Neutral Citation no. [2003] NICA 46(3) | *Ref:* **WEIC4051**

Judgment: approved by the Court for handing down | *Delivered:* **25/11/2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DEREK MARTIN ROBINSON

(Defendant) Appellant

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

(Complainant) Respondent

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Nicholson LJ, McCollum LJ and Weir J

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WEIR J

[1] The background to and the detailed facts relevant to the questions raised by this case stated are set out in detail in the judgment of Nicholson LJ and I gratefully adopt them. In summary, a Constable Miskelly attended the scene of a motor accident where he questioned the Appellant and others present as to who had been the driver of a car that had crashed. The Appellant initially alleged that the driver had been someone who had left the scene before the police arrived but after the constable had made enquiries by radio and discovered that the Appellant was the owner of the car he formed a clear and strong suspicion that the Appellant was lying. Thereafter he continued to question the Appellant until he eventually admitted that he was the owner and driver of the vehicle. It was acknowledged by the prosecution that at no stage was the appellant cautioned before he made his roadside admissions.

[2] Following those admissions and the administration of the preliminary breath testing procedure which proved positive, the Appellant was arrested and taken to the police station where, after he had provided evidentiary breath specimens (the lower of which was in excess of the limit) and having

declined the offer of a blood test, he was released on bail to appear again sixteen days later in order to be charged with driving with excess alcohol and to be interviewed in relation to other alleged motoring offences arising from the accident.

[3] When the Appellant duly returned to the police station in answer to his bail he was interviewed by Constable Miskelly accompanied by another officer. There was no solicitor present on behalf of the Appellant and he confirmed to the Constable that he did not wish to have legal advice. The Appellant was then cautioned in accordance with Article 3 of the Criminal Evidence (NI) Order 1988 and no issue was taken before the Resident Magistrate or in this court as to the adequacy of the caution. The interview then proceeded and a transcript of the tape recording of the interview is attached to the case stated. It is noteworthy that at no point in the interview did the Constable ask the Appellant whether he had been driving the crashed car but rather both Constable and Appellant proceeded throughout on the assumption that the Appellant was the driver, presumably because each was well aware of his roadside admission to that effect. The interview contains a number of implicit admissions that the Appellant was the driver. At no point before or during the formal interview was the Appellant told that, by reason of the absence of a caution, his roadside admissions would or might not be admissible in evidence against him in any subsequent proceedings.

[4] The Appellant was subsequently charged with five offences arising from the use of the car on this evening. Each required proof that the Appellant had been the driver. At the hearing it was contended on the Appellant's behalf by Mr Roche, the solicitor who was by then representing him, that the roadside admission that he had been the driver should be ruled inadmissible because it had been made before the Appellant had been cautioned but after Constable Miskelly had formed a clear suspicion that the Defendant could indeed have been the owner and driver. Mr Roche further submitted that, if the roadside admissions were inadmissible, so also were the admissions subsequently made at the formal interview under caution (" the formal interview") because they flowed directly from the roadside admissions and the subsequent admissions made in that interview were tainted by the inadmissibility of the roadside admissions.

[5] The learned Resident Magistrate acceded to the application to exclude the roadside admissions. I respectfully agree with Nicholson LJ and McCollum LJ that, for the reasons they have given, he was correct to do so. However he declined to exclude the admissions made by the Appellant in the course of the subsequent formal interview that he had been the driver of the car. As a result he convicted the Appellant of the five charges.

[6] In the first of the two questions raised by this Appeal the Appellant challenged the admissibility of the evidence relating to the results of the

preliminary and evidential breath testing because these procedures were carried out subsequently to the making of the excluded roadside admissions. The Learned Resident Magistrate rejected those submissions on the basis that the administration of those tests was not invalidated by the absence of a caution before the making of the roadside admissions. Upon the hearing of this Appeal Mr Dermot Fee Q.C. accepted the correctness of the Resident Magistrate's ruling on this issue and abandoned the Appellant's challenge on this ground.

[7] On the second question, whether the Court properly admitted in evidence the contents of the Appellant's formal interview, Mr Fee submitted that the Resident Magistrate erred in so doing and criticised the reasoning that led him to do so. I shall consider those reasons later in this judgment.

