Case No: CO/3994/2017

Neutral Citation Number: [2018] EWHC 544 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Manchester Civil Justice Centre

1, Bridge Street,

Manchester, M60 9DJ

Date: 20/03/2018

Before :

SIR BRIAN LEVESON

PRESIDENT OF THE QUEEN'S BENCH DIVISION

THE HONOURABLE MR JUSTICE KERR

- -

Between :

THE DIRECTOR OF PUBLIC PROSECUTIONS **Appella**

- and -

WILLIAM JAMES SUGDEN **Respondent**

- -

- -

Benjamin Douglas-Jones (instructed by **Government Legal Department**) for the Appellant

Jeremy Benson QC (instructed by **Geoffrey Miller Solicitors**) for the Respondent

Hearing date: 14 February 2018

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Judgment

The Hon Mr Justice Kerr:

Introduction

1.
In this appeal by case stated from a district judge sitting at Stockport Magistrates' Court, the appellant (the DPP), challenges the decision of the district judge not to allow a police officer to refresh his memory from a copy document recording the outcome of a breath test on the respondent using an "Intoxilyzer" machine. In consequence of the decision not to allow the officer to refresh his memory, the prosecution was unable to prove its case and the respondent was acquitted.

2.

The appeal is against the decision of District Judge Temperley given on 22 June 2017. On 22 August 2017, at the request of the DPP, the district judge stated a case for the opinion of this court, asking two questions:

(1)
whether he had erred in law in applying the “best evidence” rule to the document on which the officer, PC Cox, wished to rely, under section 139 of the Criminal Justice Act 2003 (the 2003 Act), to refresh his memory; and

(2)
whether he had erred in law, on the facts of the case, in refusing an application for PC Cox to be allowed to refresh his memory from a document purporting to be a copy of a “Form MG DD/A”.

3.
A “Form MG DD/A” is the document in which the testing officer records the breath test procedure and result and attaches a printout of the result from the Intoxilyzer machine. The initials “MG DD” stand for “Manual of Guidance, Drink and Drug Driving”. The prosecution was unable to produce the original form, or the original printout of the result, at the trial, but produced a photocopy of the Form MG DD/A and test result printout. The district judge refused to permit PC Cox to refresh his memory from the copy documents. A submission of no case to answer by the defence was successful.

The Facts

4.
On 10 June 2016, the respondent was driving. He was stopped by police. PC Cox administered a breath testing procedure at Buxton police station that day, using an Intoxilyzer machine. He completed the Form MG DD/A. We have seen the completed copy which was produced to the district judge. In it, PC Cox recorded that the reading was 72 and that this was a “fail”.

5.
He recorded that the respondent was “co-operative to talk to but unsteady on feet. Unable to retain information and keeps asking same questions over and over. Smell of intoxicants while talking to him”. When asked at 2330 to provide two specimens of breath, he replied “Yea whatever”, as PC Cox recorded. The readings from the machine were 78 mg at 2335 and 79 mg at 2336.

6.
PC Cox recorded that the respondent accepted a copy of the printout and did not sign for it but “placed [it] into [his] property”. The printout was inserted into section A23 of the form, which is left blank for that purpose. The machine operator, one J Henderson, signed the certificate, confirming that the first reading and the second reading related to the two specimens of breath provided by the respondent.

7.
The respondent was subsequently charged with three driving offences on 10 June 2016. The first two charges were driving without due care and attention and failing to stop after an accident. He was convicted of those charges and sentenced. We are not concerned with them in this appeal. The third charge was driving a vehicle after consuming so much alcohol that the proportion of alcohol in his breath exceeded the prescribed limit, contrary to section 5(1) of the Road Traffic Act 1988, read with Schedule 2 to the Road Traffic Offenders Act 1988 (the excess alcohol offence).

8.

The respondent pleaded not guilty and the case was listed for trial at Stockport Magistrates' Court. The defence instructed an expert, Dr Mundy, who provided a written opinion stating that on the basis of the respondent's account of the amount of alcohol he had consumed, the amount of alcohol in his breath would not have been over the legal limit.

