[2019] IEHC 723

THE HIGH COURT

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

[2018 No. 262 SS]

BETWEEN

HEALTH PRODUCTS REGULATORY AUTHORITY

PROSECUTOR

-AND-

ANNE ROSSI

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 4th day of November, 2019.

Introduction

1. This is a consultative case stated made pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act, 1961 for the opinion of this court on two questions posed by Judge John Brennan of the Dublin Metropolitan District Court on 30th June, 2017. The court has been informed that the case was stated on the application of the defendant. It concerns the prosecution of the defendant in respect of offences alleged to have been committed contrary to certain regulations made under the provisions the Irish Medicines Board Act, 1995 as amended by the Irish Medicines Board (Miscellaneous Provisions) Act, 2006 (referred to herein as "*the Act*"). The prosecutor is the Health Products Regulatory Authority (previously known as the Irish Medicines Board and hereafter referred to as "*the Authority*"). The Act makes provision for the appointment of authorised officers upon whom certain powers are conferred, including powers of entry, search and to require information and assistance.

2. The offences are alleged to have occurred on various dates between 20th November, 2014 and 19th February, 2015. It is alleged that the defendant supplied a prescription only product and placed a medicinal product on the market without a necessary prescription. The product is Dysport, which is manufactured in Wales by Ipsen. It contains Botulinum Toxin A and is commonly known as Botox, a prescription only drug. It is used to treat certain muscular conditions but, in a more purified form, is used cosmetically by blocking certain nerves that contract muscles, thus softening the skin and reducing the appearance of wrinkles.

3. The defendant is a state registered nurse who conducts business as a beautician at her premises known as the Anne Rossi Clinic *("the Clinic"),* Clontarf, Dublin. The Authority alleges, inter alia, that the defendant provided Botox treatments as part of her service without having necessary prescriptions from doctors. A number of witnesses have given evidence to the District Court regarding treatments which they received. Medical evidence has also been given. It is claimed that her registration does not authorise her to administer Botox.

4. The prosecution originated from a statement taken from a client of the defendant who claims that she received Botox treatment at the Clinic. On the 19th February, 2015, authorised officers employed by the Authority seized a quantity of Dysport during a search of the Clinic. It is alleged that an offence was committed on the date of the search

and on dates when customers attended and availed of Botox treatments. The authorised officers took a cautioned statement from the defendant when they were on the business premises.

5. The defendant maintains that the prosecution is not in a position to offer any direct evidence to prove the allegations that she was in possession of a product containing the said substance on any of the dates particularised save only on the 19th February, 2015, being the date of the search. Consequently, it is submitted that the issues that arise concern the powers purportedly exercised by the Authority's employees including*, inter alia*, the interview conducted during the search and the handling and testing of the samples.

6. Counsel for the defendant, Mr. Bradley S.C., submits that central to understanding the objections taken by the defendant is that the regulatory authority has exceeded its powers and seeks to rely upon a form of nonspecific authority which is claimed to be found in the general body of the criminal law and criminal procedure. Fundamentally, the Authority is a creature of statute and is obliged to act within its statutory powers. To this end, it is argued that the Authority is engaged in a form of reprobation and approbation, essentially choosing to rely on its statutory powers when it suits and abandoning the statutory framework when it does not. He suggests that there is a long-standing distinction between regulatory and criminal codes and refers to the Law Reform Commission Issue Paper, 2016 entitled *"Regulator Enforcement and Corporate Offences*", which addressed the issue of standardising regulatory powers. Counsel observes that the Authority joined in submissions with other regulatory bodies and argued that the lack of a standard set of procedures for regulators has led to the absence of a reliable set of precedents that can apply to enforcement powers exercised by all agencies.

The findings and the questions posed

7. The District Judge made the following findings of fact.

   i) The Authorised Officers entered the defendant's home on foot of a valid search warrant.

   ii) No issue was made in respect of items seized from the house (or the admissions made by the defendant in the house).

   iii) The Authorised Officers entered the defendant's business premises pursuant to statutory powers.

   iv) While present on the premises they took possession of a box of Dysport and three vials (one of which was empty).

   v) While present on the premises, the defendant was interviewed under caution on a voluntary basis and no statutory power was invoked to question her.

   vi) The products were not sent to the State Chemist for analysis because it was not possible to have it analysed in the State Laboratory.

vii) In those circumstances, a decision was made to send the products to the manufacturer, Ipsen, for analysis.

viii) There is no issue in respect of the chain of evidence save and except issues relating to the handling of the sample. In this regard the following submissions are recorded at para. 19(b) of the case stated. The product was not handled in accordance with the sealing requirements of s. 32C(1) and s. 32C(4) of the Act. The prosecutor could not have complied with the provisions of s. 32C(4) as there was an intervening act between the sealing and marking of the container as required by s. 32C(4)(b) and the requirements of s. 32C(4)(c). In October, 2015 the sealed container was opened or unsealed by Mr. McCarthy. He removed items and placed them into another bag. The removed items were then brought to Ipsen in Wales. The evidence in that regard (which has not been contradicted) confirms that if the authorised officer complied with the provisions of s. 32C(4)(b) and forthwith sealed and marked the container identifying it as a *"relevant thing"* taken pursuant to the section, the authorised officer did not then forward or caused to be forwarded the sealed container for test examination or analysis of the *"relevant thing*" by a person mentioned in s. 32D(1)(a)(b) or (c). As the *"relevant thing",* whether processed in accordance with s. 32C(4)(b) or not, was in fact unsealed and repackaged before it was forwarded or caused to be forwarded. Therefore, it was submitted that no sealed container as envisaged by the statutory scheme was forwarded or caused to be forwarded for test examination or analysis as envisaged.

8. The questions posed by the District Judge are as follows:-

i) "In the absence of a report as contemplated by s. 32D(1) can the statutory offences in this case be proven by the Ipsen Report and other evidence?

ii) Are the admissions made by the defendant during a voluntary cautioned interview admissible in evidence in circumstances where I am satisfied that the admissions were voluntary, but no statutory provision was invoked to interview the Defendant?"

It was confirmed at hearing that reference to the word *"report"* in the first question means and was intended to mean a "*certificate*" as described in s. 32 D(1) of the Act.

