Neutral Citation No. [2013] NIMag 1 | *Ref:* **2013NIMag1**

Judgment: approved by the Court for handing down | *Delivered:* **07/10/2013**

*(subject to editorial corrections)**

IN DUNGANNON MAGISTRATES' COURT
IN THE COUNTY COURT DIVISION OF FERMANAGH & TYRONE

DIRECTOR OF PUBLIC PROSECUTIONS

Complainant

-v-

PATRICK O'NEILL

Defendant

DEPUTY DISTRICT JUDGE (MC) CONWAY

1. The defendant in the present case has been summonsed to answer a complaint charging him with two counts of possessing counterfeit money without lawful excuse contrary to section 16(2) of the Forgery and Counterfeiting Act 1981. During police interview he made certain admissions to the offences. The defendant now alleges these admissions were made on foot of representations made by the police that he was going to given an 'informal warning' in relation to the offences instead of being prosecuted. In those circumstances the defendant applied to have the proceedings stayed as an abuse of process; or, in the alternative, for the said admissions to be excluded under Articles 74 and/or 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE").

2. The prosecution is represented by Mr Donnelly of the Public Prosecution Service and the defendant is represented by Ms Lynch BL, instructed by McNamee McDonnell Duffy Solicitors. I am grateful to both representatives for their helpful written and oral submissions.

Facts

3. The prosecution evidence comprised of 4 witnesses: Constable Caroline Nethery; Constable Mark Craig; Constable Keith Courtney and Mr Stephen McGregor. At the outset of the hearing the defence indicated that the statements of Constable

Craig, Constable Courtney and Mr McGregor could be admitted into evidence without the need for oral testimony.

4. Having listened to the evidence of Constable Nethery and upon reading the agreed statements, and having heard the oral evidence of Mr McNamee solicitor in the voire dire, I make the following findings of fact.

5. On 2 February 2012 police conducted a search of 60 Mullaghteige Road, Dungannon, pursuant to a warrant issued under section 23 of the Misuse of Drugs Act 1971 and section 25 of the Theft Act (NI) 1969. This is the family home of the defendant who is 22 years old; he lives in the family home with his mother, father and two brothers. The family operates a coal 'cash-n-carry' business. During the search the police seized several items including a quantity of cash found in a safe. They also found two £20 notes in one of the bedrooms within the house; due to the quality of these two notes, police believed them to be counterfeit and, therefore, seized them also. The two notes were seized by Constable Courtney and Constable Craig, respectively, in what was described by both police officers as "Bedroom 2" of the house. Each note was placed into individual evidence bags and marked KC1 and MC1, respectively. Both of these evidence bags were then handed to Constable Nethery. The defendant was not present at the house during the search.

6. On 10 April 2012 Mr McGregor, an employee in De La Rue Currency which prints banknotes for the Northern Bank and Ulster bank, examined "two (2) items in the case against Patrick O'Neill which purported to be either a Northern Bank £20 note, or an Ulster Bank £20 note". Mr McGregor received these two items in evidence bags which he signed. As a result of his examination he concluded the notes to be counterfeit.

7. Constable Nethery returned to the house on two or three occasions thereafter looking for the defendant, but to no avail (although she did speak to his mother). Finally, on 2 April 2013, the Constable, by chance, saw the defendant at a petrol station on the Dublin Road, Enniskillen. She arrested him on suspicion of theft and criminal damage in relation to an unrelated matter and granted him "street bail" to appear at the police station for interview.

8. The defendant duly attended Dungannon PSNI Station on 21 February 2013 accompanied by his solicitor, Mr McNamee. The custody log opened in respect of the defendant indicated he was being detained on suspicion of theft, criminal damage and possessing counterfeit currency. Mr McNamee was aware that his client was being detained in relation to the counterfeit money and would be asked questions in interview regarding same.

