered their affairs on the basis of their rightness, it inevitably requires an amending statute to dislodge them".

13. As the decision of this Court in *Mogul* illustrates, this principle applies with particular force in the case of statutory interpretation because the Oireachtas is in principle free to legislate to change the law following a judicial decision. It is for this very reason that I agree with O'Malley J. that the fact that the Oireachtas has not legislated to change the 2010 Act in the aftermath of *Freeman* is in itself a reason for judicial caution. Yet fidelity to precedent has its limits.

14. Much of this is illustrated by the discussion contained in the judgment of Henchy J. in *Mogul* itself. Here the question was whether the phrase "such injury or damage" in s. 135 of the Grand Jury (Ireland) Act 1836 extended to direct loss only or whether this statutory phrase embraced consequential loss. The plaintiffs in this case were a mining company who had suffered loss as a result of the deliberate detonation of explosives at its premises by an assembly of armed intruders. If *consequential loss* was recoverable by virtue of this provision, then the plaintiffs stood to obtain an award of some IR£220,000. If, on the other hand, this Court were to follow its earlier decision in *Smith v. Cavan and Monaghan County Councils* [1949] IR 322, then the plaintiffs could only recover for direct loss, which in this case came to IR£29,000.

15. This Court refused, however, to take the opportunity to overrule the previous decision in *Smith.* While Henchy J. agreed that if the matter were *res integra* there might be much to be said for the proposition that the statutory reference to "such injury or damage" should not be confined to direct loss, he nonetheless insisted, however, that it was generally necessary to go further in a case of this kind and demonstrate that the earlier judgment was clearly wrong ([1976] IR 260 at 273):

> "We are here concerned with a question of pure statutory interpretation which was fully argued and answered in *Smith's Case* after mature consideration. There are no new factors, no shifts in the underlying considerations, no suggestion that the decision has produced untoward results not within the range of the court's foresight. In short, all that has been suggested to justify a rejection of the decision is that it was wrong. Before such a *volte-face* could be justified it would first have to be shown that it was clearly wrong. Otherwise the decision to overrule it might itself become liable to be overruled."

16. This Court, accordingly, refused to overrule its earlier decision in *Smith*. While *Mogul* is properly regarded espousing the virtues of precedent, that decision itself pointed to two inherent limitations regarding the potentially binding character of earlier decisions whose status is now under challenge, neither of which are, in my view, satisfied in the present case.

17. First, it is clear from *Mogul* that the decision must be shown not to be "clearly wrong" to be overruled. Second, the disputed question of statutory interpretation must be shown to have been "fully argued and answered" in the judgment under consideration. On this latter point Henchy J. also said ([1976] IR 260 at 272): "A decision of the full Supreme Court… given in a fully-argued case *on a consideration of all the relevant materials*, should not normally be overruled merely because a later Court inclines to a different conclusion." (emphasis supplied)

18. These two questions run together so far as the present case is concerned. In my view, *Freeman* is clearly wrong in the *Mogul* sense of that term because the ruling of Murray J. does not itself engage with a long line of earlier Supreme Court authorities to the effect that a technical slip of this kind does not invalidate the underlying statutory certificate, at least absent evidence that on the facts it amounted to something more than harmless error. To that extent it may also be said that the decision did not "fully answer" the question posed or that there was not "a consideration of all the relevant materials" so that it does not satisfy that aspect of the *Mogul* test.

19. Accordingly, the decision in *Freeman* cannot realistically equated with the earlier decision in *Smith* which was at issue in *Mogul*. *Smith* was a reserved judgment of a panel of five judges. What is critical is that the majority judgment of Murnaghan J. in *Smith* contains a full exposition and discussion of the earlier case-law before

arriving at its conclusion. That is, with respect, what is missing from *Freeman,* because although the ruling of Murray J. may be said to have endorsed the reasoning of MacMenamin J. in the High Court there is no discussion or engagement in that case with the earlier case-law, all of which may be said to illustrate the principle that an error in the completion of a statutory certificate will not in itself serve to invalidate that certificate or render it inadmissible in evidence. Any number of earlier authorities from this Court could be cited for this wider proposition and for present purposes it may be sufficient to mention a few representative examples. This, as we shall see, also has a relevance for the status of the High Court judgments in *Keogh* and *Freeman.*

<u>The earlier case-law on the completion of statutory certificates</u>

20. We may commence on this point with another drink driving case, *Director of Public Prosecutions v. Collins* [1981] ILRM 447. Here the argument was that the certificate of the doctor who took the blood sample from the accused was bad in law simply because he had failed to delete the relevant part of the form dealing with a urine sample. As Henchy J. put it ([1981] ILRM 447 at 449): "Once [the doctor] affixed his signature to the form as filled in, the failure to delete in full the line referring to a specimen of urine was no more than a technical slip". There was "neither force nor merit in this submission".

