UNAPPROVED

THE COURT OF APPEAL

Record No.: 2023/20

Donnelly J. **Neutral Citation Number [2023] IECA 174**

McCarthy J.

Kennedy J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT, 1947

BETWEEN/

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

PROSECUTOR

-and-

ROBERT HODGINS

DEFENDANT

JUDGMENT of the Court delivered by Ms. Justice Donnelly on this 7th day of July, 2023.

1. This is a consultative case stated to the Court of Appeal by Judge Comerford of the South Western Circuit Court pursuant to s. 16 of the Courts of Justice Act, 1947, on a point of law. Mr. Hodgins ("the defendant") had appealed his conviction in the District Court of offences of driving a vehicle while there was present in his body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 22 microgrammes of alcohol per 100 millilitres of breath contrary to s. 4(4)(a) and (5) of the Road Traffic Act, 2010 (the "2010 Act").
2. The point of law concerns the consequences for the prosecution of a failure by a member of An Garda Síochána to "duly complete" in the prescribed manner two identical statements produced by an apparatus that determines in respect of a specimen

of breath the concentration of alcohol therein as required by s. 13(2) of the 2010 Act. Contrary to the sequence prescribed by SI No. 398/2015 Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2015 ("the Regulations"), the garda did not sign the statements prior to requiring the defendant to sign them. The prosecutor, ("the DPP") urges upon the Court that the Supreme Court decision in *DPP (McMahon) v Avadenei* [2018] 3 IR 215 ("DPP v Avadenei") required and/or permitted the trial judge to consider the issues of prejudice to the defendant or breach of fair trial rights as relevant factors for the purpose of deeming as admissible evidence a s. 13 statement. The defendant submitted that the trial judge was bound by the Supreme Court decision in *DPP v Freeman* (Unreported, Supreme Court, Murray J., 25 March 2014) to the effect that a statement which was not duly completed was not admissible. The defendant submitted that s. 20(1) of the 2010 Act only permits a duly completed statement to constitute evidence.

Background & Facts

3. Judge Comerford set out the background facts of the case which were proved, accepted, and agreed in the trial before him:

(a) "On the 7th of December 2020 Garda Robert O'Grady, Garda Deirdre McLaughlin and Garda Laurence Rooney were on duty in the official patrol car attached to Killaloe Garda Station. At 19.05 Hrs they received a report of a traffic collision at Killestry, Killaloe, Co, Clare;

(b) At 19: 10, Garda O'Grady arrived at the scene of the collision, noted that there were two vehicles involved and met both drivers. One driver identified himself as Robert Hodgins, the defendant, of Annesgrove, Blackwater, Co. Clare. Garda O' Grady noted that the defendant was the sole occupant of his vehicle

and that the registration number of said vehicle was […]. Garda O' Grady also met the driver of the other vehicle, (…)

(c) [The other driver] was driving on the R463 at Killestry, Killaloe, Co. Clare and was travelling in the direction of Killaloe town when an oncoming vehicle, that of the defendant, collided with [the other driver]'s car. The collision occurred approximately two kilometres outside Killaloe town in the direction of O'Briensbridge;

(d) While speaking with the defendant, Garda O' Grady was informed by him that he had come around a bend, lost control of his vehicle and had collided with the other vehicle. Garda O'Grady also noted at this time that the defendant was unsteady on his feet, that his speech was slurred and that there was a strong smell of intoxicating liquor from his breath;

(e) Garda O'Grady made a lawful demand of the defendant to produce his driving licence in accordance with section 40 of the Road Traffic Act 1961 as amended. The defendant produced a full Irish driving licence to Garda O' Grady, which was in order, and categorised him as a non-specified driver under the Road Traffic Act;

(f) Garda O' Grady then made a lawful requirement of the defendant under section 9 of the Road Traffic Act 2010, requiring a roadside breath test. The defendant complied and provided a specimen of his breath. The Drager device, on analysis of this breath specimen, returned a 'fail' reading at the scene.

(g) At 19 .20, Garda O' Grady formed his opinion that the defendant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place, arrested the

defendant under section 4(8) of the Road Traffic Act 2010, as amended, and conveyed him to Ennis Garda Station, arriving there at 20.42.

(h) At approximately 20.00, Garda O'Grady requested Garda Eoin 0' Donoghue to perform an Evidential Breath Test on the defendant. At 20.53, Garda Eoin O' Donoghue introduced himself to the defendant as a trained operator of the Evidenzer lRL machine, explained the procedure and observed the defendant to ensure he was nil by mouth;

(i) At 21.22, in the doctor's room at Ennis Garda Station, Garda O' Donoghue made the lawful requirement, under section 12 of the Road Traffic Act 2010, as amended, of the defendant to provide two specimens of his breath, by exhaling into an apparatus designed for determining the concentration of alcohol in the breath. The defendant indicated that he understood the requirement and complied. On analysis the Evidenzer 3 I 004 IRL found that there was 55 microgrammes of alcohol per I00 millilitres of the defendant's breath;

(j) In accordance with section 13(2) of the Road Traffic Act 2010, the defendant was provided with two identical statements automatically produced by the Evidenzer IRL and in the prescribed form. A copy of the section 13 statement is appended to this case stated at Appendix B;

(k) It is accepted by the prosecutor that the section 13 statement was not signed by Garda O' Donoghue prior to it being supplied to the defendant for his signature. The defendant signed the statement first and signed where Garda O' Donoghue should have. The statement was subsequently signed by Garda O' Donoghue.

[…]

(l) I formed the view that the core legal issue as defined between the parties was whether the decision of the Supreme Court in the case of the *DPP v Lloyd*

Freeman, an *ex tempore* decision of the 25th of March, 2014 remained an operative statement of the applicable law or whether its application had been altered by the decision of the Supreme Court in the case of the *DPP v Mihai Avadenei*, a decision of the 20th of December, 2017.