The Ipsen Report

9. The Ipsen report is self-described as a report on analysis of samples of Dysport 500 U/VIAL. The sample was provided by Mr. Niall McCarthy. He is an authorised enforcement officer with the Authority. The report covers the receipt and testing of the sample by Ipsen in its QC Analytical Laboratory, which is the same laboratory used for release testing of the product. It also covers the nature of the testing and provides analysis and results of the testing. Various test results and analytical reports are attached. Mr. McCarthy was questioned regarding the division of the sample into three parts and he explained that "*there was an insufficient amount of the product there*…", although it appears that he did split the sample. The case stated records that *"it was put to him that*

the Act then allows for the taking of the entire sample. He said, if there is a greater quantity, a sample is given back to provide for independent analysis." He accepted that there was no certificate of the results as is provided for in the Act.

The Statement

10. The defendant's statement was taken under caution by Mr. McCarthy and he was assisted by Mr. Smullen, another authorised enforcement officer. It is in detailed question and answer format. The defendant was asked many questions relating to the nature of the procedures conducted at the clinic, the administration of Botox to clients, her acquisition and use of Dysport, its administration without the presence of a medical practitioner and her knowledge of the requirement for prescriptions. It is recorded at the end of the statement that the defendant confirmed that she had read it over and that she had been informed that she could make additions or corrections that might be thought necessary. She confirmed that the statement was correct. It was signed by her and witnessed by Mr. McCarthy and Mr. Smullen. The District Judge found that the defendant was interviewed under caution on a voluntary basis and no statutory powers were invoked to question her.

11. Mr. McCarthy's evidence, as outlined in the Case Stated, is that he applied to the District Court for a search warrant of the defendant's private dwelling. This was granted and on 19th February, 2015, a search was conducted which proved negative. The defendant advised him that the product was kept at her business premises. He informed her, in accordance with s. 32B(3) of the Act, that the Authority had the right to enter business premises if of the belief that activities of sale, supply, administration or distribution were taking place on the premises. Although informed that she was not obliged to attend the premises, the defendant confirmed that she would facilitate entry. Mr. McCarthy gave evidence that he entered the premises and found three vials of Dysport which were in a fridge identified to him by the defendant. The contents were seized by another officer and Mr. McCarthy continued his search. He found a number of lever arch folders which contained trading and purchase documents. It is recorded in the case stated that Mr. McCarthy invited the defendant to provide a statement under caution which she duly did. Under cross-examination in the District Court he accepted that when the defendant signed the cautioned statement, no reference was made to legal advice or the powers he was exercising when taking the statement. However, he confirmed that Ms. Rossi was not under arrest and that it was an interview under caution. He maintained that he did not have to invoke a statutory power to interview her and that she understood that there was no requirement on her to speak with him. Mr. McCarthy accepted that prior to the search a discussion took place and the officers agreed who would conduct the interview. He confirmed that it was standard that such decisions would be taken prior to an operation and described the possibility that an interview would take place if something of interest was found but if nothing was found, then no interview would occur. Thus, it is clear that Mr. McCarthy contemplated potentially interviewing the defendant and he was prepared to do so prior to entering the premises. Counsel for the defendant places emphasis on the pre-planned nature of the operation and division of responsibility.

12. Mr. Smullen's evidence is also recorded. He assisted with the interview. His evidence is that the defendant was cautioned and that she indicated that she understood the caution. She was asked questions and volunteered answers. She read back over her statement and signed it without expressing a wish to make any changes. No complaints were made by her. Mr. Smullen stated that the inspection of the premises took place pursuant to the statutory powers under s. 32B(3) of the Act. He accepted that he was familiar with the provisions of s. 32B(3)(e) but agreed that they were not invoked. His understanding was that use of the section was only necessary if a person declined to furnish information and *"that he did not inform the defendant of the section as she was voluntarily providing the information".* He is also recorded as stating that with most searches who would "*do what jobs"* is pre-planned. He knew in advance that Mr. McCarthy and he would conduct any interviews.

The Statutory Framework

13. The Irish Medicines Board Act 1995 was amended by the Irish Medicines Board (Miscellaneous Provisions) Act 2006 which, by virtue of s. 17, inserted ss. 32A - 32F.

14. Section 32B(3) provides, *inter alia*, that for the purpose of the Act, an authorised officer may:-

> *"(a) Subject to subsection (5), enter (if necessary by the use of reasonable force), at all reasonable times, any premises at which he or she has reasonable grounds for believing that-*
>
> *(i) any trade, business or activity connected with the manufacture, processing, disposal, export, import, distribution, sales, supply, storage, packaging or labelling of any relevant thing is or has been carried on, or*
>
> *(ii) books, records or other documents (including documents stored in non-legible form) relating to such trade, business or activity are kept….*
>
> *(e) …require any person at the premises or the owner or person in charge of the premises and any person employed there to give to him or her such assistance and information and produce to him or her such books, records or other documents (and in the case of documents or records stored in non-legible form, produce to him or her a legible reproduction thereof) that are in that person's power or procurement, as he or she may reasonably require for the purposes of his or her functions under this Act."*

15. The Act empowers authorised officers to take copies and remove books and records. It is accepted that the entry effected by the Authority was in accordance with the statutory provision and was lawful. However, the defendant maintains that having entered the premises by lawful means, the Authority's officials thereafter conducted their business by unlawful means. Counsel for the defendant maintains that s. 32B(3)(e) is the only statutory power entitling officers of the Authority to question or interview a suspect.

Central to the defendant's case is that where a statement is obtained in accordance with a requirement made under s. 32B(3)(e), it is deemed to be inadmissible by virtue of s. 32B(9), which provides:-

> *"A statement or admission made by a person pursuant to a requirement under subsection (3)(e) shall not be admissible as evidence in proceedings brought against that person for an offence (other than an offence under subsection (7)"*

16. Section 32B(3)(f) empowers an authorised officer *"without payment*, [to] *take samples of any relevant thing found at the premises for the purpose of any test, examination or analysis."*

17. Section 32B(3)(i) empowers such officer:-

> *"…without payment, take possession of and remove from the premises for any test, examination or analysis any relevant thing found there, and detain it for such period as he or she considers reasonably necessary for the purposes of his or her functions under the Act"*

18. Section 32B empowers an authorised officer to demand a person's name and address. A number of obstruction offences are described in s. 32B(7)(a). Section 32C makes provision for the taking of samples and what is to be done with those samples. Section 32D makes provision for certification of test results.

