Neutral Citation Number: [2019] EWCA Crim 1553

Case No: 201804866B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT DERBY
HHJ SHANT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2019

Before :

LORD JUSTICE SINGH
MR JUSTICE JULIAN KNOWLES
and
SIR JOHN ROYCE

- -

Between :

TWIGG	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Mr Stephen Cobley (instructed by **CJH Solicitors**) for the **Appellant**
Mr Andrew Vout (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 12 July 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal against conviction brought with the permission of the Single Judge. This is on any view a very sad case, arising out of the death of a 14 year old boy. Nothing we say can provide sufficient consolation to his family and friends but we extend our sympathies to them for their loss.

2. On 25 October 2018 in the Crown Court at Derby the Appellant was convicted of causing death by careless driving whilst over the specified limit for a drug, contrary to section 3A(1)(ba) of the Road Traffic Act 1988, as amended ("the RTA 1988").

3. On the same occasion he was sentenced by Her Honour Judge Shant to 5 years imprisonment.

4. This case raises a potentially important point of principle in relation to the admissibility as evidence of blood samples unlawfully obtained by the police in breach of statutory duties imposed by section 7 of the RTA 1988. In accordance with the way in which submissions were presented by the parties at the trial, the judge treated the question of admissibility of unlawfully obtained evidence as being governed by section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). She ruled that in the circumstances the breach of procedure had not had such an adverse impact on the fairness of the trial that it would be unfair for it to be admitted. At the hearing before this Court, it became apparent that there may be a logically prior question which needs to be determined: whether the evidence was inadmissible as a matter of law. If it was, the issue under section 78 of PACE would never arise, since there can be no question of a court permitting evidence to be adduced at a trial if it is inadmissible as a matter of law.

The Facts

5. This case arose out of a fatal collision which occurred on the evening of 20 February 2017 on Fordbridge Lane, South Normanton, Derbyshire between the vehicle driven by the Appellant and the deceased, a 14 year old boy who was riding his scooter in the road.

6. The collision occurred just after 7:45pm. The deceased, and his friend, had been to the park. They made their way home on their scooters. They rode along Fordbridge Lane. The deceased was ahead of his friend, who got off his scooter and walked on the pavement. It was a dark, unlit road. The Appellant did not have his full beam headlights on. The deceased was not wearing any reflective clothing. The Appellant's vehicle drove past the deceased's friend and hit the rear of the deceased's scooter. The collision caused the deceased to be thrown onto the bonnet of the car and onto the windscreen.

7. Following the impact, the Appellant drove off. A short while later a telephone call was made to the police on the Appellant's behalf and as a result they attended his home address. He was arrested at 8:47pm.

8. Various bodily samples were taken from the Appellant, including a blood sample. The first procedure was a swab swipe at his home address at 9:06pm. There was no specified drug detected. At 11:15pm, at the police station, and following an examination by a healthcare professional, a blood sample was taken. This sample was subsequently analysed and traces of Delta 9 THC (cannabis) were found which placed the Appellant in excess of the specified limit for that drug.

9. At the trial the Prosecution case was that the Appellant was driving too fast, had not paid sufficient attention to the road and was over the necessary limit for drugs. The Defence case was that the Appellant denied that his driving had fallen below the necessary standard. He had not been speeding and was not under the influence of drugs. Whilst he was a cannabis user, he had not smoked any cannabis since the morning of the incident. The issue for the jury was whether the Appellant drove without due care and attention. It was not in dispute that the Appellant was over the prescribed limit for drugs but there was a dispute as to what, if any, impact this had upon his driving.

10. The Prosecution relied on the evidence of a number of witnesses who suggested that the Appellant's vehicle was travelling in excess of the 40mph speed limit. There was also evidence from expert witnesses in respect of a reconstruction of the collision, although they disagreed as to the speed at which the Appellant's vehicle must have been travelling.

11. When officers attended the Appellant's address they observed that they could smell cannabis. When asked if he had used any illegal drugs he replied "not recently, no".