(m) Having considered the written submissions provided to the District Court and oral submissions made at the close of the case, I am inclined to allow the appeal on the basis that the decision in the *DPP v. Lloyd Freeman* [[2009] IEHC 179] constitutes binding precedent applicable to the facts of this case. My ruling in the Appeal is as set out in the transcript of the 25th of May 2022 as approved by me and appended to this case stated at Appendix D.

(n) Conscious of the contest as to the proper approach to the evaluation of admissibility as was contended to arise as between the decision in the *DPP v Lloyd Freeman* and the later case law. Specifically *DPP v Mihai Avadenei*, I indicated that I was willing to state a case, at the behest of the prosecutor prior to making a final determination upon the appeal."

4. With the above facts considered, the question posed by Judge Comerford is as follows:

"As a result of the decision in *DPP v Avadenei* or otherwise, am I required and/or permitted to consider the issues of prejudice to the defendant or breach of fair trial rights as relevant factors for the purpose of deeming as admissible evidence a section 13 statement which on the authority of the *DPP v Freeman* would not constitute a duly completed statement for the purposes of s. 20 of the Road Traffic Act, 2010."

5. In his ruling prior to seeking the consultative case-stated, Judge Comerford said that he was obliged to follow the Supreme Court decision of *DPP v Freeman*. He said that he could not of his own volition override *DPP v Freeman*. In his view, the Supreme Court

in *DPP v Avadenei* did not say it was overturning *DPP v Freeman*. He accepted that *DPP v Avadenei* marked a difference in approach but he did not know if it went as far as saying that a court can deem compliance with statutory condition where this does not exist, when such compliance is necessary in order to render evidence admissible.

<u>The Relevant Legislative Provisions</u>

Road Traffic Act, 2010

6. The relevant sections of the Road Traffic Act, 2010, which provide for the statutory procedure to be followed after the taking of a breath sample are as follows:

Section 13 (Procedure following provision of breath specimen under s. 12):

"(1) Where, consequent on a requirement under section 12(1)(a) of him or her, a person provides 2 specimens of his or her 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 4(4) and 5(4) and the other specimen shall be disregarded.

(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.

(3) On receipt of those statements, the person shall on being requested so to do by the member—

(a) immediately acknowledge such receipt by placing his or her signature on each statement, and

(b) thereupon return either of the statements to the member.

(4) A person who refuses or fails to comply with subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 3 months or to both.

(5) **Section 20 (1) applies to a statement under this section as respects which there has been a failure to comply with subsection (3)(a) as it applies to a duly completed statement under this section.” (Emphasis added**)

Section 20(1) (Provisions regarding certain evidence in proceedings under Part 2):

“(1) A duly completed statement purporting to have been supplied under section 13 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2010 of the facts stated in it, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him or her by or under Chapter 4 prior to and in connection with the supply by him or her under section 13 of such statement.”

NO FURTHER REDACTION NECESSARY

Road Traffic Act 2010 (Section 13) (Prescribed Form and Manner of Statements) Regulations 2015

Regulation 4

"4. For the purposes of completing the statement referred to in section 13(2) of the Act of 2010 in the prescribed manner the member of the Garda Síochána supplying the statements shall—

(a) before the person provides a specimen of his or her breath in accordance with section 12(1)(a) of the Act of 2010, input into the apparatus referred to in that section—

(i) the member's name and number,

(ii) whether the statements are to be produced either—

(I) in the English language, or

(II) in the Irish language,

(iii) the provision that it is alleged the person providing the specimens has contravened, namely, section 4(4) or 5(4) of the Act of 2010, and

(iv) the name, address, date of birth and gender of the person providing the specimens,

and

(b) following the automatic production of the statements referred to in section 13(2) of the Act of 2010, sign the statements."

The Interpretation Act 2005

Section 12 ('Deviation from form')

> "Where a form is prescribed in or under an enactment, a deviation from the form which does not materially affect the substance of the form or is not misleading in content or effect does not invalidate the form used."

The Core Legal Issue

7. The precise legal issue that arose in the prosecution before the Circuit Court was determined in favour of the defendant in the case of *DPP v Freeman.* The same factual issue that arises in this case, namely the sequencing of the signatures to the statement, was at issue in *DPP v Freeman*. Although the prosecution in *DPP v Freeman* was taken under the Road Traffic Act, 1994, the relevant portions of the legal provisions were identical to those under the 2010 Act. In *DPP v Freeman*, the High Court judgment of MacMenamin J. was upheld by the Supreme Court in an *ex tempore* decision.

8. In the present case, the core issue is whether the Supreme Court decision in *DPP v Freeman*, was overruled by the Supreme Court in *DPP v Avadenei*. Although the case of *DPP v Freeman* was ultimately decided by the Supreme Court, a curious feature is that only the High Court judgment (MacMenamin J.) was referred to in the later Supreme Court case of *DPP v Avadenei*. Counsel's note of the Supreme Court's ex tempore judgment in *DPP v Freeman* has been made available to this Court. It is apparent from an examination of the written submissions in the application for leave to appeal in *DPP v Avadenei,* that the Supreme Court's attention was drawn to the fact that the High Court decision in *DPP v Freeman* had been upheld by the Supreme Court. It ought to be noted also that MacMenamin J. along with the other judges of the Supreme Court, concurred with the judgment of O'Malley J., in *DPP v Avadenei*.

9. The DPP submitted that the four principles set out by the Supreme Court (O'Malley J.) in *DPP v Avadenei*, (see further below) were a "radical re-framing of the jurisprudence

as it relates to flaws in the implementation of statutory procedures in drunk driving cases. This new paradigm required judges to conduct a specific analysis of the actual effect of the procedural error, or flaw in the documentary proof, on the fair trial rights of the defendant. If the statutory breach has no unfair, prejudicial or detrimental consequences, then the normal standards apply and the evidence is admissible".

