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*Judgment: approved by the Court for handing down (subject to editorial corrections)**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES COURTS (NORTHERN IRELAND) ORDER1981

BETWEEN:

PUBLIC PROSECUTION SERVICE

Complainant/Appellant

-and-

LIAM DUDDY

Defendant/Respondent

Before Kerr LCJ, Higgins LJ and Girvan LJ

<u>KERR LCJ</u>

Introduction

[1] This is an appeal by way of case stated from a decision of Mr James McFarland sitting as a deputy resident magistrate at Omagh magistrates' court on 7 March 2007, whereby he dismissed a summons issued by the Director of Public Prosecutions to the respondent, Liam Duddy, charging him with driving with excess alcohol on 17 December 2004 at Market Street, Omagh contrary to article 16(1) of the Road Traffic (Northern Ireland) Order 1995.

[2] The appeal involves two issues. The first is whether a photocopy of the certificate of analysis from a breath test (the original of which was lost), deposed by the police sergeant conducting the breath test to be a genuine copy of the original, was sufficiently authenticated to be admitted in evidence where the person who made the photocopy did not give evidence of having made it. The second issue is whether, if the copy had been shown to be an

authenticated copy of the original, the court could properly exercise its discretion to exclude it from evidence.

Factual background

[3] The summons was issued for the respondent to appear at Omagh Magistrates' Court on 6 September, 2005 and the matter was first fixed as a contested hearing for 24 March, 2006. Unfortunately, it proved necessary to adjourn the case a number of times, first because the respondent was not available and latterly due to the unavailability of a police witness. Accordingly the matter came before the magistrate on 30 August. In the case stated Mr McFarland stated that he adjourned the matter further from that date because the respondent's counsel objected to proceeding in the absence of a Constable Carscadden (who took the preliminary breath test) since he regarded his evidence as 'pivotal.' The respondent then brought an application before the magistrate to have the summons struck out for abuse of process. That application was dealt with as a preliminary hearing on 7 March 2007. It was refused and the matter proceeded to a full hearing.

[4] When the case began, it quickly emerged that the original of the pro forma for the preliminary breath test was lost. Prosecuting counsel sought to adduce in evidence a copy of the form which contained the officer's signature but not that of the respondent. The magistrate refused to allow this but suggested to prosecuting counsel that he might lead oral evidence of its contents. Following a short adjournment, the constable testified about the information contained in the document, apparently without objection.

[5] It then became apparent from the evidence of another police witness, a Sergeant Semple, that the search for the preliminary breath test pro forma had established that the original pro forma for the evidential breath test *i.e.* that carried out in the police station and which is referred to as form DDA (which records the following of the procedure for this breath test) and the original certificate of analysis from the evidential breath test were also lost. This had not been realised until the day of the hearing. Prosecuting counsel then sought to adduce in evidence photocopies of the original documents created by Sergeant Semple. The certificate would have shown that the evidential breath test result was that the respondent had 75mg of alcohol on his breath. The sergeant testified that these were copies of the original and that they showed his signature and that of the respondent. Copies had been duly served on the respondent at the time of service of the summons.

[6] Application was made to the magistrate to admit these copies as secondary evidence of the originals under article 36 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The magistrate refused to admit the documents, primarily because Sergeant Semple had not given evidence that he personally made the copies of the originals and no other

witness was called to testify having made the copies. In the case stated the magistrate averred that he had been influenced by the careless way the case and documents had been presented and his 'confidence in the quality of the police evidence was low.'

[7] The magistrate went on to state that even if the copies could have been authenticated he would not have exercised his discretion under the Order to admit the copies for the following reasons: -

> (a) Notice to adduce the copies had not been served on the respondent. He commented that careful officers ought to have noted the absence of the originals at the earlier hearing date.
> (b) The originals could still not be found after time was allowed for a search.
> (c) The copies which Constable Carscadden and Sergeant Semple produced were 'at best poor copies.'

[8] Having refused to admit the documents, the magistrate suggested that oral evidence of the breath test could be given. Counsel for the respondent objected to this, claiming that evidence of the procedure could not be received in the form of oral testimony. Following a further short adjournment, prosecuting counsel indicated that he would lead no further evidence. The magistrate then dismissed the charge.

Relevant legislation

[9] Article 18 of the Road Traffic (Northern Ireland) Order 1995, so far as is material, provides: -

> "**18. -** (1) In the course of an investigation into whether a person has committed an offence under Article 14, 15 or 16 a constable may, subject to the following provisions of this Article and Article 20, require him-
>
> (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Head of the Department …
>
> (2) A requirement under paragraph (1)(a) may be made to provide the specimens of breath-
>
> (a) at or in the vicinity of the place where the requirement is made if facilities for the specimens to be taken are available and it is practicable to take them there, or

(b) at a police station.