19. The aforementioned sections provide:-

> *"32C.— (1) Subject to subsection (3), where an authorised officer takes a sample of a relevant thing pursuant to section 32B(3)(f) or (j), he or she shall—*
>
> *(a) divide the sample into 3 approximately equal parts,*
>
> *(b) place each part into separate containers, and*
>
> *(c) forthwith seal and mark each such container in such a manner as to identify it as part of the sample taken by that authorised officer.*
>
> *(2) Where an authorised officer has complied with subsection (1), he or she shall—*
>
> *(a) offer one of the sealed containers to the owner or person for the time being in charge or possession of the relevant thing from which the sample concerned was taken,*
>
> *(b) retain one of the sealed containers, and*
>
> *(c) forward, or cause to be forwarded, one of the sealed containers for test, examination or analysis of the sample concerned by a person mentioned in section 32D(1)(a), (b) or (c).*

(3) Where a relevant thing is contained in a container and its division into parts pursuant to subsection (1) is, for whatever reason, not practicable, an authorised officer, who wishes to take samples of such relevant things for the purposes of any tests, examination or analysis shall take possession of 3 such containers belonging to the same batch, and each such container shall be deemed to be part of a sample for the purposes of subsection (1), and the provisions of subsections (1) and (2) shall apply thereto accordingly.

(4) Where an authorised officer takes a relevant thing pursuant to section 32B(3)(k), he or she shall—

(a) place the relevant thing in a container,

(b) forthwith seal and mark the container in such a manner as to identify it as a relevant thing taken pursuant to that section, and

(c) forward, or cause to be forwarded, the sealed container for test, examination or analysis of the relevant thing by a person mentioned in section 32D(1)(a), (b) or (c).

32D.— (1) In any proceedings for an offence under this Act, a certificate in the form specified in Schedule 2 to this Act signed by—

(a) either—

(i) the State Chemist, or

(ii) another chemist employed or engaged at the State Laboratory and authorised by the State Chemist to sign the certificate,

(b) either—

(i) a public analyst appointed under section 10 of the Sale of Food and Drugs Act 1875 , or

(ii) another analyst authorised by such a public analyst to sign the certificate, or

(c) a chemist or analyst appointed by the Board or the Council of the Pharmaceutical Society of Ireland, stating the result of any test, examination or analysis of a sample of any relevant thing, or of a relevant thing, as the case may be, forwarded under section 32C(2)(c) or (4)(c) shall, with regard to that sample of the relevant thing, or the relevant thing, as the case may be, be evidence of the matters stated in the certificate unless the contrary is proved.

(2) In proceedings for an offence under this Act, a relevant thing, or a package containing a relevant thing, that purports to bear the name of the manufacturer or importer of that thing, or of the person who placed that thing on the market, shall, unless the contrary is proved, be evidence that the relevant thing was

manufactured or imported, or placed on the market, as the case may be, by the person so named.

(3) In proceedings for an offence under this Act, a relevant thing, or a package containing a relevant thing, that bears a trademark shall, unless the contrary is proved, be evidence that the thing was manufactured by the person who at the time of the alleged commission of the offence owned that trademark.

(4) In this section, ' trademark ' has the same meaning as it has in the Trade Marks Act 1996."

Submissions of the defendant

20. The defendant contends that three issues arise, although distilled into two questions, and that in each case the Authority has departed from the statutory procedures and adopted procedures of its own. First, it departed from procedures by interviewing the defendant during the search. Second, by mishandling the evidence and departing from the statutory and regulatory code as it relates to the collection of samples and their subsequent testing. Third, by proceeding in the absence of the required certificate of analysis, it is argued that the manner in which the prosecutor seeks to prove its case is outside its statutory powers. The Authority is a creature of statute and must act intra vires. The defendant protests that it is wrongly claimed by the Authority that where the actions are not specifically authorised, it can resort, as some form of residual support, to the wider body of criminal or common law as it applies in criminal proceedings.

21. The principal arguments made skilfully by Mr. Bradley S.C. are as follows:-

i) In *DPP v. Kemmy* [1980] I.R. 160 O'Higgins C. J. stated:-

"Where a statute provides for a particular form of proof or evidence on compliance with certain 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 the 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."

This applies to all penal statutes.

ii) The prosecution took a sample of a relevant thing under the provisions of s. 32B, but this sample was not handled in accordance with the strict requirements laid down by s. 32C (i) and particularly (iv).

iii) While the relevant thing was seized, placed into a container and sealed, it was subsequently opened and therefore remained unsealed.

iv) It would not have been possible for the prosecutor to forward the sealed container for test, examination or analysis by a person mentioned in s. 32D.

v) The Authority has not complied with the provisions of s. 32D. The process adopted by the prosecutor is *ultra vires* amounting to a self-selected non-statutory process.

vi) The container was not forwarded to a specified person in accordance with the mandatory provisions of the Act. It was not analysed by a person described in the section. Section 32D concerns certification of the results of tests and analysis and the means by which the offence is ultimately proven.

vii) By departing from the procedures envisaged by the Act, the prosecutor is circumventing a multitude of mandatory requirements and strict legislative procedures. It is argued that it is incorrect for the Authority to contend that because the sample could not be analysed it could depart from the certificate process. Subsection (c) provides a mechanism for circumstances where persons described at (a) and (b) cannot undertake the analysis and therefore the prosecutor *"has entirely ignored the gateway provision and mechanism for departing in subs. (c)"*. The provisions of s. 32D cater for alternate analysis which was ignored and disregarded. Officers could have consulted with the Authority and secured permission for the analysis to be carried out by a person so authorised. There is no evidence that the prosecutor is unable to analyse the sample. It is submitted that the prosecutor is attempting to proceed on inadmissible hearsay evidence that one of its officers made such inquiries.

viii) The officers who testified in the District Court deny that they relied on the provisions of s. 32B(e). The inspectors proceeded to "*interview"* the Defendant at her business premises during the course of the search, having utilised their powers of entry. No such power exists, and the officers had no more right to conduct an interview with the defendant than any other person. Irrespective of the caution, the defendant did not have the benefit of the legal rights ordinarily enjoyed by a person interviewed by a member of An Garda Síochána.

ix) The component parts of an interview, including the legal caution, can only be conducted by a member of An Garda Síochána, save for some limited exceptions involving revenue and customs officials. Persons who enjoy powers under statute do not have the right to conduct an interview nor do they have the right to administer a caution. A caution derives from the Judges Rules originally formulated in 1912, which were intended to provide guidance on procedures to be adopted by police officers when detaining and questioning suspects. They relate exclusively to police officers. The right to silence and the right to be advised of such right is protected by the Constitution with the protection lying in the provisions of Article 40.6 where the right to silence is a corollary of the right of freedom of expression. Counsel relies on *DPP v. Finnerty* [1999] 4 I.R. 364 and R. v. *Director of the Serious Fraud Office ex p. Smith* [1992] 3 All ER 456, which was cited with approval by the High Court in *Heaney v. Ireland* [1994] 3 I.R. 593. In *ex parte Smith,* Mustill