10. The defendant submitted that there was no basis on which the Circuit Court judge could have been at liberty to take a different view than the Supreme Court had taken in *DPP v Freeman*. The trial judge was not at liberty to develop the law as stated by the DPP. The Supreme Court in *DPP v Avadenei* had not decided that *DPP v Freeman* was wrongly decided.

The Decision in *DPP v Freeman*

11. *DPP v Freeman* concerned the consequences of non-compliance with s. 17 of the Road Traffic Act, 1994, a provision which is identical to s. 13 of the 2010 Act. The relevant regulations under both s. 17 of the 1994 Act and s. 13 of the 2010 Act specify that the Garda performing the breath test must sign both of the automatically-produced statements of results to verify their performance of the test and thereafter the arrested person must then sign both statements to confirm receipt of same. If the arrested person does not sign an acknowledgment of receipt, they are deemed to have committed an offence under s. 13(4) of the 2010 Act, and previously, s. 17(4) of the 1994 Act. Section 21 of the 1994 Act provided (similar to s.20 of the 2010 Act) that a duly completed statement purporting to have been supplied under s. 17 shall, until the contrary is shown, be sufficient evidence for the purpose of any proceedings under the Road Traffic Acts.

The High Court

12. In his High Court judgment in *Freeman*, MacMenamin J. upheld the District Judge's decision to dismiss the charges in circumstances where the trial judge found that the

statement was not "duly completed" in line with the procedure set out in the legislation. In his judgment, MacMenamin J. addressed the case of *DPP v Thomas Keogh* (Unreported, High Court, Extempore, Murphy J., 9 February, 2004) which dealt with the issues of the sequencing of judgments. Counsel's note of the judgment in *Keogh* recorded that the High Court had held that a strict interpretation was required and that the purpose of the signature was to authenticate the s. 17 "certificate" and that the said s. 17 "certificate" was inadmissible in evidence.

13. MacMenamin J. also addressed the authorities preceding *DPP v Keogh*. He identified a question the court had to determine as "what is the nature of the evidential deficit, and whether it was such as to necessarily give rise to a "direction" of no case to answer in the court below?" He considered the case of *DPP v Kemmy* [1960] IR 160 which concerned a medical practitioner who furnished the prescribed form pursuant to s.21 of the Road Traffic Act 1978. The medical practitioner completed and signed duplicate forms when one lay exactly under the other so that when each entry and signature when made on the top copy were written also on the corresponding parts of the lower form. Only the lower copy went to the Medical Bureau. The majority of the Supreme Court held that the relevant section did not require or even make reference to a copy of the prescribed form. The Court held that each copy was identical and that it was not a copy of the other but a duplicate. There was therefore evidence on which to convict. He quoted the important statement of principle which was contained in the judgment of O'Higgins CJ, who was in the minority in saying that the form had not been duly completed in compliance with the statute.

14. MacMenamin J. also considered the decision of the Supreme Court in *DPP v Somers* [1999] 1 IR 115 where a medical practitioner failed to identify in one part of a form whether a sample taken from the accused was blood or urine but where she had by

deletion in another part of the form clearly indicated that the sample provided was one of blood. The Supreme Court held that this was a technical slip, there could be no confusion in anyone's mind. O'Flaherty J. said:

> "It is impossible to seek perfection in all stages of life and where there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possibly work any injustice to an accused and is not in discord with he purposes and objects of the legislation, then the courts are required to say that such a slip as we have here, cannot be allowed to bring about what would be a manifest injustice as far as the prosecution of this offence was concerned."

15. MacMenamin J also referred to two later High Court authorities postdating *DPP v Keogh* in which an absence of prejudice in errors in completion of statements were sufficient to render the statements admissions. *DPP (O'Reilly) v Barnes* [2005] IEHC 245 concerned a Garda entering the wrong offence into the machine and *Ruttledge v District Judge Clyne & DPP* [2006] IEHC 146 concerned where a garda had inadvertently substituted the name of the prosecuting garda for the arrested person in the form.

16. In *DPP v Freeman*, in a passage relied upon by the DPP in this case, MacMenamin J. said that there was force in the submission that there was no suggestion that what happened had perpetrated any substantive injustice on the accused. The point could only be described as wafer thin; the accused had "no merits" as such. The point only arises in the most technical sense and that there was no evidence that anyone was confused or misled. The form was otherwise "duly completed" apart from the sequencing of the signatures.

17. MacMenamin J. held that:

> "While [the statement] may not have been (to quote the section) "sufficient evidence", I am not convinced the form was, as found in Keogh, "inadmissible evidence". Pursuant to the statutory provision, (s.21) the duly completed statement is to be both: "sufficient evidence without the necessity of proof of any signature on it", and, that "the signatory was the proper person to sign it." Taken in isolation from its statutory context, this would not necessarily indicate that, the sequencing of the signature procedure was an essential aspect of a statutory intent, or a fundamental requirement for the protection of the rights of the citizen as evinced by the intent of the Oireachtas in the text of the Act But the proviso is that these cases must be judged in their procedural, statutory, and evidential context. Here statutory context is of particular importance."

18. In the next section of the case, MacMenamin J. considered cases involving a breach of a mandatory provision. He said that in those circumstances, the statutory and evidential context were different. He referred to *McCarron v Groarke* (High Court, Kelly J., 4 April 2000) where the failure to offer a specimen as required to s. 18(2) of the 1994 Act was held not to be a technical error or slip. He noted that Kelly J. stated in distinguishing *DPP v Somers* that "[t]he situation is quite different here where a mandatory procedure renders admissible in evidence a certificate of the Medical Bureau of Road Safety without further proof."

19. It is interesting that in *Freeman*, MacMenamin J. inferred that he was being asked by the DPP to decide that the decision in *Keogh* contained a manifest error or was reached *per incuriam*. Where a decision has been reached without taking into account a relevant argument, an important judicial precedent, or a relevant statutory authority then the decision may be disapproved of by a court of concurrent or superior jurisdiction. He was not persuaded that the decision in *Keogh* was *per incuriam*. It was not shown that

it contained any manifest error. He identified the true rationale of *Keogh* – that is to say that while the error may indeed be "technical", it involves a breach of a penal provision which must be interpreted and applied strictly. In the absence of any distinguishing feature or identified error he said that he had to find the decision binding on him. He noted that *Keogh* was not appealed to the Supreme Court.