(3) A requirement under paragraph (1) (a) may be made only by a constable who is especially authorised by the Chief Constable to make such requirements.

…

(8) A constable must, on requiring any person to provide a specimen in pursuance of this Article, warn him that a failure to provide it may render him liable to prosecution."

[10] Article 18 of the Road Traffic Offenders (Northern Ireland) Order 1996 provides: -

"(1) This Article and Article 19 apply in respect of proceedings for an offence under Articles 14 to 16 of the Order of 1995 (driving offences connected with drink or drugs); and expressions used in this Article and Article 19 have the same meaning as in Articles 14 to 21 of that Order.

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by or taken from the accused shall in all cases (including cases where the specimen was not provided or taken in connection with the alleged offence) be taken into account; and, subject to paragraph (3), it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen."

[11] The material parts of article 19 are as follows: -

19. - (1) Evidence of the proportion of alcohol or a drug in a specimen of breath … may, subject to paragraphs (3) and (4) … be given by the production of a document or documents purporting to be whichever of the following is appropriate, that is to say-

(a) a statement automatically produced by the device by which the proportion of alcohol in a specimen of breath was measured and a certificate

signed by a constable (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the accused at the date and time shown in the statement

….

(3) Subject to paragraph (4) –

(a) a document purporting to be such a statement or such a certificate (or both such a statement and such a certificate) as is mentioned in paragraph (1)(a) is admissible in evidence on behalf of the prosecution in pursuance of this Article only if a copy of it either has been handed to the accused when the document was produced or has been served on him not later than 7 days before the hearing, and

(b) any other document is so admissible only if a copy of it has been served on the accused not later than 7 days before the hearing.

(4) A document purporting to be a certificate (or so much of a document as purports to be a certificate) is not so admissible if the accused, not later than 3 days before the hearing or within such further time as the court may in special circumstances allow, has served notice on the complainant or his solicitor requiring the attendance at the hearing of the person by whom the document purports to be signed.

(5) A copy of a certificate required by this Article to be served on the accused or a notice required by this Article to be served on the complainant or his solicitor may be served personally or sent by registered post or recorded delivery service. …"

[12] Article 36 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 deals with proof of statements in documents. It provides: -

"36. Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either-

> (a) the document, or
>
> (b) (whether or not the document exists) a copy of the document or of the material part of it,
>
> authenticated in whatever way the court may approve."

[13] In relation to the test certificate, where a statement in a document is admissible as evidence in civil proceedings, it may be proved by production of it or a copy thereof, authenticated in such manner as the Court may approve: article 8 (1) of the Civil Evidence (Northern Ireland) Order 1997. This is substantially the same wording as in article 36 of the 2004 Order.

[14] Article 19 (2) of the 2004 Order provides that a 'statement' (for *inter alia* the purposes of article 36) is to be read as signifying any representation of fact or opinion made by a person by whatever means. Article 37 contains definitions of the words, 'copy' and 'document' for the purpose of Part III of the Order (which includes article 36). The material provisions are: -

> "(1) In this Part-
>
> 'copy', in relation to a document, means anything on to which information recorded in the document has been copied, by whatever means and whether directly or indirectly …
>
> 'document' means anything in which information of any description is recorded …"

[15] Article 41 (1) of the Order deals with the use of documents to refresh memory: -

> "41. - (1) A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if-
>
> (a) he states in his oral evidence that the document records his recollection of the matter at that earlier time, and
>
> (b) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence."

[16] A document introduced in evidence in this way is admissible by virtue of article 24 (3) which provides: -

> "(3) A statement made by the witness in a document-
>
> (a) which is used by him to refresh his memory while giving evidence,
>
> (b) on which he is cross-examined, and
>
> (c) which as a consequence is received in evidence in the proceedings,
>
> is admissible as evidence of any matter stated of which oral evidence by him would be admissible."

[17] Article 30 deals with the court's general discretion to exclude evidence. It provides: -

> "30. - (1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if-
>
> (a) the statement was made otherwise than in oral evidence in the proceedings, and
>
> (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.
>
> (2) Nothing in this Part prejudices-
>
> (a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (exclusion of unfair evidence), or
>
> (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

[18] Article 76 (1) of PACE provides: -

> "(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

The appellant's arguments

[19] For the appellant, Mr Valentine pointed out that form DDA was not a statutory document; it is merely a standard form used by police to ensure that all the procedures in the 1995 Order for an evidential breath test are complied with (notably the need to give a warning of the consequence of failure to give a specimen). This type of administrative form which is prepared internally by the PSNI for use by police is not prescribed by statute or by any statutory code. The correct completion of the forms is not a condition precedent to the validity of the procedures under statute. The prosecutor need only show by his evidence that the requirements laid down by statute were met. Indeed, incorrect details on the form are relevant only if they undermine credibility: *Hood v Lowry* [1997] NIJB 247.