[8] Article 70(1) of the Police and Criminal Evidence (NI) Order 1989 ("the Order") provides that "In this part …"confession" includes any statement wholly or partly adverse to the person who made it…" Accordingly the admissions made by the Appellant at the formal interview were "confessions" and governed by the provisions of Article 74(2) of the Order that are set out in full in the judgment of McCollum LJ. In the present case the purport of Mr Roche's representations to the Resident Magistrate on the admissibility of the admissions made at the formal interview ("the admissions")was plainly that they were or may have been obtained …. in consequence of something said or done which was likely, in the circumstances existing at the time to render unreliable the confession made by him in consequence thereof. In those circumstances the Resident Magistrate was precluded by that sub article from allowing the confession to be given in evidence against the Appellant except insofar as the prosecution proved to the court beyond a reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid. It is interesting to note in passing that the Order has the unusual additional provision in Article 74(3) that, even if the defence fail to make representations about the admissibility of the confession, the court may of its own motion require the prosecution to prove that the confession was not obtained in a manner that contravened Article 74(2). This underscores the importance that the legislature plainly attached to ensuring that confessions have been properly obtained if their contents are to be admitted as evidence against their makers.

[9] In *R v Fulling* [1987] 1 Q.B. 426 at 432D Lord Lane C.J. pointed out that the wording of sub paragraph (b) of section 76(2) of the English Act (which is identical in terms to Article 74 of the Order) "is wider than the old formulation, namely that the confession must be shown to be voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage, excited or held out by a person in authority. It is wide enough to cover some of the circumstances which under the earlier rule were embraced by what seems to us to be the artificially wide definition of oppression approved in *R v*

Prager [1972] 1 WLR 260." These include " questioning which by its nature, duration, *or other attendant circumstances* ….excites hopes….or fears, *or so affects the mind of the subject* that his will crumbles and he speaks when otherwise he would have stayed silent."*(emphasis supplied)* It is also important to recognise that whereas "oppression" under Article 74(2)(a) of the Order necessarily involves impropriety a confession may be inadmissible under Article 74(2)(b) without any impropriety. Furthermore Article 74(2) of the Order makes it clear that it is immaterial whether the confession is in fact true; when the issue of admissibility has been raised, whether by the defendant or by the court of its own motion, then unless the prosecution proves beyond a reasonable doubt that the confession was not obtained in breach of Article 74(2) the confession shall not be given in evidence.

[10] Turning to the relationship, if any, between the roadside admissions and the subsequent admissions at the formal interview, in my view the issue is whether the earlier inadmissible admissions should be regarded as tainting the subsequent interview to the extent that those confessions should also have been ruled inadmissible. (see *Archbold 2003* para. 15-376 and the cases there referred to). Giving the judgment of the English Court of Appeal in *R v McGovern* (1991) 92 Cr. App. R. 228 , Farquharson LJ said at 234:

> "We are of the view that the earlier breaches of the Act and of the Code renders the contents of the second interview inadmissible also. One cannot refrain from emphasising that when an accused person has made a series of admissions as to his or her complicity in a crime at a first interview, the very fact that those admissions had been made are likely to have an effect on her during the course of the second interview. If, accordingly, it be held as it is held here, that the first interview was in breach of the rules and in breach of section 58, it seems to us that the subsequent interview must be similarly tainted."

It is noteworthy in the context of the present Appeal that in *McGovern's* case the appellant had made an inadmissible confession at a first interview at which no solicitor was present but the subsequent interview, which was also ruled inadmissible, took place (unlike the present) in the presence of a solicitor.

[11] In *R v Neil* [1994] Crim.L.R.441 where a first witness statement was excluded because of numerous breaches of the Codes but a subsequent interview was admitted, the English Court of Appeal, (Waite LJ, Hidden and Harrison JJ,) held that where there is a series of two or more interviews and the court excludes one on the grounds of unfairness, the question whether a

later interview which is in itself unobjectionable should also be excluded is a matter of fact and degree. It is likely to depend on a consideration of whether the objections leading to the exclusion of the first interview were of a fundamental and continuing nature, and if so, if the arrangements for the subsequent interview gave the accused a sufficient opportunity to exercise *an informed and independent choice as to whether he should repeat or retract what he said in the excluded interview or say nothing.* In that case, the judge should have exercised his discretion to exclude the evidence. The appellant would have considered himself bound to the admissions in the first statement. The circumstances of the second interview were insufficient to provide him with a safe and confident opportunity of withdrawing the admissions. (*emphasis supplied)* In the commentary on the decision the editors observe "Simply giving a caution in respect of the second interview does not cure the problem; it is rather like locking the stable door after the horse has bolted…"