21. Many similar examples abound. Thus, in *The State (de Búrca) v. Ó hUadhaigh* [1976] IR 85, the entry of "3 months imprisonment" in a District Court minute book was regarded by this Court "as being judicial shorthand to denote both a conviction and a sentence therefor of three months' imprisonment. No reasonable person could read it otherwise" ([1976] IR 85 at 92). Likewise in *The State (Littlejohn) v.*

Governor of Mountjoy Prison, Unreported, Supreme Court, 18 March 1976, Henchy J. observed that "Nobody could be misled" by a reference to "the Special Criminal Court" rather than "a" Special Criminal Court. In *Minister for Industry and Commerce & Energy v. Quinn*, Unreported, Supreme Court, 23 January 1981, Henchy J. held that there was "little reality" to the submission that the original of a display notice of prices for alcoholic drink should have been produced in a prosecution under the Prices Act 1958 in the absence of a suggestion that the copy which was tendered in evidence was inaccurate. The same judge's comments in *Director of Public Prosecutions v. Littlejohn* [1978] ILRM 147 at 150 to the effect that erroneous references to Dublin Circuit Court and trial by jury in a Special Criminal Court indictment were simply "peripheral or superficial defects" and the accused "was not misled in any possible way".

22. The decisions of this Court in two decisions arising under the Road Traffic Acts, *Director of Public Prosecutions v. Kemmy* [1980] IR 160 and *Director of Public Prosecutions v. Somers* [1999] 1 IR 115, are, however, the cases which are perhaps most directly on point. In *Kemmy,* a registered medical practitioner had completed the relevant form in duplicate, and it was contended that the document was invalid in that only the duplicate copy – and not the original – had been transmitted to the Bureau of Road Safety. A majority of this Court rejected these arguments, with both Henchy and Griffin JJ. holding that both copies were authentic. As Henchy J. pithily put it, this was an argument "born of legal ingenuity rather than of merits": [1980] I.R. 160, at 165.

23. Much the same could perhaps have been said of the circumstances of *Somers*. Here, the registered medical practitioner had certified that she had taken a blood sample from the accused, but through mischance she had omitted to answer the question

"Nature of specimen (Insert 'blood' or 'urine' as appropriate)". It may be noted that there could not have been any possible prejudice caused by this oversight since the medical practitioner had elsewhere certified on the form that she had taken a blood – rather than a urine – sample. O'Flaherty J. considered this case was "all but ruled" by the earlier decisions of the Court in *Kemmy* and *Collins,* adding ([1999] 1 I.R. 115 at 199 that:

> "At most what happened here was that the doctor had made a technical slip by not filling out the second paragraph of the prescribed form. There could be no confusion in anyone's mind on reading the document as completed but that it was a blood sample that was to be forwarded to the Medical Bureau of Road Safety."

24. These decisions may all be said to share the same general theme, namely, that, absent a showing of something more than harmless error, then what Henchy J. described in *Littlejohn* as "peripheral or superficial defects" in the production of documentary evidence will not invalidate the relevant statutory certificate. So it is here. It is, candidly, difficult to understand why the signing of the certificate in the incorrect sequence should *in and of itself* make any fundamental difference to the underlying admissibility of the print-out from an intoxilyser machine.

25. In passing I should say that I agree, of course, that there might well be other cases where very different considerations would apply. If, for example, the Garda in question had for some reason failed to sign the statement this would be a far graver error, because an essential statutory pre-condition to the very authenticity of the intoxilyser print-out would then be missing. The present case is, of course, quite different in that both the Garda and motorist the signed the statement and thereby may be said to have authenticated it. The difficulty is that they did so in the incorrect

sequence. Yet I am of the view that *on these facts* this error is a harmless one which should not detract on this account from the admissibility of the statement. Returning now to the status of *Freeman* as a binding authority, it seems that at least some of these authorities were opened to the Court in that case. Yet, to repeat, the fundamental difficulty is that this Court did not itself engage with these earlier authorities. The decisions in, for example, *Kemmy, Collins* and *Somers* were all fully considered decisions of this Court which naturally bound the Court in *Freeman*. For my part, I struggle to see how this Court could have arrived at the decision which it did in *Freeman* in a manner which was consistent with these earlier authorities. At least so far as the circumstances of the present case are concerned, I cannot see that the signing of the statutory certificate in the incorrect sequence or order is anything more than the kind of "peripheral or superficial defect" described by Henchy J. in *Littlejohn*.