12. The Appellant was interviewed by the police. He explained that, having been at home, he drove to the shops. His friend was in the car. He dropped his friend off before the incident. He explained that the road was dark and unlit and that he did not see the deceased at all. He was first aware when there was a big smash and an impact on the windscreen. He stopped, but then panicked and drove home with the intention (he said) of getting help.

13. During the trial the Appellant admitted that he had lied during his police interview. His friend was in fact in the car with him when the collision occurred. He had also told the police that he had not smoked cannabis for months.

14. The Prosecution relied on the Appellant's previous convictions, namely a caution for possession of cocaine in 2013, a warning for possession of cannabis in 2013 and speeding in 2013, for which he received three penalty points.

15. In his defence the Appellant gave evidence and explained that he was a cannabis user at the time. He worked night shifts and would usually have a cannabis joint when he got home from work in the morning. He did not smoke in the afternoons. He had had a cigarette on the morning of the collision. He helped his partner with some decorating in the afternoon. His friend came round at some point, and then in the evening, before work he decided to drive to the shops to get fuel for the car and some fish and chips.

16. The Appellant gave evidence that he was not rushing on Fordbridge Lane. He knew the speed limit and stuck to it. He went slowly downhill. His headlights were

working. He did not see anything on the road. A bang then hit the windscreen. Some glass came through which cut his friend. He stopped but panicked and drove away. He did not think that he had hit anyone. He went home and spoke to his family and parents. His parents drove him back to the scene. There was an ambulance but no police. They then drove home and waited for the police to arrive. He accepted that had he lied in his interview but said that he did so because he had panicked. He did not want to get his friend into trouble.

17. At the commencement of the trial the Defence sought to have excluded as inadmissible the evidence of the blood sample that was taken from the Appellant. It was argued that this should not have been taken because the healthcare professional reported no alcohol or drug issues and found the Appellant to be alert and coherent.

18. The application to exclude the evidence was made pursuant to section 78 of PACE. The judge heard evidence in a *voir dire*. In particular she heard from PC Taylor, who had requested the blood sample. He did not recall anything of the procedure; however, he said that he "would not have asked for the specimen to be taken unless the healthcare professional had said it was required".

19. The healthcare professional had provided further information about her statement. She stated that she took the specimen of blood from the Appellant because the police had asked for it.

20. The judge observed that there was no evidence that the police or the healthcare professional were acting in bad faith. The Defence conceded this.

21. The judge found that this was not a case where there was no basis for supposing that the Appellant's driving at the time was affected by the consumption of drugs. The officer who first arrested him plainly suspected the smell of cannabis. Further, in answer to the question "have you smoked anything?", the Appellant had replied "not recently".

22. The judge said that, whilst the Appellant presented as alert and coherent to the healthcare professional, this was after nearly an hour's delay, caused because the appellant had absconded from the scene. The healthcare professional had asked the Appellant if he had taken any drugs. He lied. He could have told the truth. Had he answered honestly then it was highly likely that the healthcare professional would have reviewed her opinion about whether he was affected by cannabis.

23. The judge concluded that, although there had been a breach of procedure in taking the blood sample, in all the circumstances, admission of that evidence would not have such an adverse impact on the fairness of the trial that it would be unfair to allow the Prosecution to adduce it.

Grounds of Appeal

24. It is submitted by Mr Cobley on behalf of the Appellant that, in all the circumstances, the judge should have exercised her "discretion" under section 78 of PACE to exclude the blood sample evidence.

25. It is argued that, as in *Murray v DPP* [1993] RTR 209, there was no alternative in the Appellant's case other than to conclude that evidence of the sample was not admissible as the statutory procedure had not been followed. Furthermore, the Appellant was asked to consent to taking of the sample with the warning that he would be prosecuted if he failed to agree. Arguably this consent was vitiated by the breach of the prescribed procedure. Without the healthcare professional's opinion the police were not lawfully allowed to make the request.