J. observed that the right to silence does not denote merely a single right, rather it *"refers to a disparate group of immunities*" which includes, *inter alia:-*

> *"… a specific immunity (at least in certain circumstances which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before trial, or (b) to give evidence at the trial."*

x) The Authority's officers or other persons who have powers provided for by statute cannot have some fleeting, non-descript or ill-defined right to interview suspects. Other provisions safeguard the rights of a citizen including the right to have a solicitor present. It is argued that this right arises either when attending a Garda Station voluntarily or when detained in a Garda Station. There is a legal right to have the interview recorded. An interview is an integral part of an investigation. It is urged that decisions of the Superior Courts such as the *People (DPP) v. Gormley* [2014] 2 I.R. 591 now make it clear that Article 38.1 of the Constitution guarantees the right to trial *"in due course of law and extends to a suspect in custody having a right of access to a lawyer prior to the commencement of interrogation*". There also exist a myriad of legislative provisions which limit the right to silence, all of which are exercisable pursuant to certain powers by An Garda Síochána and not by a body such as the Authority. For example, a suspect is entitled to legal advice before questioning by An Garda Síochána except when *"there are wholly exceptional circumstances involving a pressing and compelling need to protect other major constitutional entitlements such as the right to life*" (see *DPP v. Healy* [1990] 2 I.R. 73 and *People (DPP) v. Gormley* [2014] 2 I.R. 591). An Garda Síochána has issued guidelines entitled *"Code Of Practice On Access To A Solicitor By Persons In Garda Custody*" (April, 2015). There are a number of statutory oversight provisions, in particular the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997. The now common practice of recording interviews of a suspect, it is submitted, whether in custody or not, has its origin dating back to the landmark decision of Hardiman J. in *DPP v. Connolly* [2003] 2 I.R. 1 where he observed:-

> *"the time cannot be remote when we will hear a submission that, absent some extraordinary circumstances (by which we do not mean that a particular garda station has no audio visual machinery or that the audio visual room was being painted) it is unacceptable to tender in evidence a statement which has not been so recorded."*

22. It necessarily follows that absent any power, save and except for the provision of s. 32B(e), the Authority or its authorised officers have no power to conduct their affairs in this manner. Once a state agency is tasked with questioning suspects a panoply of rights require consideration. It was not the intention of the Legislature to permit the Authority to acquire any power in this area. Otherwise such powers would have been expressly stated and contained in the legislation. In passing it should be observed that while counsel

referred to the decision of Hogan J. in *White Maple Developments v. Donegal County Council* [2013] IEHC 83, it appears to me that the sentiments therein expressed were directed at a different issue, namely the statutory procedures for the taking in charge of developments, rather than proof of a criminal offence.

Submissions of the prosecutor

23. Mr. Kennedy B.L., counsel for the prosecutor, submits that the issues in the case stated concern admissibility of evidence in a criminal trial and are not necessarily to be viewed through the prism of *vires*. On the facts as found by the District Judge, the power to enter the defendant's home was properly invoked. No issue arises regarding admissions made in the home or the legality of the authorised officers' attendance and entry on to the business premises. A caution was administered and the defendant was asked questions to which she volunteered answers. The uncontroverted evidence is that no power was invoked compelling the defendant to provide information. Against this stated factual background, the following submissions are made:-

i) The starting point is that all relevant evidence is admissible, and admissibility is governed by the rules of evidence. If the defendant is correct then no statutory authority, including An Garda Síochána, is entitled to seek voluntary co-operation from citizens. The law encourages investigative agencies and An Garda Síochána to seek co-operation before exercising potentially draconian powers which may affect legal and constitutional rights. There is no requirement for a member of An Garda Síochána or an authorised officer operating pursuant to a particular statutory scheme to invoke a statutory power before interviewing an individual under caution. The whole purpose of administering the caution is to convey to the individual that there is no obligation to answer the question. Where a statutory power to require a person to answer has been invoked, then a caution becomes meaningless if the failure or refusal to comply carries penal consequences.

ii) It is a well-established principle that where a person voluntarily cooperates with an investigating authority, the latter does not have to resort to the use of statutory powers of compulsion and such evidence that is gathered is *prima facie* admissible. If the defendant had made an admission to a customer, it would be admissible. The clear finding of the District Judge is that the statement was voluntary and admissible in accordance with the decision of the Supreme Court in *People (DPP) v. Barry Doyle* [2018] 1 I.R. 1. Consideration of various regulatory schemes demonstrate that no statutory investigative agency or body, including An Garda Síochána or the Revenue Commissioners is conferred with an express power to take statements from witnesses, or an express power to interview witnesses under caution. The reason for this is that these processes are voluntary and therefore do not require the exercise of power. Thus, it is submitted, the real issue to be addressed is whether the statement sought to be admitted is voluntary and not whether a statutory power has been invoked. Voluntariness runs through the principles of admissibility of all evidence.

iii) In the context of the exercise of statutory powers, one must first consider whether the power has been invoked and, if so, has it been followed. If there is a deviation from the statutory power, one must then assess the extent of such deviation and whether it impacts on legal or constitutional rights.

iv) The power under s. 32B(3)(e) is discretionary and an officer is never required to invoke all or any of the powers in that section. Co-operation may be sought on a voluntary basis or resort may be had to the invocation of statutory powers. It is submitted that the defendant does not identify what, if any, legal or constitutional right has been breached and further it is contended that the defendant does not engage with the decision of the Supreme Court in *The People (DPP) v. J.C*. [2017] 1 I.R. 417.

v) If there has been an impact on rights of a constitutional nature, then the court must address the question of admissibility in line with the decision of the Supreme Court in *J.C*. In consequence of that decision there is no absolute exclusionary rule in Irish law, that if the statutory process is invalidly invoked or improperly exercised then evidence is automatically excluded.