20. MacMenamin J. went on to consider the Supreme Court decision in *Maguire v Ardagh* [2002] 1 IR 385 which concerned the "not dissimilar" compliance procedure giving rise to an evidential presumption as to the "consent" under s. 3 of the Committee of the Houses of the Oireachtas Compellability, Privileges and Immunities of Witnesses Act 1997. He held that the point in that decision was clear: "non-compliance vitiates the evidential presumption". This was so even though the provision at issue in that case was not "penal" in the sense that arose in *Freeman*.

21. In the context of the case before him, MacMenamin J. stated that the phrase "duly completed" could only be read as meaning full compliance other than by the signature of the person providing a sample; "A form not signed by the garda first is "not duly completed"; and therefore the statutory presumption cannot apply to it." (para 36)

22. MacMenamin J. considered that s. 17 of the 1994 Act, which had the potential to create criminal liability for an arrested person who failed to comply with the procedure of the statute, was a penal provision, and so the provision as a whole should be strictly construed. He stated that to interpret these provisions in question in a "purposive" way would constitute judicial legislation. MacMenamin J. concluded:

> "A court should lean against the creation or extension of penal liability by extension. 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 penal liability for failure of compliance by an accused to my mind renders the provision penal. The duty is to be construed mutually - it cannot be "penal" for an accused, but not "penal" for a member of An Garda Síochána who administers the test. Section 17(3) cannot be legitimately divorced or "ringfenced" from s. 17(1) and (2). The "statement aforesaid" referred to in subs (3) is linked to the "duly completed" statement produced by the apparatus under s. 17(2). All the subsections and the regulation are to my mind so interlinked in their statutory context, that to seek to divorce one from the other, to say one subsection is penal and one is not, would be an impermissible exercise in linguistic analysis.” (para 39)

The Supreme Court

23. This decision was appealed to the Supreme Court which upheld the decision of MacMenamin J. in an *ex tempore* judgment. No copy of this *ex tempore* judgment is available but counsel’s note (for the DPP) of the decision was provided to this Court. There is no suggestion by either side to these proceedings that the note is an incorrect representation of the judgment.

24. The Supreme Court (Murray J.: Hardiman and McKechnie JJ. conc.) stated that ss. 4, which makes it a criminal offence subject to fine and/or a term of imprisonment for a person to refuse to sign the statement, underscores the importance with which the Oireachtas took that requirement. The Supreme Court said that there was no reason to consider that the signing by the garda was an inconsequential matter. The failure to sign before the arrested person meant that there was non-compliance with the statute because the certificate was not duly completed in the prescribed manner. It was stated that s. 17 was not complied with.

25. Having quoted s. 21 upon which the DPP had relied, the Supreme Court said that the question was whether the District Judge was correct in concluding that the statement could not be treated as a duly completed statement. The Supreme Court is then recorded in the note as saying:

> "Counsel for the respondent correctly points out that section 21(1) is the statutory basis on which certificates of fact can be produced in court for the purposes of proving the facts sets out therein, namely the level of alcohol. The corollary of that is that statutory procedures must be strictly complied with to ensure the correct legal basis upon which such certificates are entitled to be introduced.
>
> In this case, the court is satisfied that there was a failure to comply with section 17(2) as the duly completed form was not supplied or received.
>
> It is argued by the Director of Public Prosecutions that there is some basis for overlooking a defect or a statutory non-compliance where it can be said that it is a mere technical point and that there is no prejudice. However the court is not at liberty to ignore statutory requirements if it concludes that there has been such non-compliance. The DPP's authorities concerned completion of forms and details of forms. In some, findings of fact were made that there was a duly completed form. Here the form was not duly completed. The failure to do so is in breach of a statutory duty and the Director of Public Prosecutions has not established grounds for setting aside the High Court judgment.
>
> For the reasons in the judgment in the High Court, the learned Trial Judge was correct and this court will not interfere with those answers."

The DPP's reliance on *DPP v Avadenei*

26. The DPP submitted that the strict admissibility principle has evolved since the *Freeman* case, and that a finding that a statement was non-compliant and in breach of a statutory provision is no longer sufficient to have a statement deemed inadmissible in and of itself. Their submission is that a newer test has since been established in *DPP v Avadenei*, which considers *inter alia* the technicality of the breach, and the prejudice or unfairness (if any) caused to the accused. In her submission, *DPP v Freeman* is no longer a binding authority.

The decision in *DPP v Avadenei*

27. *DPP v Avadenei* also concerned a charge brought under s. 4(4) of the Road Traffic Act 2010 and an issue about whether a s. 13 statement was duly completed within the meaning of the regulations. In that case however, the accused's complaint was that the s. 13 statement was provided to him in English only despite the statutory requirement that the statement be produced in a bilingual format i.e. a single statement in both Irish and English. The Supreme Court, O'Malley J. (*nem diss*), concluded that the statement was not in compliance with the regulations because of the absence of the Irish language in the statement. The Supreme Court concluded however, that the deviation from that form prescribed did not materially affect the substance of what was intended to be proved in evidence by means of the statutory status accorded to the form and that the content was not misleading, confusing or unfair and no right of the accused was violated. The Court could apply s. 12 of the 2005 Act which provides that a deviation from a form prescribed in or under any enactment which does not materially affect the substance of the form or is not misleading in content or effect does not invalidate the form used. O'Malley J. stated that no matter whether the matter is looked at solely through the prism of authorities on Road Traffic Act prosecutions or in light of the general principles of the criminal law, she could see no reason why the form should not be admitted into evidence.