[12] I turn now to consider the reasons given by the learned Resident Magistrate for deciding to admit the contents of the formal interview. The first was that sixteen days had elapsed between the roadside admissions and the subsequent interview during which time the Appellant had ample opportunity to consult a solicitor. He added that since the Appellant chose not to give evidence it is unclear whether or not he did consult a solicitor but that had he sought and received advice from a solicitor it is almost certain that he would have been advised not to comment at all in the subsequent interview. He observed, correctly, that in the absence of any further admissions the Appellant could not have been convicted and concluded, "In these circumstances I found that the subsequent interview was not "tainted" by the inadmissibility of the roadside admission."

[13] I find some difficulty with this reasoning. If it means that the lapse of sixteen days was somehow sufficient to undo the effect of the absence of a caution at the roadside then I cannot agree. If it means that the period of sixteen days was ample to allow the Appellant to consult a solicitor as to the legal effect of what had occurred at the roadside and that, if he failed to do so, he had only himself to blame if he had not known to keep silent or withdraw his roadside admissions when it came to the formal interview then again I dissent. In the first place there is no onus on a suspect person to seek legal advice so as to be able to combat for the future the effect of earlier impropriety on the part of an interviewer. In the second place there is no guarantee that the Appellant would have been able to give any solicitor whom he might have consulted at that stage a sufficiently detailed account of what had been said or not said at the roadside so as to enable that solicitor to advise that the roadside admissions would be ruled inadmissible and that the Appellant could therefore disown them at the prospective formal interview. Mr Roche was able to make his submissions to the Resident Magistrate having had the benefit of the evidence of Constable Miskelly.

[14] I do not understand why the Resident Magistrate makes reference to the decision of the Appellant not to give evidence. The Appellant was not obliged to do so nor should any adverse inference have been drawn against him for declining to at a stage in the case when the admissibility of prosecution evidence was under consideration. Yet the Magistrate says "Given the Appellant's refusal to give evidence it is *entirely possible* that he made an informed and independent choice to repeat his admissions (*emphasis supplied).* Two points arise from this; the Magistrate was not entitled to draw any inference from the Appellant's choosing not to give evidence but, even relying on this improper inference, the standard of proof achieved in his mind was that of possibility and not the proof beyond reasonable doubt that Article 74(2) requires as a pre condition of admissibility. In my opinion that of itself is sufficient to dispose of the second question in favour of the Appellant.

[15] It is therefore not necessary to deal in detail with a number of other less than satisfactory features of the Resident Magistrate's reasoning. For example, he appears to have misunderstood the principle in *Glaves* [1993] Crim. L.R. 685 so as to conclude, wrongly, that the fact that that appellant was a young person and not an adult somehow lowered the threshold that the prosecution in the present case had to surmount. . He also failed to expressly consider Article 74 at all, (possibly because he was not referred to it) and refers only to the discretion to exclude unfair evidence given by Article 76 of the Order. In *R v McGovern* Farquharson LJ said of the corresponding English section 78, that it is very much a "second string" to section 76.(our Article 74):

> "If the prosecution had successfully established under section 76 that the confession was a reliable one….it would have been open to Mr Clegg to argue that it would still have been unfair for the confession to have been admitted …… It will, however, be observed that the court there has a discretion in determining whether the evidence being tendered would have an adverse effect on the fairness of the proceedings. In as much as we have come to the conclusion that his submission under Section 76 has been established, it is not necessary for us to consider the impact of section 78. Quite plainly, if the confession was inadmissible under section 76 it could not conceivably have been admitted under the provisions of section 78"

If the learned Resident Magistrate had approached his consideration of the matter in this sequential way it is likely that he would have appreciated the need for the prosecution to satisfy him beyond a reasonable doubt of the

matters specified by Article 74(2)(b) before the confession obtained at the formal interview could be admitted in evidence.

[16] I would answer the questions posed by the Case Stated:

1. Yes

2. No