The Respondent's Submissions

26. The Prosecution, represented by Mr Vout, oppose the appeal. The Prosecution have lodged a Respondent's Notice and Grounds of Opposition in which they submit that the judge did not err in refusing to exclude the evidence of the blood sample. In light of the Appellant's failure to answer truthfully when asked if he had smoked anything, it would have been unfair to exclude the evidence.

Material legislation

27. Section 3A of the RTA 1988, so far as material, provides:

> "(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—
>
> …
>
> (ba) he has in his body a specified controlled drug and the proportion of it in his blood or urine at that time exceeds the specified limit for that drug,
>
> …
>
> he is guilty of an offence."

28. Section 7 of the RTA 1988, so far as material, provides:

> "(1) In the course of an investigation into whether a person has committed an offence under section 3A … of this Act a constable may, subject to the following provisions of this section and section 9 of this Act, require him—
>
> (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or
>
> (b) to provide a specimen of blood or urine for a laboratory test.

…

(2) A constable may make a requirement under this section to provide specimens of breath only if—

(a) the requirement is made at a police station or a hospital,

(b) the requirement is imposed in circumstances where section 6(5) of this Act applies, or

(2C) Where a constable has imposed a requirement on the person concerned to co-operate with a relevant breath test at any place, he is entitled to remain at or near that place in order to impose on him there a requirement under this section.

(3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless—

(a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required, or

(b) specimens of breath have not been provided elsewhere and at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) above is not available at the police station or it is then for any other reason not practicable to use such a device there, or

(bb) a device of the type mentioned in subsection (1)(a) above has been used (at the police station or elsewhere) but the constable who required the specimens of breath has reasonable cause to believe that the device has not produced a reliable indication of the proportion of alcohol in the breath of the person concerned, or

(bc) as a result of the administration of a preliminary drug test, the constable making the requirement has reasonable cause to believe that the person required to provide a specimen of blood or urine has a drug in his body, or

(c) the suspected offence is one under section 3A, 4 or 5A of this Act and the constable making the requirement has been advised by a medical practitioner or a registered health care professional that the condition of the person required to provide the specimen might be due to some drug;

but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath.

> (4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine and, in the case of a specimen of blood, the question who is to be asked to take it shall be decided (subject to subsection (4A)) by the constable making the requirement.
>
> (6) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence.
>
> (7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution." (Emphasis added)

29. It was subsection (3)(c) that was not complied with in the present case, since the healthcare professional did not advise the police that the Appellant's condition might be due to some drug.

30. Section 15 of the Road Traffic Offenders Act 1988 ("the RTOA 1988") governs the use of specimens in proceedings for an offence under the relevant provisions of the RTA 1988 and provides that:

> "…(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 subsection (3) below, 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…
>
> (4) A specimen of blood shall be disregarded unless-
>
> (a) it was taken from the accused with his consent and either—
>
> (i) in a police station by a medical practitioner or a registered health care professional; or
>
> (ii) elsewhere by a medical practitioner; or
>
> (b) it was taken from the accused by a medical practitioner under section 7A of the Road Traffic Act 1988 and the accused subsequently gave his permission for a laboratory test of the specimen."

31. Section 78 of PACE provides that:

> "(1) In any 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."
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

Analysis

32. The first case to which reference should be made is the decision of the Privy Council in *Kuruma v The Queen* [1955] AC 197, in which the opinion of the Board was delivered by Lord Goddard CJ. That case concerned evidence which had been obtained as a result of a search. The Board proceeded on the basis that the evidence was illegally obtained: see p. 203. On the same page Lord Goddard said:

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

33. Later at p. 204, Lord Goddard continued:

> "There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. … If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

34. In the decision of the House of Lords in *R v Sang* [1980] AC 402, Lord Diplock regarded that passage in *Kuruma* as referring to a situation which was "clearly analogous to a confession which the defendant has been unfairly induced to make": see pp. 434-435.

35. Later in his speech, at p. 436, Lord Diplock continued:

> "Outside this limited field in which for historical reasons the function of the trial judge extended to imposing sanctions for improper conduct on the part of the prosecution before the commencement of the proceedings in inducing the accused by threats, favour or trickery to provide evidence against himself, your Lordships should, I think, make it clear that the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution had been obtained, but with how it is used by the prosecution at the trial."