28. O'Malley J. noted that there were very few authorities within the criminal sphere where the provisions of s. 12 of the 2005 Act had been considered. She referred to *People (DPP) v Jakubowski* [2014] IECCA 28 where the Court of Appeal upheld the trial judge's decision to admit evidence despite the search warrant not being in accordance with the form prescribed by the District Court Rules. O'Malley J. noted however that while s. 12 may have been a new provision when enacted, not having been in previous Interpretation Acts, the concepts concerned were not new to the courts. She proceeded to categorise the various authorities cited to her and to consider the principles illustrated by those cases. She discussed a wide range of cases, many of them the same cases that MacMenamin J. had considered in *DPP v Freeman*. She stated with a preliminary consideration of *DPP v Kemmy*. O'Malley J. said that the following passage from O'Higgins CJ., which is taken to represent a correct statement of the law even though O'Higgins CJ. dissented as to result:

> "Where a statute provides for a particular form of proof or evidence on compliance with certain statutory provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof."

29. O'Malley J. reviewed the cases under the following categorisations:

a) Lawfulness of arrest as prerequisite to lawful demand for specimen

NO FURTHER REDACTION NECESSARY

People (DPP) v Greeley [1985] I.L.R.M. 320, *DPP v Cullen* [2014] IESC 7 (which referred to *DPP v Finn* [2003] I I.R. 372 and *DPP (Kelly) v Fox* [2008] IESC 45, [2008] 4 IR. 811.

b) The procedure for taking the specimen

(i) making an unauthorised demand of the driver

DPP v Corcoran [1995] 2 I.R. 259, *DPP v Moorehouse* [2005] IESC 52, *DPP v McDonagh* [2008] IESC 57.

(ii) failure to safeguard a defendant's statutory rights

McCarron v Judge Groarke, *DPP v Somers*

(iii) the sequence to be followed

DPP v Freeman (H.Ct.) (which considered *Maguire v Ardagh* and *DPP v Moorehouse*), *DPP v Kennedy* [2009] IEHC 361.

c) Due completion of the form

Director of Public Prosecutions v. Collins [1981] I.L.R.M. 447, *DPP v O'Neill* (Unreported, Supreme Court, 30 July 1984), *DPP v Somers* (noting that the Supreme Court said that the case was all but ruled by the earlier decisions in *DPP v Kemmy* and *DPP v Collins* [1981] I.L.R.M. 447), *DPP (O'Reilly) v Barnes*, *Ruttledge v Clyne*, *DPP (O'Brien) v Hopkins* [2009] IEHC 337 (distinguishing *DPP v Freeman* as the flaw related only to the label on the container and not the certificate to be put in evidence) and *DPP v Kennedy*, *DPP (Myler) v Mullins* [2015] IEHC 695.

30. O'Malley J. commenced the discussion element of her judgment by accepted the propositions put by the parties that the court was dealing with a penal statute that must be strictly construed by the courts and strictly complied with by members of An Garda

Siochána. She identified the issue as "whether a "strict" approach means, in the circumstances of any given case, that identification of a particular defect has the consequence of invalidating the prosecution evidence". She said it was a striking feature of the debate that the submissions and authorities on each side only focused on cases involving Road Traffic prosecutions and did not refer to the broader criminal law where comparable issues would generally be dealt with according to principles relating to the adequacy of the prosecution evidence or the admissibility of improperly obtained evidence. She distinguished the cases where improperly obtained evidence amounts to a constitutional violation and those where an illegality is at issue, reference to *People (DPP) v J.C.* [2015] IESC 31, [2017] 1 I.R. 417 and *People (Attorney General) v O'Brien* [1965] I.R. 142. The latter case involved an exercised of judicial discretion.

31. O'Malley J. referred to the judgment of O'Higgins J. in *Mullins v Harnett* [1998] 4 I.R. 426 where the implications of a strict construction were examined. O'Higgins J. quoted Bennion, *Statutory Interpretation*, (2 edn, Butterworths, 1992) to say that the principle against doubtful penalisation came into play whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any court. If the detriment is minor, it will carry little weight. This passage was endorsed by Hardiman J. in *Montemuino v Minister for Communications* [2013] IESC 40. O'Malley J. held that the issue was whether the application of those principles has the consequence that the use of the statement in the format described means that the statutory conditions precedent to the imposition of criminal liability have not been met.

32. O'Malley J. stated that the was clear that use of the defective statement in that case did not in any way impinge on the clarity of the legislative definition of the offence with which the appellant was charge and thus the principle against "doubtful penalisation" was not relevant. The production of the statement did not in itself create any criminal

liability, or impose any detriment. It was a piece of evidence that could be sued to establish liability, and the issue was simply one of admissibility and adequacy with respect to that purpose.

33. O'Malley J. then stated:

> "Secondly, the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory scheme if:-
>
> > (i) A precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or
> >
> > (ii) The power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or
> >
> > (iii) The power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or
> >
> > (iv) The power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove."

34. It was then stated by O'Malley J. that although the context within which disputes about the admissibility of evidence has undoubtedly been altered by the judgments of the Supreme Court in *People (DPP) v JC*, the decisions she had referred to in relation to the first two categories were not in question in the case before her. She said that the powers conferred by the 2010 Act must accordingly be exercised within the statutory context and in accordance with the statutory conditions and those powers could not be added to by error on the part of a garda.

35. It is then that O'Malley J. turned to the issue of "due completion" of the statutory forms. She said that it was likely that those disputes would fall into either the third or fourth category. The latter category presented a simple enough situation – if the form had been filled in so inadequately as to fail to prove the requisite matters, either in whole or in part, it will to the same extent lose the benefit of the evidential status conferred by the 2010 Act.