[20] Mr Valentine submitted that the form was a hearsay statement by Sergeant Semple in which he had recorded what had passed between him and the respondent. It was therefore admissible under the 2004 Order, either as a hearsay statement under article 21, or as a document used by him to refresh his memory under article 41(1) and admissible as hearsay under article 24. In either case it was a statement which may be proved in evidence under article 36.

[21] The magistrate's ruling that Sergeant Semple could not rely on this document because it could only be authenticated by the person who made the copy was a proposition of law for which there is no authority, Mr Valentine argued. Just as a film or photograph can be proved by any person who was present when it was taken or who recognises its contents without having to call the film-maker (*R* v *Murphy* [1990] NI 306) it was submitted that the sergeant could authenticate the copy by testifying that it was recognised by him as an exact copy. In this context Mr Valentine drew our attention to the difference in wording between article 36 and section 6 of the Civil Evidence (Scotland) Act 1988 which provides: -

> "6 Production of copy document
>
> (1) For the purposes of any civil proceedings, a copy of a document, *purporting to be authenticated by a person*

responsible for the making of the copy, shall, unless the court otherwise directs, be—

(a) deemed a true copy; and

(b) treated for evidential purposes as if it were the document itself." (the emphasis has been added)

[22] On the admissibility of the breath test certificate, Mr Valentine suggested that it was questionable that article 36 applied since the 'statement' that the respondent's breath contained 75mg of alcohol was made by the machine. This record was produced by the machine's analysis of the respondent's breath sample. It was not based on any statement by a person, as appears to be required by article 19(2) which provides: "A statement is any representation of fact or opinion *made by a person* by whatever means" (see paragraph [14] above). The certificate was admissible, Mr Valentine argued, as real evidence because it is produced by the automatic calculations of a machine from the actual breath of the accused. In *Castle v Cross* [1985] 1 All ER 87 it was held that, "In the absence of evidence to the contrary, the courts will presume that [mechanical instruments] were in order at the material time".

[23] An alternative argument advanced by Mr Valentine was that oral evidence of breath test results was admissible without having to adduce the certificate if the witness can say that he saw the accused's breath reading and the result of the calibration test to prove that the machine was working correctly. In this context he relied on the decisions in *Morgan v Lee* [1985] RTR 409, *Garner v DPP* [1989] Crim LR 583 and *Sneyd v Director of Public Prosecutions* (2006) 170 JP 545.

[24] Finally, on the reasons given by the magistrate for not exercising his discretion to admit the documents, even if he had concluded that they were admissible, Mr Valentine argued that:

(a) there was no statutory requirement to give advance notice of an intention to adduce copies in lieu of originals. No reason was given suggesting that the defence would be prejudiced by not having earlier notification. A copy of the breath test certificate had been served on the respondent after the test had been administered and he could have used that to deal with any discrepancies that might have arisen between that and the testimony of Sergeant Semple.

(b) the fact that originals were searched for and not found is a reason for admitting copies, not for excluding them.

(c) the failings in the preliminary breath test procedure are irrelevant to the issues in the case. The magistrate did not identify the defects that he said were apparent in the documents that Sergeant Semple proposed to introduce in evidence other than to say that they were 'poor copies'. These were annexed to the case stated and there was nothing which casts doubt on the veracity or accuracy of the copies. In any event, Mr Valentine pointed out, the clarity of the copies was not in issue, whereas their authenticity was.

The stance of the respondent

[25] The respondent did not address any argument to the court to challenge any of the assertions made by the appellant. In advance of the hearing a skeleton argument was filed on his behalf in which it was stated that no contrary submissions would be made.

Conclusions

[26] It is important to recognise that form DDA is not invested with any particular evidential status. As Mr Valentine argued, its primary function is as a checklist for police officers to ensure that the various components of the statutory requirements for the taking of the evidential breath test have been followed. Of course, as a matter of convenience, the form is routinely produced in evidence to establish that this has been done but one should not assume from that practice that its production is an indispensable prerequisite to proof that there has been compliance with the statutory requirements. This can just as readily be established by the police officer giving oral testimony to that effect. There was therefore no basis for the objection to the receipt of oral testimony on this issue from Sergeant Semple.