9. Police conducted an interview with the defendant, commencing at 19:04 hours on 21 February 2013; present were Mr McNamee, Constable Nethery and

Sergeant Ballantine. The relevant extract from the summary of the taped recorded police interview is in an appendix to this judgment; however, in brief, the defendant volunteered, inter alia, that "a member of his family came into the house one day and he had received them [the counterfeit notes] as payment and I just asked out of curiosity could I have them", he then "just threw them in the drawer" and they had been lying there for about 2 years.

10. Following the interview the police offered the defendant the option of receiving a caution rather than being prosecuted in court for the offence of possessing counterfeit currency. On legal advice the defendant refused the caution. A summons, dated 25 April 2013, was then issued charging the defendant with the present offences.

The Disputed Evidence

11. The main dispute in the present case relates to the contents of a conversation which took place between Constable Nethery and Mr McNamee solicitor. A form of voire dire was held during the hearing to determine the necessary facts in relation to the disputed conversation.

12. During the search on 2 February 2012 money which had been found in a safe was seized. This money became the subject of an application for a forfeiture order under the Proceeds of Crime Act 2002 ("POCA"). Certain members of the O'Neill family were the respondents in the POCA proceedings, but the defendant in the present proceedings was not one of them; the respondents in the POCA proceedings were represented by Mr McNamee. Constable Nethery attended court on several occasions in relation to the POCA proceedings as interim orders for continued detention were made and then for the full hearing. She admitted that on one of these occasions she spoke to Mr McNamee about the counterfeit notes and asked him to make arrangements for his client to attend for interview as she was having difficulty contacting the defendant. She denied indicating to Mr McNamee that an informal warning would be given to the defendant and stated she didn't speak to Mr McNamee after that occasion.

13. Mr McNamee gave evidence saying that from the date of the search he represented members of the O'Neill family. He attended court three times in relation to the POCA proceedings and had contact with Constable Nethery in relation to arranging for his clients to be interviewed under POCA. The first set of these interviews was on 3 December 2012; the next set was maybe about two months later. He said the constable contacted him either through his office or on his mobile phone. However, he said he also spoke to Constable Nethery on the steps of the courthouse at one of the POCA hearings regarding the expert analysis of the two seized counterfeit notes. He continued that she told him she had discussed matters with her superiors and had decided to proceed by "informal warning"; there was no need to interview Patrick (the defendant); and

that arrangements should be made for him to attend at the police station. He said the defendant subsequently contacted him and gave him the 'Street Bail' notice regarding allegations of theft and criminal damage. Mr McNamee stated that he believed the police interview related to the alleged theft and criminal damage; but accepted that the counterfeit notes were listed in the custody record as one of the reasons for arrest and also that the issue was mentioned at the start of the interview. He said the raising of the counterfeit notes "didn't bother" him as the police had already indicated the "way forward" in relation to them; and told the defendant the police had already decided on their approach to that offence. He stated "My advice would have been different" if the indication of an informal warning had not been given to him. He said that after the interview he had a discussion with the custody officer regarding the informal warning; and advised the defendant against taking the caution as previous representations had been made that an informal warning would be given. Under cross-examination Mr McNamee admitted he had no note of his conversation with Constable Nethery; he said that at that point in time he was representing other family members in relation to the POCA proceedings, but not the defendant so had no file opened in relation to the defendant (although he had been asked by the defendant's mother to approach Constable Nethery regarding the matter against the defendant). He stated Constable Nethery's evidence was "untrue". When questioned about his conduct in the interview, Mr McNamee said he had "no problem" with the questions as he already knew how the matter would be dealt with. He accepted that if he had been told an informal warning would be given but an interview was also necessary he would probably have advised his client not to upset the police (i.e. answer their questions). However, if he had been told that the outcome would be a caution then he would have advised his client of his various options.