9.
On 27 April 2017, the trial was part heard. It was resumed on 22 June 2017. The issues included the reliability of the Intoxilyzer machine; whether statutory requirements under section 7 of the Road Traffic Act 1988 [were met]; and whether the guidance in Form MG DD/A was followed. On 22 June 2017, the prosecution called PC Cox, who had conducted the breath testing procedure.

10.
The Crown Prosecution Service (CPS) asked permission under section 139 of the 2003 Act for PC Cox to refresh his memory from the Form MG DD/A. He had a document with him which he initially said was the original Form MG DD/A. Subsequently, he conceded that it was a copy.

11.
Counsel for the defence, Mr Philip Lucas, objected to PC Cox refreshing his memory from the document produced by him, on the ground that it was "secondary evidence". He submitted that the copy could be unreliable; he said Dr Mundy had seen documents purporting to be copies where the reading had been different from that in the original printout. He referred the district judge to three cases: R. v. Nowaz [1976] 1 WLR 830, CA; Kajala v. Noble (1982) 75 Cr App Rep 149 (DC) and R. v. Albert Patrick Collins (1960) 44 Cr App Rep 170 (CA).

12.
The district judge also considered relevant extracts from Blackstone's Criminal Practice and Stone's Justices Manual. The judge put the case back to enable the CPS to enquire further after the original Form MG DD/A. The CPS were unable to produce it or to explain satisfactorily why the original was not on the court file. According to the case stated, it was established that PC Cox had sent the original Form MG DD/A to another officer not present in court, PC Stordi; but the CPS could not say whether the original had been lost, nor whether a proper search had been made.

13.
The judge ruled against allowing the witness to refresh his memory from the copy document. He said the defence had repeatedly requested the original due to previous experiences of discrepancies; that the "best evidence" rule no longer applies except where an original document is available in the hands of the party seeking to rely on it; that it was reasonable to assume the original was still available unless it had been destroyed or lost; that a proper search should have been done; that the CPS had had ample time to ensure all required documents were available at court.

14.
Following that ruling, the CPS did not apply for an adjournment. PC Cox gave evidence without reference to the Form MG DD/A or the printout but was forced to rely on his memory of what had transpired (and, presumably, what he had seen on the form outside the court). He did not give evidence that he had given the respondent the required statutory warning under section 7(7) of the Road Traffic Act 1988. He gave evidence of the two breath alcohol readings but not about the calibration of the Intoxilyzer machine, nor about whether it was functioning properly when the test was carried out. No printout of the breath test result was adduced in evidence.

15.

At the end of the prosecution case, the judge upheld a submission by the defence of no case to answer. Consequently, the respondent was acquitted of the excess alcohol offence. The DPP appeals on the ground that the learned district judge erred in not allowing the officer to refresh his memory from the copy Form MG DD/A in that he:

(1)
wrongly took into account the “bald submission” that there had been discrepancies between copies of Forms MG DD/A and originals in other cases; and

(2)
misapplied the best evidence rule so as to preclude the use of a copy as a document from which a witness’s memory could be refreshed, when its use was (a) permissible at common law (b) parliament had in section 139 of the 2003 Act relaxed the common law rule (c) the current “Better Case Management” digital filing system now imposes the use of copy documents in criminal proceedings; and (d) a document used to refresh a witness’s memory is not evidence.

The Law

16.
It appears from the case stated and the skeleton arguments that the prosecutor did not argue in the magistrates’ court that the copy of the Form MG DD/A on the court file was admissible as evidence in its own right. Indeed, Mr Douglas-Jones, now appearing for the DPP, submitted in his skeleton argument that the district judge was “wrong to characterise a memory refreshing document as evidence”.

17.
Nonetheless, it is necessary to consider the best evidence rule separately from the body of law which allows a witness to refresh his or her memory from a document not itself adduced in evidence. The two are conceptually distinct. The best evidence rule, or what remains of it, goes to the admissibility of a document as evidence. The law on refreshing of a witness’s memory does not turn on the admissibility of the document from which the witness’s memory is refreshed; that document is not adduced in evidence at all.

18.
I consider first what is left of the best evidence rule. It is well settled that secondary evidence of what a document contains is admissible where the original cannot be produced, provided some account is available to the court of why the original cannot be produced. In R. v. Albert Patrick Collins(1960) 44 Cr App R 170, the Court of Criminal Appeal, applying the proviso to section 4(1) of the Criminal Appeal Act 1907, upheld a conviction for obtaining money by false pretences based on a letter admitted below incriminating the defendant.