36. Of significance to the present case, O'Malley J. stated as follows:

> "The third category may be more complex. Having regard to the authorities, there should in my view be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible. If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible. My own view, therefore, would be that both *McCarron v. Judge Groarke* (High Court, Kelly J., 4 April 2000) and *Director of Public Prosecutions v. Freeman* [2009] IEHC 179, (Unreported, High Court, MacMenamin J., 21 April 2009) should be regarded as being at the far end of the spectrum of insistence upon the letter of the statute."

37. Referring to *McCarron v Groarke*, O'Malley J. then set out her views that if the defendant had not in fact been informed of his right to take and retain a sample that would have been a clear breach of the statutory protection of his fair trial rights but in

light of the fact that he had been informed, had taken the sample and had given it to his legal represented there was no breach of his fair trial rights.

38. O'Malley J., in passages relied upon by the prosecution, proceeded to say as follows:

> "Similarly, it is correct to say that in *Director of Public Prosecutions v. Freeman* [2009] IEHC 179, (…) the form proffered to the defendant for signature was not, at that point, a "duly completed" form. After all, the form would have no evidential status if not signed by the garda. If the defendant had refused to sign it unless the garda did so first, it is difficult to imagine that he could have been prosecuted for such refusal. However, in circumstances where the garda signed it immediately after the defendant, it is again hard to see any impact upon the fairness of the trial of the offence with which the defendant was charged.
>
> I bear in mind here the consideration, which obviously influenced MacMenamin J., that a person in this situation signs the form under pain of prosecution in the event of a refusal to sign. However, it is important to note that the signature is simply for the purpose of confirming receipt. It cannot be held to amount to approbation of the contents - the defendant is neither accepting nor warranting the accuracy of the content of the statement. The fact that there is a legal compulsion to sign does not, in my view, necessarily relate to or justify a conclusion that a flaw in the form means that it should be excluded." (para 96-97)

O'Malley J. then made the conclusions set out above: the form ought to have contained the Irish language version but that there was no reason the form could not be admitted into evidence.

<u>Discussion & Decision</u>

39. This Court, as was the Circuit Court, has been presented with a different Supreme Court authority by each party followed by a submission that the principle of *stare decisis* requires the Court to follow the particular decision upon which they rely. It is quite striking that the two Supreme Court decisions were delivered within four years of each other.

40. The DPP's submission on the doctrine of *stare decisis* is apparently, directed towards there being "a basis for re-visiting the Supreme Court decision in *Freeman*". The submission refers to *In re Worldport Ireland Ltd* [2005] IEHC 68 and to the principles stated therein which dictate that a judge of a court of first instance is bound by the decisions of a judge of the same court unless there are substantial reasons as to why the first decision was incorrect.

41. In the DPP's submission, the *Avadenei* case and the analysis of the approach to prejudice outlined therein represent a radical re-framing of the jurisprudence in cases of implementing statutory procedures in cases of intoxicated driving and a "significant advancement" of the law. The DPP refers to *People (DPP) v J.C.*, where O'Donnell J. (as he then was) stated that a court has the power to reverse an earlier decision but it should not do so in general, "simply because it comes to a different conclusion, but only where the previous decision is clearly wrong, and moreover, cannot be said to have become inveterate, or become the basis of a shared understanding of the law." The DPP also relied upon the dicta of the Court of Appeal in *People (DPP) v Redmond* [2009] IECCA 64 referred to the limited value of ex tempore decisions as precedents for other cases.

42. On the other hand, the defendant relied upon *M and others v. Minister for Justice* [2018] IR 417 in which the Supreme Court gave judgment on issues arising in the context of immigration matters from the constitutional status of the unborn. The Supreme Court

had been referred to judicial observations in cases arising both before and after the passage of the Eighth Amendment which acknowledged the right to life of the unborn and noted that it was required, because of the arguments made in the case, to look closely at what was and was not said and decided in those cases. The Supreme Court noted that the case before them was important in its immediate legal context but it also raised important issues relating to the function of the court when considering novel issues of law particularly in the field of constitutional interpretation. The Court went on to address the principle of *stare decisis*. I disagree with the DPP's submission that because *M and others v. Minister for Justice* concerned constitutional interpretation that what was said about stare decisis has no relevance. On the contrary, the Court specifically said that the principle of *stare decisis* is "an essential part of the common law system of law". It is the common law principle that is applicable here. The Supreme Court stated that "[t]he fact that is it only the central reasoning leading to the particular decision (in Latin the *ratio decidendi*) which forms a binding part of the court's decision having effect beyond the individual case is, of course, a familiar part of the principle of stare decisis which itself is an essential part of the common law system of law."

43. In light of the DPP's comments about the "radical re-framing of the jurisprudence" in this area and the submission that there is a basis "for re-visiting the Supreme Court decision in *Freeman*", it is appropriate to quote the following clear statement of the Supreme Court concerning importance of the *ratio decidendi in extenso*:

> "The fact that a ratio is binding provides the element of certainty and predictability: the limitation of the binding nature of a decision to the ratio provides some necessary flexibility. But in addition to that, the limited nature of the ratio decidendi can be seen itself as an important component of the

judicial function more generally, derived from the separation of powers. Law may in some sense be made by judicial decision, but even in the most important case raising issues of obvious national consequence, which may inevitably be the subject of active public and political debate, law made by courts is always made indirectly, and only because it is a necessary and indeed essential consequence of the performance of the judicial function of resolving the particular dispute. The intense focus of adversarial argument on such core issues provides in addition the best assurance that the decision made can properly bind citizens and others whose legal situation may be identical, but who have not been party to the proceedings, and had no right or entitlement to participate or make representations in relation to it. This analysis of the importance of the ratio decidendi is not to depreciate the value of considered ancillary observations made in the course of a judgment, (and again in Latin *obiter dicta*). In many cases these statements have been accepted subsequently as anticipating developments in the law and expressing principles of value. However, it is essential to appreciate the distinction between the two."

44. The Supreme Court in *M v Minister for Justice* accepted that *obiter dicta* were not to be disregarded. The court's task then becomes a consideration as to whether the judicial observations, detached as they are from the core focus of the case in which they were made, are nevertheless correct and can properly be applied when an issue is properly raised which it is necessary to decide in order to resolve the dispute between the parties.

