

## **In the Crown Court for the Division of Antrim**

### **R –v- Bothwell**

#### **Smyth J**

#### **Possession of drugs with intent to supply: Police and Criminal Evidence Order (NI) 1988, Articles 76 and 78: Code of Practice, paragraphs 11 (C )(13) and 11(4).**

#### **Facts**

1. The following facts are either not in dispute or I find them for the purpose of this ruling. On the 22<sup>nd</sup> December 2004 Miss Bothwell’s car was stopped on the Scottstown Road, Ballymena. Miss Bothwell was in the passenger seat. The driver was a Mr Surgenor, her boyfriend. The vehicle was searched at 8.30 p.m. and two holdalls were found in the boot of the car. They contained a very considerable quantity of a prohibited Class B drug amphetamine, wrapped in plastic bags. Constable McElhone arrested Miss Bothwell at the scene and gave her the pro-forma caution required by Article 3 of the Police and Criminal Evidence Order (NI) 1988.

“You do not have to say anything, but I caution you that if you do not mention, when questioned, something which you later rely on in court, it may harm your defence. If you do say anything it may be given in evidence.”
2. Miss Bothwell is recorded as making no reply to this. Constable McElhone and Constable Brannigan began an interview, under a further

caution, with Miss Bothwell at 11.04 p.m. The interview ended 28 minutes later at 11.36 p.m.

3. Mark Surgenor has pleaded guilty to possessing the amphetamine that was found in Miss Bothwell's car. He was brought separately to Ballymena Police Station and, on the way there, but not immediately after arrest and caution, told police, "it's her car, we went down to Belfast Docks and they put two bags into the back, she knew nothing about it" and "I was asked to pick up two bags, money is tight coming up to Christmas. I was to get £10,000 for it" and "I was to put them in a hedge."
4. Miss Bothwell was interviewed at length on a number of occasions, starting with an interview that night. She was asked about the holdalls and said she knew nothing about them and did not see them being taken out. She gave an account of her movements with her boyfriend that day and of going for a ride in her car to Dublin. She repeated that she had not seen the holdalls and did not know what they looked like.
5. Before the first interview was commenced Miss Bothwell was taken to see Dr Dick for a medical examination. This was at 10.00 p.m. that day. Constable Julie McAllister escorted Miss Bothwell to the medical, remained with her and then took her back to the cell. This was before interviews began with Miss Bothwell at 11.04 p.m. It is possible to be fairly precise about the time as the custody record records the time of arrival back in cell 3 of Miss Bothwell at 10.20 p.m.
6. The notes taken by Constable McAllister straddle two notebooks but there in an extensive record referring to Miss Bothwell being admitted

to the Custody Suite, being escorted to the medical with Dr Dick and then taken back to the cell. It is not clear from the notebook entries as to when they were entered up but I accept Constable McAllister's evidence that, after she returned Miss Bothwell to the Custody Suite and to her cell she went up to the office and made up her notes. The entry dated 10.30 p.m. and which relates to a continuity record is quite extensive and to some extent supports this. I therefore accept the note was made very shortly after the comments were allegedly made by Miss Bothwell and conclude that this was as soon as was practicable.

7. The entry from the notebook is as follows:

“following the examination I placed Deborah back in her cell and as I was doing so she stated the following to me ‘Why are you going to my house? I don’t want you to go there. You won’t find any drugs there. I don’t do drugs. You won’t find any drugs at Mark’s either, I’m sure. We were just asked to pick up two bags that’s all.’”

The next entry is timed 10.30 p.m.

8. Constable McAllister has given evidence to the effect that Miss Bothwell made the comments as she was being returned to the Custody Suite and that she recorded these almost straight away. Miss Bothwell has not given evidence but has denied making these comments through her Counsel.

**The application:**

9. Mr McGrory, on behalf of Miss Bothwell, challenges the admissibility of these comments. He does this on two principal grounds. Firstly, he

refers to the requirement of Code 11 (c) (13) which requires a record to be made of relevant comments that have been made outside the context of an interview and which apply to comments that have been volunteered. Secondly, Mr McGrory relies upon Article 76 and 74 of the Police and Criminal Evidence Order. He, in particular, refers to the failure of the Police to time and date any entry in relation to these comments, to read this entry over to Miss Bothwell and to invite her to comment upon it and to authenticate it.

10. Constable McAllister accepts that, while she did make a note that was as contemporaneous as possible given the circumstances, she did not precisely time it or time record her notebook entry. She accepts that she did not later read it over to Miss Bothwell and invite her to accept it and authenticate it. She does not recall whether she told any other officer about the entry until after the interviews. It is likely that, since there is no record of these comments being used in interview to contradict Miss Bothwell's assertion that she was unaware of the existence of the holdalls, Constable McAllister did not draw anyone's attention to the admission. She did however realise some of the significance of the admission otherwise she would not have made the entry in her notebook.

11. Mrs Kitson, who appears on behalf of the Crown, says that this was not a deliberate breach of the Code of Practice, that there was a virtually contemporaneous note made, that accuracy and reliability are not seriously challenged, that there is no unfairness in any breach of the Code of Practice and that, if there were breaches of the Code, they were both very minor and in no way deliberately engineered by the police. There were neither significant nor substantial breaches.