[27] In any event, Mr Valentine is undoubtedly correct in his claim that the document was admissible under either article 21 of the 2004 Order as a hearsay statement or article 41(1) as a document used by the police officer to refresh his memory. In either event, the document was admissible under article 36. This does not appear to have been controversial. It was because a copy of the document was proposed to be introduced that the magistrate refused to admit it. But there is nothing in the legislation about its condition as a copy that rendered it any less admissible than an original document. Nor was there any warrant for concluding that because evidence was not available from the person who actually copied the original that it should be deemed inadmissible on that account. Quite apart from the absence of any stipulation to that effect in the relevant provisions (and here the contrast with the Scottish legislation is instructive), there is no sensible reason that evidence from the police officer that the document was an exact copy of that which he had completed should not be sufficient to authenticate it.

[28] In *Wayte* [1983] 76 Cr App R 110, the Court of Appeal in England held that photostat copies of documents are admissible in evidence where they are relevant and the originals have been lost. It had been argued that photocopies were secondary evidence and as there was no satisfactory explanation as to why the originals could not be provided, they should not have been admitted in evidence. This argument was disposed of summarily by Beldam J in a passage at page 116 with which we respectfully and wholeheartedly agree: -

> "… there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible. Moreover, it is now well established that any application of the best evidence rule is now confined to cases in which it can be shown that the party has the original and could produce it but does not."

[29] We accept Mr Valentine's argument that the breath certificate was admissible as real evidence because it represented the automatic calculations of a machine from the actual breath of the respondent and it is to be presumed that the intoximeter was working correctly. As this court recently said in *PPS v McGowan* [2008] NICA 13: -

> "… the presumption must be that machines … are operating properly and in working order in the absence of evidence to the contrary. The presumption of the correct operation of equipment and proper setting is a common law presumption recognised by article 33(2) [of the 2004 Order]. In the modern world the presumption of equipment being properly constructed and operating correctly must be strong."

[30] We likewise accept the argument that oral evidence of the contents of the breath certificate would have been admissible. We endorse the approach taken by Newtownards magistrates' court in *Police v Philips* [1991] 9 BNIL 88. In that case the breath test device did not have a print out facility and a police officer testified as to the reading which the device displayed while he and the defendant observed it. The officer had made a written record of the display which the defendant signed. It was held that the oral evidence was admissible, being an acceptable alternative to a print-out.

[31] On the matter of the exercise of his discretion, the magistrate's remarks were, of course, *obiter dicta*. We do not consider, however, that it would have been a proper exercise of his discretion to refuse to admit the evidence on any of the grounds adumbrated. The failure to give notice of an intention to introduce copies of the documents in evidence simply does not bear on

whether this should have been permitted. No complaint had been made by the respondent that he was in any way prejudiced by a lack of notice. If he had been, this could have been accommodated by an adjournment and an appropriate order for costs. But the objection to the introduction of copies of the document was a technical one. The discussion by the magistrate of the exercise of his discretion was on the premise that the evidence was technically admissible. On that basis there could be no warrant for refusing to admit the copies for want of notice. The same holds true for the other reasons canvassed by the magistrate on this issue. As Mr Valentine pointed out, the fact that the documents could not be found after a search was surely a factor that *supported* their admission in evidence rather than their exclusion. And the avowed lack of quality of the copies could never be a reason for their exclusion, provided they could be read. They were clearly legible. Their contents were not in doubt.

[32] It appears that the underpinning for the magistrate's conclusions as to how it would have exercised his discretion was his displeasure at the handling of the matter by the police and the prosecuting authorities. This is not a basis on which the exercise of the power under either article 30 of the 2004 Order or article 76 of PACE could be sustained. These powers are conferred in order to avoid injustice or unfairness in the trial process, not to penalise the prosecuting authorities or the police service.

[33] We allowed the appeal on the day that it was heard, quashed the magistrate's decision and remitted the matter to a different magistrate to proceed according to law. For the guidance of those who may be required to deal with similar issues in the future, however, we will deal with the questions posed by the magistrate in the case stated. These were: -

1. Whether a photocopy deposed by Sergeant Semple to be a genuine copy of the original was insufficiently authenticated to be admitted in evidence because, *inter alia*, the person who made the photocopy did not give evidence of having so made it?

2. Whether, if the copy had been shown to be an authenticated copy of the original, I would have properly exercised a discretion to exclude such copy from evidence by reason of the matters stated in paragraph 9 above? [These were the matters that have been set out in paragraph [7] of this judgment]

[34] We answer the first question 'No'. We answer the second question, 'The copy did not require to be authenticated but the matters adumbrated in paragraph 9 of the case stated could not justify the exercise of discretion to exclude the document under article 30 of the 2004 Order or article 76 of PACE'.