45. Added to that statement of the Supreme Court must be that the principle of *stare decisis* also places obligations on courts of lesser jurisdiction to follow binding precedents set by courts of higher jurisdiction. All courts are bound to follow the *ratio decidendi* of Supreme Court decisions. That is a fundamental part of the system of law in this

jurisdiction and there are risks for legal certainty if that is not followed. The following of precedent does not mean that even clearly erroneous decisions of the Supreme Court must be followed in perpetuity. The Supreme Court has stated that "the rigid rule of *stare decisis* must in a Court of ultimate resort give place to a more elastic formula" (Kingsmill Moore J. in *Attorney General v Ryan's Care Hire Ltd* [1965] IR 642). The circumstances in which the Supreme Court may decline to follow its earlier precedent are exceptional (See *State (Quinn) v Ryan* [1965] I. R. 70 dealing with constitutional interpretation and *Attorney General v Ryan's Car Hire Ltd* dealing with all other areas of law). Walsh J. said in *State (Quinn) v Ryan* that "This is not to say, however, that the Court would depart from an earlier decision for any but the most compelling reasons. The advantages of stare decisis are many and obvious so long as it is remembered that it is a policy and not a binding, unalterable rule."

46. It is not necessary here to refer to any of the numerous cases in which the Supreme Court has been asked to overrule itself. An important point was made by Henchy J. in *Mogul of Ireland Ltd v Tipperary (North Riding) County Council* [1976] IR 260 when he said "…it is implicit from the use in that judgment [*Attorney General v Ryan's Car Hire Ltd*] of expressions such as "convinced" and "for compelling reasons" and "clearly of opinion that the earlier decision was erroneous" that the mere fact that a later Court, particularly a majority of the members of a later Court, might prefer a different conclusion is not in itself sufficient to justify overruling the earlier decision."

47. That the Supreme Court has the power to overrule itself where it is convinced that the earlier decision was erroneous does not mean that judges in the lower courts are free to do so even when they are equally convinced that a decision is erroneous. The Circuit Court judge in the present case indicated his preference for the reasoning in *DPP v Avadenei* over the decision in *DPP v Freeman* but as he considered *DPP v Freeman*

binding authority, he correctly said he could not override it. Giving the structure of the Court system and the option of the courts of local and limited jurisdiction to state cases to either the High Court or the Court of Appeal, there is (since the Thirty-third Amendment to Bunreacht na hÉireann) no obstacle in principle to those cases which raise points of general public importance (or where it is necessary in the interests of justice) to reach the Supreme Court for the purpose of deciding if there are compelling reasons and it is in the interest of justice to overrule an earlier decision. It is apparent that the principles set out in *Re Worldport*, upon which the DPP has relied, would, in the circumstances of this case, be far more suitably addressed to the Supreme Court than to a court of lesser jurisdiction such as this Court. That decision sets out the principles applicable to courts of equal jurisdiction. In any event, the principles in *Re Worldport* do not seem particularly apt. Apart from an argument about the value of an *ex tempore* decision, which I will address further below, this is not a case where it is being argued that a previous decision had not dealt with a particular legal argument which changed the circumstances in which the decision ought now to be considered or even that a decision of the Supreme Court was clearly *per incuriam* without having considered a prior binding authority. On the contrary, the only issue for this Court is whether the initially binding authority of the Supreme Court in *DPP v Freeman* can be said to have been overturned by the "radical re-framing of the jurisprudence" by the Supreme Court in *DPP v Avadenei*.

48. When one applies the principle of *stare decisis* to the issue in this case, the outcome becomes clear. Even a helpful and considered decision such as that of *DPP v Avadenei,* which sought to discern the principles arising from earlier case law, can only be binding authority to the extent of its *ratio decidendi*. Naturally, the observations made therein which are not part of the ratio must be given careful consideration but if those

observations conflict with an earlier precedent, then a lower court is bound to follow that precedent. In *DPP v Avadenei*, the issue was that the form did not conform to the one required by the regulations. Section 12 of the 2005 Act (and the common law principles it reflected) were applicable to the deviation from the form set out in the regulations. The defect in the form – the omission of that part of it required to be in the Irish language – was not one of substance as all the information required had been given to the person. The provision of the form within that content was not misleading, confusing or unfair in any way to the appellant. No matter how one viewed the general principles of criminal law or of the authorities in the area of Road Traffic Act prosecutions, the Supreme Court held that there was no reason why the form should not be admitted into evidence.

49. Significantly, the decision in *DPP v Freeman* was based on facts which are identical to the facts in this case. The High Court reached a decision on the facts of that case which was that despite the point raised being "wafer thin" and only arising in the most technical of senses, the statutory context was such that where the statement had not been signed by the garda first, it was not a duly completed statement and the statutory presumption that it amounted to sufficient evidence in any proceedings under the Road Traffic Acts did not apply to it. This was not a deviation from the form used.

50. One of the arguments put forward by the DPP as to why the principles in *DPP v Avadenei* are to be applied in this case instead of that in *DPP v Freeman* was that the later decision was given *ex tempore*. In those circumstances the DPP submitted it did not have the same status as a considered decision. There is indeed reason for courts to be cautious in giving to *ex tempore* judgments their full value as precedents. In *DPP v Redmond*, in a passage relied on by the DPP, the Court of Appeal (Murray J.) in, somewhat ironically, an *ex tempore* judgment, said with respect to such judgments that

"[g]enerally speaking, they do not analyse and recite *in extenso* the principles of law to be applied and they do not necessarily analyse all the other factors that are pertinent to the case. They tend to confine themselves to the application of general principles to resolve the particular issues in the case".