36. Later, at p. 437, Lord Diplock continued:

> "… The fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason."

37. There were similar statements in the speeches of the other members of the House of Lords.

38. The law as stated by the House of Lords in *Sang* was modified by Parliament in enacting section 78 of PACE. However, the general principle remains good that there is no automatic rule requiring the exclusion of evidence because of the manner in which it was obtained.

39. That general approach is also consistent with the obligations of the United Kingdom under the European Convention on Human Rights ("ECHR").

40. There is no principle of law under the ECHR that unlawfully obtained evidence is not admissible: see the decisions of the European Court of Human Rights in *Schenk v Switzerland* (1988) 13 EHRR 242, para. 46; and the House of Lords in *R v Khan (Sultan)* [1997] AC 558.

41. In *El Haski v Belgium* (2013) 56 EHRR 31, the European Court of Human Rights confirmed its longstanding jurisprudence to the effect that it is not the role of that Court to determine, as a matter of principle, whether particular types of evidence (for example unlawfully obtained evidence) may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where violation of another Convention right is concerned (for example the right to respect for private life and correspondence in Article 8) the nature of the violation found: see para. 82 of the judgment. Nevertheless, at para. 85, the Court went on to state that particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3 (which prohibits torture, and inhuman or degrading treatment, and which is absolute since it permits of no exceptions and cannot be derogated from under Article 15 even in time of war or public emergency). The Court stated that the use in criminal proceedings of statements obtained as a result of a person's treatment in breach of Article 3 (irrespective of the classification of that treatment as torture, inhuman or degrading treatment) "makes the proceedings as a whole automatically unfair and in breach of Article 6." It continued:

> "The same applies to the use of material [in the sense of real] evidence obtained directly as a result of torture; the use of such evidence obtained by treatment which is contrary to Article 3 but falls short of torture is not, on the other hand, contrary to Article 6 unless it is shown that the breach of Article 3 had a bearing on the outcome of the proceedings, that is, had an impact on the conviction or sentence."

42. The function of a judge under section 78 of PACE is often described as being the exercise of a "discretion". That is how it was described in the present case. This is consistent with the use of the word "may" in section 78 itself. However, as Auld LJ observed in *R v Chalkley* [1998] QC 848, at p. 874, strictly speaking section 78(1) does not involve a discretion because, if a court decided that admission of the evidence in question would have such an adverse effect on the fairness of the proceedings that it ought not to admit it, it cannot logically exercise a discretion to admit it. Indeed, this position can only have been reinforced by the coming into force of the Human Rights Act 1998 ("HRA").

43. The right to a fair trial is one of the rights enshrined in Article 6 of the ECHR, set out in Sch. 1 to the HRA; and section 6(1) of the HRA makes it unlawful for any public authority to act in a way which is incompatible with a Convention right. A public authority includes not only the police, the prosecution but also a court: see section 6(3)(a). In circumstances therefore where there would be an unfair trial that is unlawful under section 6(1) of the HRA. To that extent it is not appropriate to refer to there being a "discretion" since it is not possible in law to admit evidence which would render a trial unfair.

44. We have seen therefore that the general approach of English law is to regard the manner in which evidence was obtained (including where it was obtained unlawfully) as not leading to its automatic exclusion. The manner in which it was obtained will

be a relevant factor to be taken into account when performing the exercise required by section 78 of PACE and Article 6 of the ECHR but ultimately the question for the court is whether there will be a fair trial. However, in the present case, it is submitted on behalf of the Appellant that, even before one gets to that issue, the blood sample in question was inadmissible as a matter of law, so there could be no question of admitting it at all.