vi) Where relevant legislation mandates the adoption of a particular procedure, failure to adhere to that procedure will deprive the relevant certificate of evidential value, but this does not have the effect of rendering inadmissible evidence that would otherwise be admissible. The provisions of the Act of 2006 apply only when the prosecutor seeks to rely on certificate evidence. The Authority is not required to rely on the provisions of s. 32D but may opt to do so. It is a statutory provision designed to assist proof of the results of analysis without requiring the attendance of several witnesses involved in that process. As the Authority does not seek to rely on certificate evidence there is nothing to prevent the Ipsen report being admitted in evidence.

vii) Counsel draws an analogy with the certification provisions of the Misuse of Drugs Act 1984 *("the Act of 1984"),* s. 10, the wording of which, it is maintained, is not dissimilar to s. 32. Prior to the enactment of the Act of 1984, the Misuse of Drugs Act 1977 did not allow for proof of the presence of a controlled drug by means other than oral evidence.

viii) In *DPP v. Cullen* [2014] 3 I.R. 30 the Supreme Court expressly recognised that where a statute provides for the use of certificate evidence to circumvent the rule against hearsay, it is permissible for the prosecution to opt not to rely on those provisions and to prove facts in issue by other means. In the *DPP v. Buckley* [2007] 3 I.R. 745 the prosecutor relied on the defendant's admission as proof that the substance was a controlled drug. It did not rely on a certificate. An issue arose as to whether this was permissible, and the District Judge stated a case for the opinion of the High Court. The question was:-

> *"Whether the defendant's admission that the substance recovered from his pocket was cannabis is sufficient evidence that it was such, in a prosecution for possession of a controlled drug to wit, contrary to ss. 3 and 27 (as amended by the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977, in the absence of a certificate of analysis from the Garda Forensic Science Laboratory confirming that the substance was in fact cannabis?"*

Charleton J. held that this was admissible evidence and was sufficient *prima facie* proof that the substance was a relevant controlled drug. I will return to this decision in due course.

ix) Referring to what are described as the analogous provisions of the Road Traffic Act, 1994, and certificates provided by the Medical Bureau of Road Safety under that Act, it is contended that the certificate makes admissible what would otherwise be hearsay. In opting to adduce oral evidence to prove matters which would otherwise be stated in the certificate, the defence is not disadvantaged as all such evidence may be tested. In *Power v. Circuit Judge Hunt & DPP* [2013] 3 I.R. 709, O'Malley J. observed that the certificate in issue in that case was given evidential status only for the purposes of the specified proceedings and had no freestanding legal status. If the prosecution did not seek to rely on it for the statutorily prescribed purposes, it becomes irrelevant. In this regard it is contended that the decision in *Kemmy* concerned whether statutory preconditions were satisfied to render a certificate admissible.

x) No realistic comparison can be made between the powers of statutory regulatory bodies such as the Authority with the powers and duties of An Garda Síochána in the enforcement of the criminal law.

xi) The Judge's Rules address situations where a person is not in custody and serve to demonstrate that a statutory power need not be invoked before an interview takes place. They dictate that when a member of An Garda Síochána is attempting to discover the author of a crime, he may ask questions but when he makes up his mind to charge that person, a caution should be first administered before the question is posed. The remainder of the Rules concern persons in custody. It is the fact of custody which triggers the obligation to administer the caution because a person cannot leave or avoid being subject to the questions which are being put to him or her. This much is evident from in *Buckley v. Convening Authority* [1998] 2 I.R. 454.

Decision

24. I accept Mr. Bradley S.C's submission that, as was stated by O'Higgins C.J. in *Kemmy*, a penal statute must be construed strictly. I also accept that as a matter of statutory interpretation, the authorised officer did not enjoy an express statutory power to seek information save in accordance with and subject to the limitations and restrictions contained in the Act. Nevertheless, I must accept Mr. Kennedy B.L.'s submission that

what lies at the heart of this case concerns the admissibility of evidence, be it the defendant's statement or the report prepared by Ipsen.

25. The statement, described as a statement under caution, was made to an authorised officer. In taking this statement, he did not invoke his powers under s. 32B(3)(e) of the Act. Had he done so then in light of the provisions of s. 32 B(9) the information or statement obtained would be inadmissible. If such powers had been invoked and the defendant refused to comply with the requirements demanded of her, potentially she would be guilty of an offence under s. 32B(7)(e) of the Act.

26. It seems to me that if the defendant had made an unsolicited statement of involvement or guilt to a citizen/member of the public then as a matter of general principle it would be admissible in accordance with the rules of evidence as relate to admissions against interest (emphasis added). If that is the case then where a person in the position of the defendant were to make an unsolicited admission to an authorised officer, can the position be any different? I can see no reason in authority or principle for a difference in approach. In each case such evidence is *prima facie* admissible and it will be a matter for the trial judge to assess the evidence to determine whether it ought to be admitted.

27. What then of the situation where a statement is solicited? In *People (DPP) v. Buck* [2002] 2 I.R. 268, a decision delivered many years before the decision in *J.C.*, Keane C.J. emphasised the requirement that the statement be voluntary and observed:-

> *"The law as to the admissibility in evidence of confessions of guilt has for long been the subject of anxious consideration by courts in this and other jurisdictions. Three propositions are firmly established in our law.*
>
> *(1) A confession, whether made to a police officer or any other person, will not be admitted in evidence unless it is proved beyond reasonable doubt to have been voluntarily made;*
>
> *(2) Even where voluntarily made, a trial judge retains a residual discretion to exclude such a statement where it is made to a police officer otherwise than in accordance with certain procedures, accepted in Ireland as being embodied in the English Judges' Rules;*
>
> *(3) Such a statement will also be excluded where it has been obtained as the result of a conscious and deliberate violation of the accused's constitutional rights." (emphasis added)*

28. In *People (DPP) v. Shaw* [1982] I.R. 1, Griffin J. considered that a statement will be involuntary:-

> "*If it is wrung from its maker by physical or psychological pressures, by threats or promises made by persons with authority, by use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of the diversity of methods which have in common the result or the risk that what is*

tendered as a voluntary statement is not the natural emanation of a rational intellect and a free will." (emphasis added)

29. In light of the above it seems clear that the basic tenet of the rule applies not only to statements obtained by members of An Garda Síochána, but to those obtained by persons in authority. It is reasonable to conclude, in this case, that an authorised officer may be regarded as just that, i.e. a person with and therefore in authority.