14. I have considered the disputed evidence and am satisfied that an indication was given by Constable Nethery to the effect that the defendant would receive an informal warning for the index offence. I have come to this conclusion by virtue of the fact the Constable's evidence, and in particular her responses under cross-examination, in respect of her conversation with Mr McNamee was vague and, at times, evasive. This is compared to the evidence of Mr McNamee who gave a vivid description of the conversation. Whilst Mr McNamee may not have been technically instructed to represent the defendant at that point, I consider that, given he was representing the other members of the immediate family in relation to other items seized in the search, and given the defendant's age and the fact he was still living at home, it was reasonable to believe that Mr McNamee would also be representing the defendant in relation to the seized £20 notes. I further consider the fact the police offered a caution after the interview (a diversionary disposal) to be supportive of the view that at an earlier stage they had considered an informal warning (another form of diversionary disposal) to be appropriate; this supports the view that Constable Nethery had discussed the matter with her superiors earlier in the investigation and, when

speaking to Mr McNamee on the steps of the Courthouse, indicated their view of an acceptable disposal for the offence.

Abuse of Process Application:

15. The defendant argues that the proceedings should be stayed as an abuse of process where the defendant receives a promise or undertaking that he will not be prosecuted; and that it is not necessary that the State official making the promise had either sufficient authority to make such a promise or made the promise in bad faith (R v Croydon Justice ex parte Dean [1994] 98 Cr App R 76). He says that in the present case, by making the representation, his Article 6 ECHR right to defend himself has been effectively removed and the integrity of the criminal justice system eroded. The defendant further claims that the case should be stayed on the grounds of delay: he points out that the £20 notes were seized in February 2012; they were examined and confirmed as being counterfeit in April 2012; but nothing occurred in the investigation until the defendant's arrest on 4 February 2013. The defendant highlights that his arrest was 2 days after the POCA proceedings against the other members of his family were dismissed and claims this temporal nexus creates a perception of bad faith by the police.

16. The prosecution submits that the case of ex parte Dean can be distinguished on the facts – in that case the undertaking was given to the defendant in person; whereas in the present case the disputed representation was made to Mr McNamee who, on his own evidence, was not formally instructed by the defendant to act on his behalf. In relation to delay, the prosecution argues that the proceedings have been brought within a reasonable period. The prosecution further argues that, in any event, the defendant has failed to show he can no longer have a fair trial or that it would be unfair to try him at all.

Decision:

17. The Court has an inherent power to stay proceedings in order to protect its processes from abuse. The *locus classicus* for the exposition of the principle of abuse of process in the Northern Ireland courts is to be found in the decision of Carswell LCJ in Re DPP's Application [1999] NI 106 where he stated:

> "Our conclusion from our examination of these authorities is that there are only two main strands or categories of cases of abuse of process:
>
> (a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected …
>
> (b) those, like *Ex parte Bennett*, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all.

…
The courts have constantly been enjoined to bear several factors in mind when considering an application for a stay:

> **1.** The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: *Ex parte Bennett* [1994] 1 AC 42 at page 74, per Lord Lowry.
>
> **2.** The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: *ibid***.**
>
> **3.** The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and *a fortiori* if he has admitted the offences, there may be little or no prejudice: see *Ex parte Brooks* (1984) 80 Cr App R 164 at page 169, per Sir Roger Ormrod."

18. The two categories of abuse identified by Carswell LCJ are distinct and should be considered separately (Warren v Attorney General for Jersey [2011] 3 WLR 464). The first category focuses on the trial process; while the second category is applicable where the defendant should not be standing trial at all, irrespective of the fairness of the actual trial (Blackstone's (2013), paragraph D3.69). The burden of establishing that the proceedings are an abuse rests on the defendant who must show same on the balance of probabilities (R v Telford Justices ex parte Badhan [1991] 2 QB 78; although this was later criticised in R v S [2006] EWCA Crim 756). In R v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42 (at page 74) Lord Lowry emphasised that the jurisdiction to stay proceedings as an abuse of process must be exercised carefully, sparingly and only for very compelling reasons. That a stay must be wholly exceptional has been emphasised by the NI Court of Appeal in R v Murray and Others [2007] NI 49 and R v McNally and McManus [2009] NICA 3.