12. I remind myself that the Code is designed to ensure good practice and that the provisions of 11(c)(13) are part of a scheme meant to prevent or reduce the possibility of suspects being the victim of fabrication or of inaccurate recording of verbal statements that have not been formally recorded on tape. It may seem surprising to refer to it as such but I regard the comments, if said, by Miss Bothwell as being an admission against her interests. This is so given what she said later in interview about the holdalls. I also do regard there to have been **at least** two breaches of the Code. The entry should have been timed, signed, and later read back to Miss Bothwell, and she should have been invited to accept or otherwise comment on what she was alleged to have said. In my view it should also have been used **in interview** in accordance with 11(13) and also 11(4) of the Code.

13. As I have said, there are at least two breaches of the Code by the police. The entry was not dated, timed and signed by the officer and Miss Bothwell was not invited to accept or reject it. It was not, as it should have been, put to the suspect in the next appropriate interview. It was perhaps not put because Constable McAllister was not the interviewing officer of Miss Bothwell and because the interviewing officers of Miss Bothwell were not made aware of the comments. If they had been they would doubtless have put these comments to Miss Bothwell in interview in an attempt to contradict her allegation that she did not know about the holdalls.

14. However, I am satisfied that this was not trickery or deliberate withholding by Constable McAllister. I am also satisfied that the entry was made as soon as it practicably could be. To my mind the accuracy

and reliability of what was said are not in question, and put at its height, the suspect has been deprived of an opportunity to deny, affirm or to qualify the comments she is recorded as saying.

15. I am of the view that the admission of these comments (bearing in mind the overall circumstances and the way in which I can comment upon them) would not have such an effect on the fairness of proceedings that I should not admit them in evidence.

**Ruling:**

16. I have had regard to the significance of the Code and also to the way in which these breaches relate to the case against Miss Bothwell and to the manner in which they occurred. It has not been suggested that Constable McAllister concocted the evidence. A record was made by her as soon as practicable and given the time when it must have been made I do not find that the failure to date and sign this and to ensure that interviewing officers put it to Miss Bothwell is, in the circumstances of this case, such a significant or substantial breach of the Code that the evidence should be excluded.

17. These comments were admissions against interest but volunteered outside the context of an interview and were recorded as soon as reasonably practicable. The breaches of the Code that followed happened because of inadvertence but were not of the nature of the significant, substantial breaches that the court was referring to in *R.-v-Keenan* (1990) 2QB 54

“(breaches) of the ‘verballing’ provisions of the Code, the evidence so obtained will frequently be excluded. We do not think that any injustice will be caused by this. It is clear that not every breach or combination of breaches of the Code will justify the exclusion of

interview evidence under Section 76 or Section 78 .... They must be significant and substantial. If this were not the case the courts would be undertaking a task which is no part of their duty: as Lord Lane CJ said in Delaney 88 CR APPR 338 “it is no part of the Court to rule a statement inadmissible simply in order to punish the police for failure to observe the Code of Practice. But if the breaches are ‘significant and substantial’ we think it makes good sense to exclude them .... If the rest of the evidence is strong, then it may make no difference to the eventual result if he excludes the evidence. In cases where the rest of the evidence is weak or non-existent, that is just the situation where the temptation to do what the provisions are aimed to prevent is greatest, and the protection of the rules most needed.” Pages 69-70.

18. Constable McAllister made the entry in her notebook after she had returned Miss Bothwell to her cell. By 11.33 p.m. Constable McAllister was in interview with Mark Surgenor but not Miss Bothwell.

19. I in particular have had regard to the authorities helpfully provided by Mr McGrory and in particular to R.-v-Scott 1991 Crim Law Review. This concerned a comment allegedly made by a Scott after he had asked to listen to the interview of his co-accused. This was used in the trial to suggest that Scott had adopted the admissions made by his co-accused when he said, “he’s said too much. We’d have got off with it if he had said nothing..” In that case a record was made but Scott was not invited to sign it or to read it or to sign any comment. Its admission set in train a chain of events that is not applicable here. The comments volunteered by Miss Bothwell were not in any formal or even informal interview

situation. They were recorded as soon as practical. The failure to put them to Miss Bothwell and to invite her to sign them did not have the consequences that ensued for Mr Scott.

20. I neither find that the admission of the evidence would have such an adverse effect on the fairness of these proceedings that I should not admit it (Article 76 Pace) nor do I find that any admission against interest made in those circumstances would be unreliable when one considers all of the circumstances I have outlined above (Article 74 (2)(b)) namely if one regards the failure of the police to put those comments to Miss Bothwell in interview as a thing done by the police and if one also regards the comments by Miss Bothwell as being an admission against interest and being tantamount to a confession.

21. I bear in mind the case, as made by Mr McGrory, is that Miss Bothwell did not make these comments. I, however, do not find that anything done by the Police in all these circumstances makes these comments, allegedly made by Miss Bothwell, unreliable. The question is whether she made or did not make these comments and this in my view is a matter for the jury and I so rule.