30. In *National Irish Bank Limited and the Companies Act* [1999] 3 I.R. 148, inspectors appointed by the High Court pursuant to s. 8(1) of the Companies Act 1990 to investigate and report on improper charging of interest and fees, sought directions as to whether persons from whom information, documents or evidence was sought were entitled to refuse to answer questions, or to provide documents, on the grounds that the answers or documents might tend to incriminate him or them. They sought directions on whether the procedures proposed by them were consistent with the requirements of natural or constitutional justice. Barrington J. stated at p. 188:-

> *"In the course of their submissions, the question arose of what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under s. 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the Drink Driving laws. The inspectors have the power to demand answers under s. 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either. The case of The People (Attorney General) v. O'Brien [1965] IR 142, which deals with evidence obtained in breaches of the accused's constitutional rights has no bearing on the present case. In the final analysis however, it will be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession. In these circumstances, I would uphold the decision of the learned trial judge but would add the statement that a confession of a bank official obtained by the inspectors as a result of the exercise by them of their powers under s. 10 of the Companies Act 1990, would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary" (emphasis added).*

This would seem to be an illustration of the principle that the test for admissibility of a statement is one of voluntariness or, as has been described by Charleton J. in *Doyle, "whether the confession came as the result of a decision by a rational mind that has freely exercised a choice to admit guilt*". Further, it is to be recalled that in *Attorney*

General v. McCabe [1927] I.R. 129, Kennedy C.J. commented at p. 134 that the legal requirement is that the statement be voluntary, not that it be volunteered:-

> *"Though this matter has been much discussed with varying opinion for many years, it is somewhat difficult, and perhaps not desirable, to extract a general positive rule from the judgments and text-writers. It can be posited, however, that it is not the law that a statement must be excluded from evidence on the sole ground that either the statement was made in answer to questions put by a police officer or that it was made without a caution having been first administered. But in such cases it is a matter for the Judge at the trial to decide whether, in his judicial discretion, he will admit the statement or not, having regard to all the circumstances, and observing the legal requirement that the statement shall be voluntary, though not necessarily volunteered."*

It is also to be observed that the Act of 2006 has an "*inadmissibility saver*" that was absent from the relevant provisions of the Companies Act.

31. With regard to the Judge's Rules, I accept counsel for the defendant's submission that as they apply in this jurisdiction they are of fundamental importance having regard to provisions of the Constitution and the right to silence. It is clear, nevertheless, that a statement made in breach of the rules is not automatically inadmissible and the trial judge retains a discretion in relation to admissibility.

32. Counsel for the prosecutor has challenged the defendant to identify any right alleged to have been breached, or potentially breached, by the taking of a statement in such a manner. It is recorded in submissions to this court that in evidence in the District Court it was confirmed that the defendant was advised of her legal rights which I understand to be her right to silence. The defendant submits, however, that she did not enjoy the benefit of the legal rights that ordinarily apply to a person being interviewed by a member of An Garda Síochána, particularly the right to a solicitor and to legal advice, assistance or representation.

33. In *Gormley*, Clarke J., (as he then was), with whom the other members of the court agreed, was *persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process*. He continued at para. 8.8 as follows:-

> *"Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods and, indeed, in certain circumstances, may be exposed to a requirement, under penal sanction, to provide forensic samples. It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only*

be tried in due course of law, therefore, requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in State (Healy) v. Donoghue applies from the time of arrest of a suspect."

34. Clarke J. described the first issue as being whether it was appropriate to regard any part of the investigative stage of the criminal process as forming part of the trial in due course of law. While the ECtHR may have taken such view, he observed that in many civil law countries, the more formal parts of the investigative process, which are judicial, involve prosecutors who have quasi-judicial status. Acknowledging that the line between investigation and trial was not necessarily the same in each jurisdiction, he thought it important to emphasise a potential distinction between a formal investigation directly involving an arrested suspect, and what "*might be termed a pure investigative stage where the police or other relevant prosecuting authorities are simply gathering evidence"* (emphasis added). I believe that this supports the proposition that such principles apply to prosecuting authorities other than An Garda Síochána, such as the Authority in this case.

35. The position was more recently summarised by Denham C.J. in the *People (DPP) v. Barry Doyle* [2017] IESC 1 at para. 4:-

"4. The right of access to legal advisers is well established in our jurisprudence. In The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336, the Court of Criminal Appeal held that a person in detention:

> *'has got a right of reasonable access to his legal advisers and that a refusal of a request to give such reasonable access would render his detention illegal.'*

5. The right of access to a solicitor, when requested by or on behalf of a person in detention, was recognised as being a constitutional right by Finlay C.J. in The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73, where he stated:-

> *'The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.*
>
> *Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and to*

classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give.'

6. Thus, it was recognised over twenty years ago that there is a constitutional right of reasonable access to a solicitor.

7. The constitutional right is grounded in Article 38.1 of the Constitution, which provides that:

'No person shall be tried on any criminal charge save in due course of law.'

8. The protection of a trial in due course of law is not confined to the trial in court but applies also to pre-trial detention and questioning. However, not all rights which are guaranteed for the courtroom apply to pre-trial detention and questioning. For example, the solicitor of an accused is not permitted to have regular updates and running accounts of the progress of an investigation: Lavery v. Member in Charge, Carrickmacross Garda Station [1999] 2 I.R. 390.

9. The concept of basic fairness of process applies from the time of arrest…"

36. In the circumstances, I am not satisfied that it has been demonstrated that a person who is not in custody enjoys a right to have a solicitor present. The defendant was at all times free to leave. On the authorities the right contended for arises as and from the time of arrest.

37. But even if I am incorrect in this analysis, and the defendant enjoys such a constitutional right, or that such a right has been breached, it is difficult to avoid the submission of the prosecutor that in those circumstances, on the application of *J.C.*, the exclusion of such evidence is not inevitable. The elements of the test in *J.C.* were summarised in para. 7 of the judgment of Clarke J. as follows:-

"7.2 In summary, the elements of the test are as follows:-

(i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.

(ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or
(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.

(iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.

(iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

7.3 In my view, the application of that test should also be informed by the matters identified in sections 4 and 5 of this judgment. It is next necessary to consider the application of that test to the facts of this case."

38. The provisions of s. 32B(3) are couched in non-mandatory terms and empower, but do not oblige, an authorised officer to obtain information in a particular manner or in the manner specified in s. 32B(3)(e). In so far as it is suggested that questions may be raised only pursuant to an express power conferred by statute, I do not believe that this is supported by authority. If in truth it is a power, about which the court is not convinced, then the court echoes the sentiments of Finnegan P. in *DPP v. Boyce* [2008] IESC 52, that a power may be conferred by statute, by common law or by consent.