19. The defendant's arguments straddle both categories of abuse – the first argument relating to the representation falls within the second category; while the delay issue falls within the first category. The delay point can be dealt with in fairly short measure so I shall deal with it first.

20. The principles of abuse of process by virtue of delay were summarised by the English Court of Appeal in R v S [2006] EWCA Crim 756 as:

> "[21] In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:
>
> (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
>
> (ii) Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;

(iii) No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;

(iv) When assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;

(v) If, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

21. See also R v F [2011] EWCA Crim 726 at paragraphs 37-39.

22. It can thus be seen, in relation to the present case, the defendant is required to show three things: firstly, that the prosecution has not taken place within a reasonable time; secondly, that the delay has caused him prejudice in the conduct of his trial; and, thirdly, that prejudice cannot be regulated or counterbalanced by the safeguards within the trial process. I am of the opinion, in the present case, the defendant has failed in respect of all three of these hurdles. There was evidence before the court that Constable Nethery made concerted attempts to reach the defendant both by visiting the house and by asking Mr McNamee to have the defendant arrange to attend the police station (albeit for the purposes of the purported informal warning). I am of the opinion that the defendant's non-availability to the police was caused by the defendant and not the police. Furthermore, the defendant has failed to show any prejudice whatsoever caused by this delay; he has not claimed the delay has caused his memory to fade or that witnesses or other evidence is no longer available for the trial.

23. I now turn to the defendant's argument under the second category of abuse – that although he could receive a fair trial the representation by Constable Nethery that he would be given an informal warning means that it would be unfair to try him at all.

24. In Warren v Attorney General for Jersey [2012] 1 AC 22 Lord Kerr summarised the principles which have emerged from the jurisprudence relating to the second category of abuse:

    (i) "… the principal purpose of the examination, in the second category of cases, of the question whether proceedings should be stayed is to determine whether this is necessary in order to protect the integrity of the criminal justice system--see R v Maxwell, at para 13. This principle has been expressed in various, slightly differing ways in a number of

judgments on the subject. Thus, in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 74G Lord Lowry said that a stay will be granted where a trial would "offend the court's sense of justice and propriety". In R v Latif Lord Steyn stated, at p 112F, that a stay should be granted where to allow the trial to proceed would "undermine public confidence in the criminal justice system and bring it into disrepute". In R v Mullen [2000] QB 520, 534C-D Rose LJ said that a stay should be granted notwithstanding the certainty of an accused's guilt where to refuse it would lead to "the degradation of the lawful administration of justice". I consider that it should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson JSC in R v Maxwell--that it should be granted where necessary to protect the integrity of the criminal justice system."

(ii) "A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. As Lord Steyn observed in R v Latif, the various factors that might arise in the range of cases in which this issue may have to be considered are potentially extensive and it is unwise to attempt to list these exhaustively or, as Lord Dyson JSC has said in para 26 of his judgment in this appeal, to rigidly categorise those cases in which a stay will be granted. But where a stay is being considered in order to protect the integrity of the criminal justice system, "the public interest in ensuring that those that are charged with grave crimes should be tried" will always weigh in the balance: Lord Steyn in R v Latif at p 113A-B. Lord Steyn mentioned that a possible countervailing factor was that the impression should not be created that the court is giving its sanction to an approach that the end justifies any means. With the emphasis that is given in this and other cases to statements that prosecutorial or police misbehaviour will never be condoned, this may not be as significant a consideration as heretofore. Other factors that will commonly call for evaluation are those referred to in the passage from the book by Professor Choo, Abuse of Process and Judicial Stays of Criminal Proceedings, 2nd ed (2008), quoted by Lord Dyson JSC in para 24 of his judgment but, again, these should not be regarded as exhaustive."

(iii) "The "but for" factor (ie where it can be shown that the defendant would not have stood trial but for executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue."

(iv) "A stay should not be ordered for the purpose of punishing or disciplining prosecutorial or police misconduct. The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system."