45. The essential foundation for the argument on behalf of the Appellant is the decision of the Divisional Court in *Murray v DPP* [1993] RTR 209 (Watkins LJ and Laws J). Before we consider that decision in detail we should refer to an earlier decision of the Divisional Court, which was followed in that case: *Howard v Hallett* [1984] RTR 353. That case concerned the predecessor to the RTA 1988, the Road Traffic Act 1972. The 1972 Act included a provision, in section 10(2), which was similar to what is now section 15(2) of the RTOA 1988.

46. In *Howard*, at p. 361, Robert Goff LJ stated that:

> "It would, it seems to me, be a most extraordinary consequence if, where the Act of 1972 lays down a careful and statutory procedure for requiring a suspected motorist to provide specimens of breath and for analysing them and presenting them before a court, it is possible to disregard that procedure altogether. I cannot believe that that was the intention of the legislature."

47. He continued:

> "In my judgment, it is plain that section 10(2) is referring to specimens taken in accordance with the statutory procedure laid down under section 8 of the Act. There must be read into the section as implicit in it, after the words 'specimen of breath, blood or urine provided by the accused', the words 'pursuant to the provisions of this Act.' That must include a reference in particular, to the procedure laid down under section 8 of the Act. So read, in my judgment, section 10 of the Act takes effect in a sensible manner and precludes any of the startling consequences which flow from Mr Lofthouse's argument [for the Prosecution]. It follows that I, for my part, am unable to accept Mr Lofthouse's primary submission made in response to Mr Sellick's argument".

48. *Howard v Hallett* was considered and commented upon by the House of Lords in *R v Fox* [1986] AC 281. In that case the defendant was the driver of a motor vehicle when it was involved in an accident. There was a passenger in the vehicle but no other person or vehicles were involved. When police officers arrived at the scene the defendant and his passenger had left. The police went to the defendant's house and required the defendant to provide a specimen of breath. He refused. He was arrested

and taken to a police station, where he was again required to provide a specimen of breath. A specimen provided contained 57 micrograms of alcohol in 100 millilitres of breath. The defendant was charged with two offences. The first was failing to provide a specimen of breath, contrary to section 7(4) of the Road Traffic Act 1972; the second was driving a motor vehicle with a breath/alcohol level in excess of the prescribed limit, contrary to section 6(1) of the Act. The defendant was convicted of both offences by the justices. On his appeal, the Divisional Court quashed the conviction for failing to provide a specimen of breath, holding that at the time when the police officers had been in his house they had been trespassers; but the Court upheld the conviction for driving with excess alcohol. It was conceded that none of the police officers concerned had acted otherwise than in good faith. The House of Lords dismissed the defendant's appeal.

49. Although there was some discussion in the speeches of the House of Lords of the decision in *Sang*, there was no discussion of section 78 of PACE. No doubt this was because at the material time of the events in question that had not yet come into force. However, as Lord Fraser of Tullybelton noted at p. 290, in the House of Lords "a frontal attack was mounted on the admissibility of the specimen as evidence, on the ground that it had been obtained by means which were not authorised by the Act and which were illegal, and that it was, therefore, tainted by illegality." At p. 291, Lord Fraser said that:

> "Apart from the detailed provisions of the Act, there is nothing in *Morris v Beardmore* [1981] AC 446 which supports the general principle that conviction for an offence under section 6(1) will be invalid if the evidence by which it is proved has been obtained unlawfully."

50. Later on the same page, Lord Fraser continued:

> "In the present case … the offence of which the accused now stands convicted is not the offence of failing to provide a specimen of breath. It is the offence of driving with excess alcohol in his breath, and the specimen was only evidence, important but not in itself conclusive, tending to show he had committed that offence. Moreover it was 'evidence subsequently obtained from the accused himself relating to an offence that [had] already been committed by him,' and as such it would be capable of falling with[in] the judge's exclusionary jurisdiction."

51. At p. 292, Lord Fraser continued:

> "It is a well established rule of English law, which was recognised in *R v Sang*, that (apart from confessions as to

> which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally."