19.
The secondary evidence of the letter was not a copy of the original but, as Lord Parker LCJ put it, “a document which we are told was a copy of the carbon [copy], although there is no clear evidence that it was”. The court found it unnecessary to express a final conclusion on the issue whether secondary evidence of a document must be a copy of the original document rather than a copy of a copy, but:

“as at present advised … can see no objection to a copy of a copy being produced, provided that somebody is called who can verify not only that the copy produced is a true copy of the original copy, but also that it is in the same terms as the original”.

20.
The court held that the document ought not to have been admitted, because the prosecution had not called evidence that the witness producing the copy of a copy had checked that it was in the same terms as the carbon copy of the original, and therefore in the same terms as the original itself.

21.
In R. v. Nowaz [1976] 1 WLR 830, it was agreed before the Court of Appeal that the safety of the applicant's conviction for making a false declaration under the Perjury Act 2011 turned on whether a police officer's oral evidence of the contents of the declaration, and of a photograph said to be of the applicant, had been correctly admitted where the originals could not be produced because the person in possession of them claimed diplomatic immunity from attending court and producing them to the court. The Court of Appeal upheld the conviction on the basis that the secondary evidence was correctly admitted and refused leave to appeal against conviction.

22.
Later, in Kajala v. Noble(1982) 75 Cr App R 149, on an appeal by case stated from a magistrates' court, this court upheld a conviction for threatening behaviour based on identification from a BBC news programme which could only be produced to the court in the form of a video cassette copy of the film, the BBC's policy being not to permit original films to leave its premises. Ackner LJ, sitting with Woolf J (as he then was) and giving the judgment of the court, said at page 152:

"The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility: Garton v. Hunter [1969] 1 All E.R. 451, per Lord Denning M.R. at 453e; see also Archbold, Criminal Pleading, Evidence and Practice (40th ed.), para. 1001. In our judgment, the old rule is limited and confined to written documents in the strict sense of the term, and has no relevance to tapes or films."

23.
In the current (2018) edition of Archbold, the law is expressed as follows, at paragraph 9-98, which I would endorse:

"The old rule that only the "best" evidence is admissible now survives only in the rule that secondary evidence of the contents of a private document cannot be given without accounting for the non-production of the original. Otherwise all admissible evidence is in general equally accepted, though its weight may be a matter of comment: see Kajala v. Noble ....."

24.
In similar vein, the current (2018) edition of Blackstone's Criminal Practice at paragraph F1.31 describes the best evidence rule as "all but defunct"; see also paragraphs F8.2 and F8.3 on the admissibility of a copy where the original is not available and the proposition repeated in at least two cases that "there are no degrees of secondary evidence".

25.
I turn next to the law permitting the refreshing of a witness's memory. At common law, the refreshing by a witness of his or her memory from a document has long been permitted: see e.g. Horne v. Mackenzie (1839) VI Clark & Finnelly 628, HL, in which Lord Cottenham LC accepted in a dictum that

a surveyor had properly been allowed to refresh his memory by looking at a printed copy, rather than the original, of his own survey report together with his handwritten annotations on it.

26.
The evidential status of documents used to refresh a witness's memory varies from case to case, depending on the scope of cross-examination on the document, if the opposing party calls for it and inspects it; see the discussion of the issue in Sir Jocelyn Simon's judgment in the contested divorce case of Senat v. Senat[1965] 2 WLR 981. A document does not become evidence in the case merely by being relied on by the witness during evidence in chief, for the purpose of refreshing the witness's memory.

27.
The Court of Appeal returned to the subject in R. v. Kwok Si Cheng (1976) 63 Cr App R 20. They upheld the safety of a conviction for supplying heroin where a police officer at the trial had given evidence of observations of the defendant after refreshing his memory not from his original notebook, which could not be found, but from a written statement used at the committal proceedings, which had been prepared from the notebook but was not an exact copy of it.