25. It is recognised that the second category of abuse of process may arise where a person who has received a promise, undertaking or representation from the police or prosecuting authorities that he will not be prosecuted, but is then subsequently prosecuted. This realm of abuse has similarities to the public law principle of legitimate expectation and in R v Abu Hamza [2007] QB 659 the English Court of Appeal concluded (at [54]):

> "… it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

26. These principles were adopted by Weatherup J in Tsang's Application [2008] NIQB 135. In R v Brown and Taylor (No.2) [2009] NICC 58, Hart J also highlighted that unfairness to the defendant is not the test, quoting Richardson J in Moevao v Department of Labour [1980] 1 NZLR 464 when he said:

> "The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court." (Emphasis added)

27. A perusal of the authorities on the issue shows: a letter from the Public Prosecution Service stating that on "the facts and information available" the defendant would not be prosecuted is not an unequivocal representation (McFadden's Application [2002] NI 183); nor a letter stating "having considered the evidence currently available" (Tsang's Application); it has also been held not to be an abuse of process where the prosecution have indicated at trial that they would accept a plea of guilty to a lesser charge but then changed their mind (R v Mulla [2004] 1 Cr App R 6). However, the authorities further show that it may

be an abuse of process for a prosecution to continue where the police inform a suspect he will not be prosecuted if he co-operates with them but is then prosecuted on the basis of admissions made during, or evidence obtained by virtue of, his co-operating as a potential prosecution witness (R v Croyden Justices ex parte Dean [1993] QB 769; and R v Townsend , Dearsley and Bretsher [1997] 2 Cr App R 540); where a prosecutor states to the court that the proceedings are to be withdrawn but on the next occasion states that decision has been reversed (R v Bloomfield [1997] 1 Cr App R 135); where the prosecution does not give a reason for the reversal of the decision (R v Bloomfield [1997] 1 Cr App R 135); where a private prosecution is instituted after the police/Prosecution Service have dealt with the defendant by way of a caution (Jones v Whalley [2007] 1 AC 63 and DPP v Alexander [2011] 1 WLR 653 (but also see R v Gore [2009] 1 WLR 2454 where it was not an abuse of process for charges to be laid following a review or CCTV footage even when the defendant had been issued with an on the spot fixed penalty.)

28. From the above authorities I have discerned that a three stage test must be applied in the present case: firstly, has an unequivocal representation been made to the defendant that he would not be prosecuted; secondly, has the defendant acted to his detriment in reliance upon the unequivocal representation; and, thirdly, in those circumstances, is a stay necessary to protect the integrity of the justice process.

29. In considering the first stage I remind myself that, for an abuse of process application, the burden is placed on the defendant to show that the necessary elements exist. In relation to the first stage, therefore, the defendant must not only show that the representation was made but also show that the said representation was unequivocal. In the present case Constable Nethery didn't say the representation was equivocal; her evidence was that the representation was never made at all. This is compared to the evidence of Mr McNamee who simply said that Constable Nethery advised that the matter would be dealt with by an informal warning; there was no mention of any conditions or requirements. On the evidence before me, therefore, I am sufficiently satisfied the defendant has shown that the representation was unequivocal.

30. In relation to the second stage, for the reasons I shall give later in this judgment in relation to the Article 74 PACE application, I am satisfied the defendant has sufficiently shown that when at the police station he was under the belief he would be given the informal warning and that he made admissions during interview on foot of that belief.