26. I accept that this Court in *Freeman* may be taken to have endorsed the reasoning of MacMenamin J. in the High Court. Yet it is clear that that decision itself rests at least in large part on the authority of the earlier decision of *Keogh* by which MacMenamin J. regarded himself as *prima facie* bound. Returning to the reasoning of Murphy J. in *Keogh* it may be recalled that two reasons were given for the conclusion in that case regarding the sequence of signatures and why this incorrect sequence affected the admissibility in evidence of the statement. First, that the purpose of the signature was to authenticate the intoxilyser certificate. Second, that there was a "penal element which must be dealt with in a strict manner."

27. I find myself unpersuaded by this reasoning. In the first place all the case-law on this topic necessarily concerns road traffic offences with a penal element, so that there was nothing in itself special concerning the background to *Keogh*. Second, it

is true that the purpose of the Garda's signature was to authenticate the certificate. Yet the certificate in *Keogh* (as in *Freeman* and, indeed, in this case) was duly signed by the Garda in question, so that there is no doubt regarding the authenticity of the intoxilyser statement. The only issue was the precise sequence of signatures, something which at least on these facts does not at all bear on the authenticity of the statement. Judged by earlier decisions of this Court in cases such as *Kemmy, Collins* and *Somers,* this minor irregularity should not affect either the validity or the admissibility of the statement.

28. One may also note here other post-*Keogh* decisions from this period which all have taken a different view. In *Director of Public Prosecutions (O'Reilly) v. Barnes* [2005] IEHC 245, [2005] 4 IR 176 O'Neill J. upheld the admissibility of an intoxilyser statement which had referred in error to the wrong section. O'Neill J. said that the error was "of such an obvious or trivial or inconsequential nature" that it did not affect the validity of the certificate or its admission into evidence: see [2005] 4 IR 176 at 181-182. A similar approach was taken by Dunne J. in *Ruttledge v. District Judge Clyne* [2006] IEHC 146 where the Garda in charge had inadvertently substituted the name of the prosecuting Garda for that of the motorist. This too was regarded as an obvious or inconsequential error which did not prejudice the motorist or affect the admissibility of the certificate.

29. Accordingly, even if all of this reasoning of *Keogh* is to be regarded as having been incorporated by reference into the decision of this Court in *Freeman,* I am nonetheless obliged to say that both decisions are clearly wrong for all the reasons I have just mentioned.

Conclusions

30. Summing up, therefore, I consider that *Freeman* was wrongly decided and should now be overruled. I take this view for two inter-related reasons.

31. First, I think that the decision itself is at odds with the general principle recognised in both earlier and, indeed, subsequent decisions of this Court in cases such as *Director of Public Prosecutions (McMahon) v. Avadenei* [2017] IESC 77, [2018] 3 IR 215 to the effect that non-compliance of this peripheral or non-sequential character with the statutory requirements in the production of a statutory certificate does not *in and of itself* invalidate the certificate in question or prevent its reception into evidence.

32. Second, I do not think that *Freeman* can in this respect be equated with the decision of this Court in *Smith* which was subsequently allowed to stand in *Mogul*. Unlike *Smith*, it cannot be said that the Court in *Freeman* can itself be said to have fully considered or answered the question posed, not least because there was no engagement at all in that judgment with those earlier authorities. To that extent *Freeman* may be said to be out of step with the broad sweep of authorities from *Kemmy* and *Collins* in the earlier 1980s right through to the more recent decision of this Court in cases such as *Avadenei.* The incorrect sequence of signatures is, to my mind, as immaterial as various technical slips identified in cases such as *Kemmy*, *Collins* and *Somers*. Yet there was no indication at all from this Court in *Freeman* as to why this trilogy of otherwise binding case-law did not apply or otherwise govern the outcome of the appeal.

33. While I accept that in *Freeman* this Court endorsed the reasoning of the High Court in that case, that judgment itself rests on the earlier decision of that Court in *Keogh.* The reasons given in *Keogh* for that conclusion – the fact that it is a penal statute

and that the object of the Garda's signature was to verify the authenticity of the intoxilyser statement – do not, with respect, satisfactorily explain why the statement should be excluded from evidence where the signatures have been signed in the incorrect sequence.

34. In these special circumstances I consider that *Freeman* should be overruled as being clearly wrong in the *Mogul* sense of that term and that the statutory certificate at issue here should be considered to be valid. While, to repeat, I agree that the Court of Appeal was correct to follow *Freeman*, this Court enjoys the freedom to depart from that decision as it is clearly wrong. In these circumstances I would accordingly allow the appeal.