28.
After reviewing various authorities, Lawton LJ cited with approval the dictum of Lord Cottenham LC in Horne v. Mackenzie and held that the position was as follows, at page 24:

"If the statement in this case, or any other transcription of notes in other cases, is substantially what is in the notes and there is evidence to that effect, then the judge should allow the witness to refresh his memory from the statement or transcription as the case may be. But if, after investigation, it turns out that the statement or transcription bears little relation to the original note, then a different situation arises. The judge in the exercise of his discretion would be entitled to refuse to allow a witness to refresh his memory from such an imperfect source of information."

29.
And in A-G's reference No. 3 of 1979 (1979) 69 Cr App R 411, Lord Widgery CJ, at page 414, approved the formulation of the rule in the then current edition of Archbold thus:

"The rule may be stated as follows: a witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with, the facts to which he testifies. `Contemporaneously' is a somewhat misleading word in the context of the memory refreshing rule. It is sufficient, for the purposes of the rule, if the writing was made or verified at a time when the facts were still fresh in the witness' memory."

30.
Against that common law background, parliament then enacted section 139(1) of the 2003 Act. It provides as follows:

"(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."

31.
Section 139(1) was considered by this court in Cummings v. CPS[2016] EWHC 3624 (Admin), a case of refusal by a driver to provide a specimen of breath when required by a police officer to do so. The form recording the refusal had been completed by a different officer from the one who gave evidence at the trial, though the latter had been present when the appellant had refused to provide the sample and when the form was filled in by her colleague. The court held that the justices had been correct to find that the requirements of section 139(1) were satisfied.

32.
Soole J, sitting with Lindblom LJ and giving the judgment of the court, noted that the common law position as set out in Lord Widgery CJ's judgment in A-G's reference No. 3 of 1979 had been stricter than the law subsequently enacted in section139(1) of the 2003 Act. He derived from R v. Kelsey[1982] 74 Cr App R 213 the proposition that at common law a statement is "verified" (the word subsequently used in section 139(1)) if the witness has:

"verified in the sense of satisfying himself whilst the matters are fresh in his mind, (1) that a record has been made, and (2) that it is accurate"

(per Taylor J, as he then was, at page 217).

33.
As Soole J pointed out (see paragraphs 16-18 of his judgment), whether that has or has not occurred is a question of fact; often, the fact will be shown by the witness having signed a document but that is only one way of proving that verification has taken place.

34.
There appears to be no reported case deciding whether verification under section 139(1) of a document setting out the witness's recollection at a time when it was better than it has subsequently become, may be carried out by reference to a copy of the document in question and not the original. As both parties in this appeal have noted, section 139(1) is silent on this issue.

35.
Mr Douglas-Jones, for the DPP, submits that the position is correctly set out in the current (2018) edition of Archbold, at paragraph 8-188:

"Section 139 of the 2003 Act … is silent as to the use of a copy of the document that was made or verified by the witness. The unmistakeable intent of the Act being to relax the rule relating to the use of a document by a witness for the purpose of refreshing his memory, it seems inconceivable that the courts will not permit the use of a copy at least in those cases where a copy document could have been used prior to the commencement of the Act."

36.
The editors of Blackstone's Criminal Practice, at paragraph F6.20, take a similar view:

"It is submitted that where the original of a document has been lost or destroyed, under s. 139(1) (as at common law), a witness may use a copy if it is proved to be an accurate copy either by the witness himself or by some other person. …"

37.

Mr Jeremy Benson QC, for the respondent, accepts in his skeleton argument that “the common law rule in relation to the use of a copy document applies also to memory refreshing documents”. But he goes on to submit that “[w]here the original document is in existence, a copy of the document cannot be used to refresh memory”.

38.
In my judgment, the combined effect of the common law and section 139(1) is that the position can be summarised as follows:

(1)
A document containing a record of relevant factual evidence is generally admissible in the ordinary way, because the content of the document is relevant to an issue in the case.

(2)
If the document is a copy or other form of secondary evidence, it is not thereby made inadmissible. However, the absence of the original calls for an explanation if one is one is sought by the opposing party.

(3)
If the original is not produced, the court may, not must, refuse to admit in evidence a copy or other secondary evidence and will consider the likely accuracy or otherwise of the copy or other secondary evidence.

(4)
In criminal proceedings, the court will also consider any explanation for its absence, its probative value and any prejudicial effect on the defence (cf. section 78 of the Police and Criminal Evidence Act 1984).