He then cited the passage in *Kuruma* which we have already quoted above. Lord Fraser therefore rejected the submission that the evidence was inadmissible. In those circumstances he did not find it necessary to place any reliance on the provision of section 10(2) of the 1972 Act that evidence of the proportion of alcohol in a specimen of breath "shall, in all cases, be taken into account …", which is similar to section 15(2) of the RTOA 1988. He said:

> "As at present advised, I do not think those words can make evidence admissible if it would not be admissible under the general law. I am inclined to read them as referring only to a specimen 'provided pursuant to the provisions of this Act.' "

52. Lord Elwyn-Jones agreed with Lord Fraser, Lord Edmund-Davies and Lord Bridge of Harwich. Lord Edmund-Davies agreed with Lord Fraser, including on the point that it was not necessary to give a final decision on the section 10 issue.

53. Lord Bridge also agreed with Lord Fraser. He expressly referred to the decision of the Divisional Court in *Howard v Hallett* on the true construction of section 10(2). He could "see no reason to doubt" that decision. On the contrary he found the reasoning of Robert Goff LJ in that case "wholly convincing." Nevertheless, this passage was clearly *obiter* and is not part of the *ratio* of *Fox*.

54. Lord Brightman agreed with all of the other speeches.

55. In our judgment, it was not authoritatively decided by the House of Lords that section 10(2) of the 1972 Act (now section 15(2) of the RTOA 1988) did have the effect which was considered by the Divisional Court in *Howard v Hallett*. The point of law was ultimately left open without being finally determined. What is more important is that the House of Lords dismissed the appeal despite the admissibility argument being squarely before it, since the principal submission for the appellant was that the evidence should have been excluded because of the illegal manner in which it had been obtained.

56. The mainstay of the argument on behalf of the Appellant in the present case is the decision of the Divisional Court in *Murray*. That case concerned section 7(7) of the RTA 1988, which provides that:

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

57. In *Murray* the defendant was arrested and was at a police station. He was required, pursuant to section 7(1)(a) of the RTA 1988, to provide two specimens of breath for analysis. The specimen with the lower reading contained 47 micrograms of alcohol in 100 millilitres of breath. In accordance with section 8(2) of the RTA 1988, the defendant was offered the option of providing a specimen of blood or urine under

section 7(4). He declined to provide an alternative specimen. He was charged with driving on a road having consumed alcohol in such quantity that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1)(a) of the RTA 1988. Evidence was given before the Magistrates' Court by a police constable that, after the defendant had declined to provide an alternative specimen, she had completed the standard procedure form but was unable to recall the exact words used. The justices accepted a submission by counsel for the defendant that there was no evidence to show that the defendant had been warned, in accordance with section 7(7), that a failure to provide a specimen of breath might make him liable to prosecution but went on to hold that, as no prejudice had been caused to the defendant, the specimen of breath was not rendered inadmissible. The defendant was convicted and appealed by way of case stated to the Divisional Court.

58. The Divisional Court allowed the appeal. The Court held that it was clear that section 7(7) did not confer any discretion on the trial court to admit evidence of test results where no prejudice had been caused. Once it was accepted that the admission in evidence of the results of tests was, on a proper construction of section 15(2) of the RTOA 1988, dependent on the statutory procedures having been carried out, it was impossible, as a matter of principle, to carve out an exception to cater for cases where the breach of procedure caused no prejudice. Accordingly the conviction was quashed.

59. In the course of his judgment in *Murray* Watkins LJ cited *Howard v Hallett* and stated:

> "The effect of Robert Goff LJ's reasoning is, quite clearly, that the results of the breath, blood or urine test are only admissible on a prosecution for driving with excess alcohol if the procedural requirements of what are now sections 7 and 8 of the Road Traffic Act 1988 have been fully complied with. His conclusion at p 361B as to the correct construction of section 10(2) of the Road Traffic Act 1972 [now section 15(2) of the Road Traffic Offenders Act 1988] was necessary for the decision in the case, since the very argument mounted by the prosecutor was to the effect that the results of the second and third tests had been properly admitted by the justices even though the statutory procedure had been departed from. The conclusion reached by Robert Goff LJ was, accordingly, part of the ratio decidendi of his judgment."