39. I see nothing in the Act which prohibits an authorised officer from asking a question in circumstances where the failure to answer the question has no legal consequences. Nor do I interpret the Act in a manner which suggests that if information is to be elicited, it can only be done in one way.

40. The information was obtained in a solicited manner by a person in authority, and to that extent, it seems to me that the caution assumes some significance on the facts. In my view, had a caution had not been administered, it may have been open to the District Judge to conclude that the statement obtained was not voluntary in the true sense of that term. Further, if for example an authorised officer was to take a statement in circumstances where the defendant was left under the impression that he or she was obliged to answer questions because the authorised officers had entered the premises in accordance with a warrant of authority, it may be open to the trial judge to conclude that such statement is not truly voluntary. Should an issue arise as to whether the officer, by the tone of the questioning or by the trappings of office, led a person under investigation to believe, despite the administration of a warning or caution, that he or she was nevertheless obliged to answer the question, then it would also be open to the trial judge to conclude that the statement was not truly voluntary, or the caution not effective. These will be dependent on the assessment of the evidence. But that does not arise in this case. Here it is accepted by the defendant, and found by the District Judge, that a caution was administered and the statement voluntary.

41. I now turn to consider the question of the admissibility of the contents of the Ipsen report. It is to be recalled that in *Kemmy* the prosecutor purported to rely on statutory provisions concerning proof by means of certification. While the majority took the view that it had complied with those provisions, O'Higgins C.J. concluded that it had not. Therefore, the words of O'Higgins C.J. were uttered in circumstances where reliance was sought to be placed on a certificate of the Medical Bureau of Road Safety to prove that an offence had taken place. In his judgment, which was dissenting as to the result, he observed:-

> *"The whole basis for the evidential value given by the Act to the Bureau's certificate depends upon it receiving a specimen "forwarded to it under Section 21". It is such a specimen that it may analyse and in respect of which it may certify the result. Section 21(3) specifically provides that what is to be forwarded to the Bureau is the completed form together with the relevant sealed container. A sealed container unaccompanied by any form could not be regarded as being received by the Bureau under Section 21. The case is no different, in my view, if what accompanies the sealed container is a copy of the form. While this copy is in all respects exact and contains a true impression of what was entered on the form completed by Dr. Mulvihill, it is not that form and it was not signed by him as such. It is, therefore, not "the completed form" provided for by Section 21."*

42. The authorities indicate that when a prosecutor seeks to rely on a certificate as proof of a matter then necessary statutory procedures must be followed. The purpose of a

certificate of evidence in the context of a drink driving related prosecution was described by O'Malley J. in *Power v. Circuit Judge Hunt & DPP* [2013] I.R. 709 at p. 716, as being:-

> *"…to enable the prosecution to give evidence of the prescribed matters without having to call oral evidence thereof. The sole point is to make admissible what would otherwise be hearsay. In such cases, the certificate covers the admissibility of its own contents.*
>
> *2.6. In the context of a drink or drug-driving case that means that the prosecution does not have to call witnesses from the Bureau to prove how the analysis was carried out or what the findings of the analysis were, along with other issues such as, for example, the chain of custody of the sample within the Bureau and thereafter. The certificate is given evidential status, but only for the purpose of the specified proceedings - that is, for the purposes of prosecution under the specified provisions of the Road Traffic Acts. It has no free-standing legal status. It would not enjoy any presumption in a civil claim. If the prosecution do not seek to rely on it for the statutorily-prescribed purpose, it is irrelevant (unless of course the document itself raises some issue which the defence can legitimately make use of - for example, to raise a reasonable doubt about the reliability of some aspect of the prosecution evidence)."*

43. I find it difficult to see why the same considerations should not apply to the certification process under the Act in question in this case.

44. Both parties place reliance on the decision in *DPP (McMahon) v. Avadenei* [2017] IESC 77. The defendant was charged with a drink driving offence contrary to s. 4(iv) of the Road Traffic Act 2010 *("the Act of 2010").* At hearing it was submitted on behalf of the defence that the prosecution had not proved the case in the manner required under s. 13 of the Act of 2010 and that the degree of noncompliance was more than a mere deviation. Under s. 20 of the Act of 2010, a duly completed statement purporting to be supplied under s. 13 is sufficient evidence of the facts stated in it for the purposes of the Acts, without proof of any signature thereon, until the contrary is shown. It is also sufficient evidence of compliance by the Garda with the requirements imposed upon him under the Act in connection with the supplying of a statement. O'Malley J. observed that the starting point is that documents of the nature of the form then under consideration are given a particular evidential status that they would not otherwise have, on condition that the legislative requirements are satisfied. Those requirements must not be interpreted in such a way as to defeat the right of an accused person to a fair trial. Regarding the requirement to strictly construe a penal statute she observed at para. 77:-

> *"The submission has been made in this case that the Court is dealing with a penal statute that must be strictly construed by the courts and strictly complied with by members of the Garda Síochána. There is no dispute as to either of these propositions – the question is 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."*

45. Referring to the broader field of criminal law, however, O'Malley J. stated at para. 78:-

> "*It is a striking feature of the debate that the submissions on both sides, and the authorities upon which they are based, appear to consider only decisions in other cases involving Road Traffic Act cases (specifically, relating to the prosecution of cases of driving under the influence of alcohol). There is no reference to the authorities from the broader field of criminal law, where comparable issues would generally be dealt with according to the principles relating to (depending on the nature of the defect) the adequacy of the prosecution evidence or the admissibility of improperly obtained evidence. Broadly speaking, the principles concerned with improperly obtained evidence come into play where evidence is challenged as being the fruit of either a breach of the constitutional rights of an accused (in which case the issue now falls to be considered according to the decision of this Court in Director of Public Prosecutions v. J.C. [2015] IESC 31) or of an action which, although not amounting to a constitutional violation, is nonetheless illegal. It is well recognised that cases in the latter category give rise to a discretion on the part of a trial judge to exclude the evidence, according to long established criteria."(*emphasis added).