31. I now turn to the third stage of the test. In my opinion the present case is distinguishable from the above cited authorities relating to change of decision. The representation was not one of outright 'no prosecution' but rather one of'diversionary disposal'. Furthermore, the change of position by the police was

not one of 'no prosecution' to 'prosecution', or even 'diversionary disposal' to 'prosecution'; the change of position was from one form of diversionary disposal to another form of diversionary disposal (although I accept the caution is considered to be, relatively speaking, a more severe punishment than a warning). I further note that when the defendant was offered a caution after interview he declined to accept and instead elected, as is his right to do so, to be prosecuted in the courts. He did so on legal advice and, as can be seen from the conduct of the present proceedings, the purpose for doing so was to challenge the police's change of position from a warning to a caution and also to challenge the legality of the confession evidence. Thus, these proceedings are an exercise of the defendant's rights rather than a manipulation by the police for an ulterior motive. Far from being an abuse of the court, the present proceedings and the legal arguments raised exemplify the nature and role of the criminal courts to ensure the protection of the rights of all persons including those accused of and charged with criminal offences. I note that the second of the principle enunciated by Lord Kerr in Warren (supra) was that there should be a balancing of interests in deciding whether to grant a stay; for the reason I have just given, I believe the present proceedings are in both the defendant's interests (in the protection of his rights) and in the public interest (in the prosecution of criminal offences).

32. Finally I remind myself of the repeated emphasis in all the authorities of the exceptionality required to stay the proceedings. The defendant, in my opinion, has failed to show that the present case falls within that very small cadre of cases where a stay is appropriate. The continuation of the present case, in the circumstances by which it has come before the court, in my opinion does not jeopardise the integrity of the criminal justice system and is not an abuse of the court process.

33. In conclusion, for the reasons given in relation to both the first category and second category of abuse of process, I dismiss the application to stay the proceedings.

Application to Exclude Evidence Under Article 74(2) PACE:

34. Article 74(2) PACE provides:

> "If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

35. The defence relies on subparagraph (b) thereof, namely, as a consequence of the representation that an informal warning would be given the admissions made by him in interview have been rendered unreliable. Relying on R v Fulling [1987] EWCA Crim 4, he submits that an inducement of bail or a promise that a prosecution would not arise from a confession is sufficient to be "anything said or done"; moreover the fact the confession is true is irrelevant (R v McGovern (1990) 92 Cr App R 228). The defendant further claims he was denied proper legal advice; his solicitor acted in reliance on the representation and, on foot of same, did not advise the defendant as to his legal options (Lam Chi-Ming v R [1991] 2 AC 212). All of this, he argues, must also be seen in the context of inaction by the police to expedite the investigation of the present offences against the defendant.

36. The prosecution submits that, even if the court is satisfied that a representation was made by Constable Nethery, the evidence presently before the court is such that it can also be satisfied beyond a reasonable doubt that the representation is not likely to render a confession made in those circumstances unreliable. It argues that such a representation was not an inducement to make a confession; rather the fault lies in the solicitor failing to properly advise his client.

Decision:

37. From reading the relevant authorities, I have discerned the following principles applicable to determining if a confession should be excluded under Article 74(2):

    (i) Article 74(2) requires a broad approach;

    (ii) The first step is to identify the thing said or done (R v Barry [1992] 95 Cr App R 384);

    (iii) The second step is to ask whether what was said or done was likely in the circumstances to render unreliable a confession made in consequence – this is both an objective test (requiring all the circumstances to be taken into account) and a hypothetical test (as it does not relate to the confession actually given but rather to any confession given in those circumstances) (R v Everett [1988] Crim LR 826; R v Barry [1992] 95 Cr App R 384) The "concerns" or motives of the detainee are only relevant in so far as it affects the reliability of the confession (R v Wahab [2002] EWCA Crim 1570);

(iv) The third step is whether the prosecution has proved beyond a reasonable doubt that the confession was not obtained in consequence of the thing said or done – this is a question of fact (R v Barry [1992] 95 Cr App R 384).

38. In relation to the first of these three steps, I refer to my findings above that Constable Nethery indicated to Mr McNamee during their conversation on the steps of the Courthouse that the matter relating to the counterfeit money would be dealt with by way of an informal warning.