60. We would observe that, first, this Court is not bound by decisions of the Divisional Court, although they are certainly entitled to respect, not least because the statement of principle by Robert Goff LJ in *Howard v Hallett* was approved *obiter* by Lord Bridge in *Fox*.

61. Furthermore, in our view, the decision in *Murray* is distinguishable because it concerned section 7(7) of the RTA 1988, which is in substance a statutory exception to the normal principle against self-incrimination. In giving the judgment of the Divisional Court Watkins LJ said at pp. 220-221:

> "… It should be remembered that the legislation, contrary to the general traditions of the criminal law but for good and pressing social reasons, compels a suspected person to provide evidence against himself. It is, therefore, in our judgment, not surprising that a strict and compulsory code is laid down and a set of pre-conditions which must be fulfilled before any specimen produced by the defendant, which may condemn him at the hearing of the charge against him, can be adduced in evidence: no matter that there may be some instances where breach of the code occasions no discernible prejudice."

62. The decision in *Murray* is not, in our view, authority for the proposition that *any* breach of *any* of the procedures associated with the obtaining of specimens under section 7 of the RTA 1988 means that a specimen is automatically rendered inadmissible in evidence in criminal proceedings.

63. In this context we would emphasise that section 15(4) of the RTOA makes it clear on its face that a sample is to be "disregarded" if it was not obtained by consent. It is because the Divisional Court in *Murray* considered that a failure to give the warning required by section 7(7) vitiated consent that it concluded that the specimen was inadmissible as a matter of law. It is telling that the analysis conducted by the Divisional Court was entirely couched in terms of the particular statutory scheme in the road traffic legislation and did not concern section 78 of PACE at all.

64. On behalf of the Appellant in the present case reliance was also placed on the decision of the Divisional Court in *Cole v DPP* [1988] RTR 224, in which the Court (Watkins LJ and Kennedy J) considered the situation where the defendant (a motorist) was stopped by a police constable on suspicion of driving with excess alcohol, failed to provide a specimen of breath for a breath test, was arrested and was taken to a police station. He was required to provide two specimens of breath for analysis in accordance with section 8(1) of the Road Traffic Act 1972. The officer in charge of the device formed a suspicion that the defendant might be acting under the influence of drugs. A doctor, who was summoned for the purpose of considering whether a blood specimen could be required from the defendant, was at first of the opinion that the defendant was incapable of understanding a request for a blood specimen. Subsequently, the doctor was of opinion that the defendant's condition might be due to drugs or epilepsy, did not advise that it might be due to some drug and advised that the defendant understood a requirement for a blood specimen. Therefore the constable required a blood specimen for analysis. The defendant refused to provide it and was tried on an information charging failure to provide a specimen of blood, contrary to section 8(7) of the 1972 Act. He submitted that, since there was no evidence that the doctor had advised that the defendant's condition might be due to drugs, as required by section 8(3)(c), the constable had no right to require a specimen of blood. The justices were of the opinion that the requirement of the blood specimen was a legal requirement and convicted the defendant.

65. On his appeal the Divisional Court allowed the appeal. It held that section 8(3)(c) intended a doctor to give a clear indication orally to a police officer at a police station of the doctor's view, formed by him at the station, about the possible cause of the

motorist's condition; in the absence of such an indication by the doctor and in the light of his view that the defendant's condition was due to either drugs or epilepsy, the justices were not entitled to infer from the defendant's behaviour that his condition was due to drugs. They had erred in finding the constable's requirement to be valid and erred in concluding that the evidence justified finding that the constable had been advised by the doctor that the defendant's condition might be due to some drug. Accordingly the conviction was quashed.

66. In giving the judgment of the Divisional Court Watkins LJ emphasised that the doctor was of the view that the defendant's condition might equally by due to epilepsy as it might be due possibly to drugs. At p. 230 he said:

> "There were therefore two different causes possibly for the defendant's condition of which in my judgment the constable had to be made directly aware. …
>
> When section 8(3)(c) was enacted, I have not the slightest doubt, Parliament intended that there should be a clear indication from a doctor to a police officer at a police station in circumstances such as this of the doctor's view as to the possible cause of a defendant's condition as found by him at the police station – by a clear indication I mean a clear oral statement by the doctor to the police officer of his opinion. Here obviously there was none."