51. It must be noted however that the Supreme Court decision in *DPP v Freeman* upheld a reserved written decision of the High Court in which the relevant cases and the general principles arising from them were discussed before the conclusion was reached. The Supreme Court in the note of its decision said that for the reasons set out in the High Court judgment the trial judge had been correct and the Supreme Court would not interfere with the answers to the questions posed. In the absence of any indication that this is not what the Supreme Court said, it is apparent that the Court was satisfied with the fully reasoned judgment of the High Court. This is unlike the situation where a High Court or even Court of Appeal decision is given *ex tempore*; in those cases, it is more likely that the *ex tempore* decision is delivered in circumstances where no previous reserved judgment exists. I view this as a factor which would indicate that this particular *ex tempore* decision has a greater value as a precedent which a lower court ought to follow. Its value before the Supreme Court may be more limited.

52. That is not the only difficulty with the DPP's argument that this Court (and the Circuit Court) ought to reject the decision in Freeman and see the principles in *DPP v Avadenei* "as a new starting point for cases where this issue arises". The DPP argues that the principles therein are "a significant advancement in the law since the Supreme Court decision in Freeman" and were arrived at after a thorough and extensive examination of the case law. That submission – and the submission that the principles are a radical re-framing of the jurisprudence – can only be based on a view that the Supreme Court

in *DPP v Avadenei* were overruling the decision in *DPP v Freeman*. The careful wording of the judgment does not bear that out.

53. In the first place, nowhere in her judgment does O'Malley J. say that she is overruling the decision in *DPP v Freeman*. As noted above it is curious that there is no mention of the Supreme Court decision. I am satisfied however that the Supreme Court hearing the case of *DPP v Avadenei* were aware of the fact that the Supreme Court had upheld the decision of the High Court (MacMenamin J.) in *DPP v Freeman*. The written submissions of the appellant in *DPP v Avadenei* made express reference to that fact. As the Supreme Court was aware of its earlier decision, then, given the importance of the policy of *stare decisis* in our system, it would be highly surprising if the Supreme Court would have overruled an earlier decision, given less than four years previously, *sub silentio*. Such an approach, I consider, would be more harmful to legal certainty than a judgment which pointed out that an earlier decision had been wrongly decided and was not to be followed. In my view therefore that was not the approach that the Supreme Court took in the particular case.

54. Secondly, and contrary to the submission that *Avadenei* overturned *Freeman*, O'Malley J. said that *DPP v Freeman* (and *McCarron v Judge Groarke*) "should be regarded as being at the far end of the spectrum of insistence upon the letter of the statute". The use of the word "spectrum" implies a continuum. Thus, this is a statement that those cases were within the range of outcomes permitted under the principles outlined. Those cases were not said to be "outliers", a designation which may, but not necessarily, imply that they were outside the set of principles concerned. Even within the context of the decision itself there is, therefore, no statement that the High Court decision in *DPP v Freeman* was wrong or incorrect or not to be followed.

NO FURTHER REDACTION NECESSARY

55. Thirdly, there was also an acknowledgment that the third category may be more complex. In other words, it is not possible to find a simple solution that fits all circumstances. Yet, the High Court and, on appeal, the Supreme Court, found in *DPP v Freeman* that the particular set of circumstances there, which are identical here, meant that the statement not being duly completed could not avail of the statutory presumption of admissibility in proceedings under the Road Traffic Act and was not sufficient evidence of compliance.

56. The DPP relied upon views expressed by O'Malley J. that the fact that there is a legal compulsion to sign does not necessarily relate to or justify a conclusion that a flaw in the form means that it should be excluded. The defendant says that because O'Malley J. expressly said "in my view" that this cannot be taken as an expression of the Supreme Court's view. I disagree with the defendant's submission in that regard. If a judge expresses a view in a judgment and her colleagues expressly agree with the judgment, they must be taken as agreeing with that view. That being said, what was said at the relevant point in *DPP v Avadenei* was merely an expression of the Supreme Court's view in relation to a particular case that was not before it, a judicial observation as it were, that is not binding on any court dealing with that issue in the future. It was, in short, an *obiter dictum*. Such an observation must of course be given careful consideration. If there was no other Supreme Court decision expressing a contrary view, then, in light of the principles set out in *Avadenei*, those observations may be very beneficial in the development of the law by future decisions considering a case involving those facts. This is not the position here. This Court and the Circuit Court must apply the binding precedent of *DPP v Freeman* over the *obiter dicta* observations of the Supreme Court in *DPP v Avadenei*.

57. Finally, it must be observed that at no point was this Court asked to consider whether the intervening judgment of *The People (Director of Public Prosecutions) v J.C.* had any relevance to the consideration of the issues in this case. The DPP referred to other cases such as *The People (DPP) v McAreavy and Smyth* [2022] IECA 182 which dealt with the admissibility of evidence alleged to have been obtained unlawfully and in breach of the privacy rights of the accused. A balancing test between the weighted public interest and common good was said to comprehensively outweigh any limited privacy rights. The issue in *DPP v Freeman* (and in this case) was not a balancing of interests – in reality there was little, if anything, to balance on the defendant's side – but a question of whether the statutory presumption applied to permit this statement which was *not duly completed* to be accorded the statutory presumption set out in (now) s. 20 of the 2010 Act. This was not a matter of "admissibility" of illegally or unconstitutionally obtained evidence *per se* but a question of whether this statement, which was not duly completed, could amount to "sufficient evidence" of the facts stated in it or of compliance with the relevant requirements under statute. The Supreme Court in *DPP v Freeman* held that it was not sufficient evidence given the statutory context and the circumstances of the case.

58. For the reasons set out above, I am of the view that the decision of the Supreme Court, upholding the decision of the High Court in *DPP v Freeman* remains binding authority on the Circuit Court judge. The question posed by the judge of the Circuit Court must be answered in the negative.

As this judgment is being delivered electronically, my colleagues McCarthy and Kennedy JJ. have authorised me to record their agreement with the judgment and the answer proposed

NO FURTHER REDACTION NECESSARY