(5)
Where there is no reason to doubt that the document is a true copy of the original (e.g. where it is a straightforward photocopy of a missing original) and its content is within the knowledge of the defendant so that its accuracy can be challenged in cross-examination, there will generally be no prejudice to the defence in admitting the copy document in evidence.

(6)
Whether or not the document or copy or other secondary evidence of its content is admitted, a party may refresh his or her memory from the document if the requirements of section 139(1) of the 2003 Act are met.

(7)
The witness may refresh his or her memory from either the original document or from a secondary document – i.e. a copy, or other document derived from the original – if the secondary document is likely to be an accurate reflection of the content of the original, provided that the witness verified either the original or the secondary document at a time when his or her recall was better than at the time of giving oral evidence.

(8)
Where a witness is permitted to refresh his or her memory from a document and the document is not adduced as evidence by the party relying on it, the content of that document may or may not become evidence in the case, depending on the nature and extent of cross-examination on its content.

(9)
Whether or not the document becomes evidence in the case, the court will always consider and give appropriate weight to any discrepancy or risk of discrepancy between its content and an original or source document of which it is a copy or from which it is derived.

Submissions, Reasoning and Conclusions

39.
Mr Douglas-Jones, for the DPP, submits that the circumstances here were such that PC Cox should clearly have been allowed to refresh his memory from the copy of the MG DD/A. The copy could have been used by him to refresh his memory under the common law rules before the enactment of section 139(1), which was intended to relax the common law rule, not to enact a stricter rule.

40.
He pointed out that the criminal courts now operate entirely through the use of electronic copies of statements and exhibits, applying the principles of “Better Case Management” and using the “Digital Case System”. He contended that Mr Lucas did no more than baldly assert that there could be discrepancies between the lost original Form MG DD/A and the copy from which PC Cox wished to refresh his memory. There was no specific evidence to support that assertion. This was, he said, the sort of technical point the courts should no longer entertain.

41.
Mr Douglas-Jones submitted further that the district judge had wrongly treated the copy Form MG DD/A as evidence in its own right, while he should have considered it merely as a document used to refresh PC Cox’s memory. The judge had applied the best evidence rule when deciding to refuse the request for PC Cox to refresh his memory.

42.
For the respondent, Mr Benson QC submitted that the district judge had been right to reject the request of the CPS that PC Cox be allowed to refresh his memory from the copy Form MG DD/A. He had been entitled to find that the original Form MG DD/A and the printout of the breath result included within it, were still available to the Crown although they had not been produced.

43.
In particular, Mr Benson submitted that the judge was entitled to place weight on the fact that the defence had repeatedly been asking for production of the original documents, the case had been in progress for 12 months and the Crown did not appear to have conducted a proper search for the original documents. He submitted, further, that if the original documents could not be produced, then a copy can be used but only if the witness can attest that the copy is accurate. PC Cox did not do so.

44.
He submitted that the advent of the Digital Case System and Better Case Management were not relevant and could not abrogate the need for original documents; the electronic processes of reproducing document can themselves create discrepancies, such as typing or formatting differences, between an original and a scan of it; the copies often do not reproduce in colour and some evidence gathering exercises, such as fingerprinting, DNA analysis and electrostatic detection analysis, can only be carried out on original documents.

45.

In my judgment, the district judge did not need to consider directly the residual content of the “best evidence” rule because the prosecution had not sought to adduce the copy Form MG DD/A in evidence. I note that the three cases cited to him by the defence were R. v. Nowaz, Kajala v. Noble and R. v. Albert Patrick Collins, all cases concerning the best evidence rule rather the law relating to memory refreshing, and all long predating section 139 of the 2003 Act.

46.
Before the trial, initial details of the prosecution case were no doubt sent to the defence in the usual way. The respondent did not dispute that he was on notice that the machine had produced readings leading to the conclusion of the testing officer that the test result was a “fail”. At trial, when the original Form MG DD/A could not be produced, the district judge had before him a partial explanation for the absence of the original form MG DD/A. The explanation was that the original form had been sent by PC Cox to PC Stordi.