67. In our view, that case turns on its own facts and is distinguishable from the present case. In that case there were two possible causes for the defendant's condition, only one of which was the influence of drugs. That was not true of the present case. We have come to that view essentially for the same reasons which the trial judge gave in the present case when she made her ruling on the admissibility of this evidence. In essence the circumstances in which the healthcare professional came to express the view which she did was that the Appellant himself had lied about whether he had been taking drugs earlier that day.

68. Finally we should refer to the case of *Bodhaniya v Crown Prosecution Service* [2013] EWHC 1743 (Admin); 178 JP 1, which was not shown to us at the hearing but which appears to us follow the conventional approach, as we have set out above, in a context very similar to the present case. The main judgment was given by Burnett J, with whom Moses LJ agreed.

69. In that case the appellant was involved in a serious collision on the motorway. He provided a positive roadside breath test and was taken to a police station. He was unable to provide the second of two specimens of breath at the police station and so in due course provided a specimen of blood. On analysis the blood contained 137 micrograms of alcohol in 100 millilitres if blood. The legal limit is 80 micrograms. The appellant was prosecuted for an offence of driving with excess alcohol and was convicted by the Magistrates' Court. He appealed by way of case stated to the Divisional Court. This was on the ground that the request by the police constable at

the police station for a specimen of blood was unlawful. Reference was made to section 7 of the RTA 1988, in particular subsection (3)(b).

70. The principal argument before the Court concerned whether there was reasonable cause for a constable to believe that for medical reasons a specimen of breath could not be provided, as required by section 7(3)(b). The Divisional Court concluded that the inference drawn by the District Judge was one which was open to him: see para. 17 of the judgment. As Burnett J then said that was sufficient to dispose of the appeal. However, at para. 18, he said that there was one further matter that called for mention. He said:

> "Section 7 of the Road Traffic Act 1988 does not in terms provide that a failure to comply with section 7(3) has the consequence that the results of the analysis of a blood sample cannot be given in evidence. That is why the appellant's advocate at trial and the district judge approached the matter through section 78 of the Police and Criminal Evidence Act 1984 that is in contrast, for example, with the provisions of section 54 of the Road Traffic Offenders Act 1988 [this appears to be a typographical error for section 15(4)]. That provides that the specimen of blood should be disregarded, unless it was taken with the consent of an accused and was taken by a medical practitioner or registered healthcare professional. The general position in English law is that evidence obtained illegally remains admissible, even in criminal cases. That is why its exclusion is argued by reference to section 78 of the 1984 Act. In the overwhelming majority of cases it may be that a failure to comply with section 7(3) of the Road Traffic Act 1988, before requiring an accused to provide a specimen of blood, will have the result that all evidence of that specimen will be excluded. But it is not necessarily so. The facts that this case, where on any view the constable concerned bent over backwards to try to assist the appellant in difficult circumstances, provides an example where exclusion under section 78 would not have been appropriate."

71. Although that passage was *obiter*, we respectfully agree with that analysis.

72. We therefore reject the more fundamental submission that has been advanced on behalf of the Appellant in this case, to the effect that, even before one reaches the question of section 78 of PACE, the evidence consisting of the blood sample was automatically inadmissible as a matter of law.

73. Turning to the circumstances of the present case, we have come to the conclusion that the trial judge was entitled to exercise the judgement which she did under section 78 of PACE and to refuse to exclude the evidence of the blood sample. This is essentially for the reason that she gave, namely that the Appellant lied to the healthcare professional about whether he had been taking drugs. If he had not lied it

was likely that the healthcare professional would have altered the opinion which she formed as to whether his condition might have been due to drugs.

Conclusion

74. For the reasons we have given this appeal is dismissed.