46. Having considered the authorities in relation to the requirement to strictly construe a statute, O'Malley J. observed that there was no doubt about the principles. The question was whether the principles in their application in that case was that the statutory conditions precedent to the imposition of criminal liability had not been met. The use of the defective statement did not impinge on the clarity of the legislative definition of the offence with which the appellant was charged. The principle against "*doubtful penalisation"* was therefore not relevant. Production of the statement did not in itself create criminal liability or impose detriment. The issue was one of admissibility. It was a piece of evidence that could be used to establish liability. She continued:-

> *"87. 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 regime 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."*

Acknowledging that the context within which disputes about the admissibility of evidence have been altered by the decision in J.C., and that the authorities supporting the first two principles cited above were not in issue in Avendei, O'Malley J. stated:-

> *"The powers conferred by the Act must accordingly be exercised within the statutory context and in accordance with the statutory conditions. Such powers cannot be added to by error on the part of a Garda, so as to be exercisable in respect of a person who has not been made amenable to the statutory regime or so as to enable demands to be made that are not authorised by the Act."*

47. The particular subsections of the Act under consideration in this case provide for the manner in which the offence may be proved. Section 32B(3) of the Act provides that an authorised officer may do certain things, including, in accordance with s.32B(3)(f) and (j), take samples of a relevant thing. On the face of it this does not impose a mandatory obligation to take a sample. If the sample is not taken there is nothing to be tested in the manner envisaged by the Act. Section 32C(1), however, imposes a mandatory obligation on an authorised officer who has taken a sample to follow certain procedures in relation to that sample, such as the division of the sample into three approximately equal parts, placing them in separate containers, and sealing and marking for the purpose of identifying them as part of the sample taken.

48. Nothing in the case stated suggests that the samples of the relevant thing were unlawfully taken. It is what happened to the samples thereafter that is in issue. The samples were not forwarded for analysis in the manner envisaged by the provisions of s. 32C(2)(c) and therefore, on the face of it, a mandatory requirement of the statutory framework was unfulfilled.

49. Section 32C(2)(a) obliges an officer who has complied with s. 32C(1) to offer one of the sealed containers to the owner or person in charge of the premises. In my view, this is likely one of the defendant's fair trial rights i.e. that she be given the opportunity to test the sample(s) upon which reliance is placed by the prosecution at trial. On the other hand, however, the provisions of s. 32C(2)(c) appear to me to relate to proof of the offence by the prosecution and ought not be read in isolation from the provisions of s. 32D, to which it refers.

50. Section 32D provides for a certificate to be prepared by the individuals referred to therein:-

> *"stating the result of any test, examination or analysis of a sample of any relevant thing or a relevant thing as the case may be, forwarded under s. 32C(2)(c) or 4(c) shall, with regard to that sample of the relevant thing, or the relevant thing as the case may be, the evidence of the matters stated in the certificate unless the contrary is proved."*

51. Unlike in *Avandei* the prosecutor does not purport to rely on the statutory process of certification to prove the offence. The evidence as contained in the Ispen report is the

means by which the offence is sought to be proved. To adopt *dicta* of O'Malley J., it is difficult to see how the use of the evidence outlined in the report impinges on the clarity of the legislative definition of the offence with which the defendant is charged.

52. If the statutory process is not followed, then the certification procedure cannot apply. Nevertheless, having considered the submissions of the parties and the authorities upon which reliance is placed, I am satisfied that it cannot be the case that the only manner in which the offence may be proved is by production of a certificate from an individual identified in s. 32D(1)(a),(b) or (c). Equally, I do not read this section as mandating that the testing or examination must be carried out by such person as is described in s. 32D(1)(a) to (c) and that it is only where this takes place that the offence may be proved, presumably either by certification or, in the absence of a certificate, by the evidence of witnesses who might otherwise have provided certificates. The wording of s. 32 C(2)(c) is instructive as it provides for the forwarding of the sealed container *"for test, examination or analysis … by a person mentioned in s. 32D(1)(a),(b) or (c*)". It does not mandate that testing can only be done in that manner where reliance is not sought to be placed on a certificate as provided for in s. 32D. Therefore, I am unable to conclude that only persons referred to in s. 32D(1)(a), (b) or (c) may give evidence of testing procedures, analysis and results.

53. In the circumstances, I do not believe that it follows that a failure to comply with the provisions of the Act in this specific regard necessarily results in the invalidation of the process.

54. If I am incorrect in this analysis and such mandatory obligation exists, nevertheless it is difficult to see why the offence cannot be proved by evidence, the admissibility of which is capable of being tested by and against the broader principles of the criminal law. If the contention of the defendant is correct, then it would seem to follow as a matter of principle that evidence purported to be relied upon which was not analysed and tested in accordance with the procedures envisaged under s. 32C would not be admissible. Logically this could include other evidence such as an admission made by a defendant. Such conclusion, it seems to me, runs contrary to the decision of Charleton J. in DPP v. Buckley, where at para. 15 he stated:-

> *"Cases proceed on the basis of direct evidence and circumstantial evidence. Here, there was both. The admission by the accused that he was in possession of cannabis constituted an admission against interest and was therefore admissible against him. A piece of direct evidence should never be divorced from its factual background. Instead, it should be considered in the light of all the other relevant evidence in the case".*

Later, at para. 17, he added the caveat:-

> *"It should be borne in mind, however, that if the prosecution choose to weaken their case by not adducing a certificate of analysis in circumstances where the nature of the substance is at the core of the charge, that applications to dismiss the*

charge may be expected. I would advise, that in all the circumstances of the case, that there was sufficient prima facie proof through the admission of the accused, coupled with the pipe and the knife, that the substance in his back trouser pocket was the relevant controlled drug."

55. It also seems to me that the Court's conclusion on this point is not inconsistent with *dicta* of Clarke J. in *DPP v. Cullen* [2014] 3 I.R. 48, regarding how evidence in matters such as concentration of alcohol in blood or custody of a sample might be given.

56. Nevertheless, on the further assumption that I am incorrect in this analysis and there has been an illegality in the failure to follow the statutory process for testing by such designated persons which has resulted in a breach of a *legal right*, then it will be a matter for the District Judge to exercise his discretion as to whether the evidence ought to be admitted. If such breach is deemed to amount to a breach of a constitutional right, then *J.C*. applies.

57. For similar reasons, I do not believe that a failure to comply with sealing requirements of the samples automatically leads to the exclusion of the evidence. The District Judge, however, must be satisfied beyond reasonable doubt that the prosecution has established its case, including any issues relating to the chain and integrity of the samples taken (with particular reference to the matters referred to at para. 19(b) of the case stated) and their testing and analysis. Issues relating to the chain of evidence or the integrity of the samples require determination in accordance with the principles concerning the onus and burden of proof in a criminal matter.

58. In all the circumstances, I am satisfied that the answers to the questions posed by the learned District Judge are as follows:-

i. Yes;

ii. Yes.