47.
It was not explained why the document that had found its way onto the court file turned out to be a copy and not the original and why the original was not available; but it was clear that what was on the court file was a document derived from the original and obviously a copy of it. No one was suggesting that the copy was of a document other than the missing original. There was no support for the suggestion that the printout recording the result of the test was other than a copy of the original printout from the Intoxilyzer machine.

48.
In those circumstances, the judge’s starting point should have been that the document from which PC Cox wished to refresh his memory was, clearly, a secondary document derived from a missing primary original source document. It was not a remote secondary document such as a paraphrase from memory long after the event. Nor was it suggested that it could be a document misplaced from the file in a completely different case, or the like. The Crown’s omission to carry out a proper search was therefore of little moment.

49.
In my judgment, the copy document was one which the CPS could have adduced as evidence from PC Cox during his evidence in chief. Any risk of discrepancy between it and its missing original counterpart, and any weakness in the Crown’s case thereby resulting, were matters for cross-examination and comment in submission. The case falls within the proposition numbered (5) above. There was no possible prejudice to the defence by admitting it. The content of the entries made on the form by PC Cox were all within the knowledge of the defendant, who could give instructions challenging the accuracy of the entries which could be tested in cross-examination.

50.
But since the CPS did not apply to adduce the copy MG DD/A as evidence and sought only to use it as an aid to PC Cox’s memory, that was not the issue before the district judge. When considering whether to permit the officer to refresh his memory from the copy Form MG DD/A, the district judge ought to have applied the tests set out in section 139(1), which includes the test of verification in turn derived from the earlier common law authorities considered by this court in R. v. Cummings.

51.
It does not appear that the judge performed that exercise. If he had done so, it is likely that he would have acceded to the Crown’s request if it turned out that PC Cox had “verified” either the missing original form or the copy on the court file. It is not clear from the case stated that PC Cox was ever

asked the necessary questions to establish whether the requirements of section 139(1) of the 2003 Act were satisfied. Furthermore, I agree with Mr Douglas-Jones that there was no specific evidence from the defence, as distinct from mere assertion, that there were likely to be discrepancies between the original form MG DD/A and the copy before the court.

52.
I therefore consider that the district judge erred in the manner in which he dealt with the request for PC Cox to refresh his memory from the copy document. I think it likely, subject to asking him the necessary questions arising under section 139(1), that the correct course would have been to allow him to refresh his memory and to allow the defence to explore with him in cross-examination, and subsequently in submissions, the likelihood or risk of any discrepancy between the copy and the original.

53.
I would therefore set aside the verdict of not guilty and direct a retrial of the excess alcohol offence before a differently constituted magistrates' court. I would also wish to sound a note of warning: this judgment should not be taken either as an indication to prosecutors that a lax approach to production of original documents of this kind is to be encouraged, nor as any encouragement to defendants to seek the exclusion of memory refreshing documents on flimsy grounds, where by there is no reason to suppose that they differ from their original counterparts.

54.
I do not think the advent of Better Case Management and the Digital Case System makes any difference to the analysis one way or the other. The parties will very often find it unnecessary to go beyond the electronic versions of documents disclosed using that medium; but any shortcomings in transcription, formatting, the reproduction of coloured inks and the like, can be addressed in the case of a particular document whenever that proves necessary.

55.
I would conclude by answering the two questions asked in the case stated, as follows.

56.
The first question is whether the judge erred "in applying the best evidence rule to the memory refreshing document sought to be relied on by PC Cox under s139 Criminal Justice Act 2003". My answer is, for reasons given above, that the best evidence rule was not the correct starting point and that the words of section 139(1) ought to have been applied.

57.
The second question is whether the judge erred in law "on the facts of this case, in refusing the application for PC Cox to refresh his memory from a purported copy of Form MGDD/A". For the reasons already given, I think that the judge did so err and that on a retrial the court is likely, applying the words of section 139(1), to permit recourse to the copy MG DD/A if the original has not by then been found.

Sir Brian Leveson, P:

58.
I agree and wish only to add emphasis to paragraphs 53 and 54 of Kerr J's judgment. Whereas the courts must adjust to digital working and other steps taken to improve the efficiency of the criminal

justice system, this requirement does not affect the obligation of prosecutors (and, indeed, defence practitioners) to comply with the laws of evidence as properly understood.