39. I now turn to the second of the three steps, namely, whether the representation of an informal warning was likely in the circumstances to render unreliable a confession made in the consequence thereof. In this respect I have considered the decision of the Divisional Court in E&W in R v Commissioner of the Metropolitan Police ex parte Thompson [1997] 2 Cr App R 49. In that case the applicant for judicial review had been arrested for a public order offence. Prior to being interviewed, and before the applicant made any admissions, the police considered the matter could be dealt with by a caution. The applicant was told, in terms, if he admitted the offence he would be given a caution rather than prosecuted. The applicant accepted the caution but subsequently sought judicial review to quash it. In giving the decision of the Divisional Court quashing the caution Schieman LJ stated:

> "The essence of Mr Broatch's submission was that the person to whom the admission was made had held out an inducement to make the confession, namely, the prospect of not being taken to court…
>
> The result of that is that evidence of this confession would be excluded in any criminal proceedings.
>
> A rationale … behind that exclusion is that a confession obtained in such circumstances is not reliable and a man ought not to be convicted on unreliable testimony. "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it." (R v Warwickshall (1783) I Leach 263 at 263, 264) …
>
> Once one accepts an inducement can vitiate an admission then it seems to us indefensible for the court to distinguish between different types of inducement. If a distinction is to be made - and there are arguments either way - that distinction ought to be made by the legislature." [emphasis added]

40. It is clear from that excerpt that there is no hierarchy in relation to inducements with only the more serious forms rendering a confession unreliable; instead, if an inducement of any kind is made then any confession therefrom is unreliable.

In making the finding above that a representation was made to the defendant's legal representative that an informal warning would be given, and this was passed onto the defendant, I am satisfied that an inducement was made in the present case and that such an inducement would render any confession made in those circumstances unreliable.

41. I now turn to the third and final step of the process, namely, has the prosecution proved beyond a reasonable doubt that the confession was not obtained in consequence of the representation that an informal warning would be given.

42. At the time of the interview the only evidence against the defendant was that two counterfeit £20 notes had been found in a bedroom of his family home. There was nothing linking the notes directly to the defendant as distinct from any other member of the family. In those circumstances the case against him was, at best, weakly circumstantial and certainly not sufficient to secure a safe conviction. By confessing in interview the defendant connected himself to the notes and, therefore, gave the prosecuting authorities the evidence necessary to mount a prosecution. The defendant could have remained silent during his interview, as was his right. If he had done so, the police may not have been able to find any further evidence to connect him to the notes and, therefore, no prosecution could have ensued. Instead, he confessed to the offences, according to Mr McNamee, because he was under the belief he was going to be dealt with informally – as Mr McNamee put it, if the police are minded to deal with the matter by an informal disposal you don't want to "upset" them.

43. I further take into consideration the fact the defendant refused to accept the caution that was offered to him. A caution is similar to an informal warning in that it is a diversionary disposal for a criminal offence (i.e. it diverts the offender away from court prosecution); but it was also common case between the parties that a caution appears on a person's criminal record whereas an informal warning does not. Thus a caution is, relatively speaking, more severe than an informal warning. The defendant's refusal of the caution adds weight to the argument that he had a specific expectation he would be dealt with by way of an informal warning rather than a general expectation that he would be dealt with in some manner falling short of court prosecution.

44. Whilst, surprisingly, the defendant did not give evidence himself in relation to why he decided to confess, I am satisfied on the evidence of Mr McNamee that the defendant's admission was more likely than not due to Mr McNamee's advice to him that he would be receiving an informal warning. However, I remind myself that it is not for the defendant to show that his confession was as a consequence of the representation made by the police; but rather Article 74(2) places the very heavy burden on the prosecution to prove beyond a reasonable doubt that the confession was not as a consequence. By virtue of the findings and conclusions I have made above, I am not satisfied the prosecution has

discharged this burden. Thus, in respect of the application to exclude the confession evidence under Article 74(2) PACE, the prosecution has not proved beyond a reasonable doubt that the confession was not obtained as aforesaid.

45. Whilst the issue was not argued before me, for completeness I have also considered the observations of Carswell LCJ in DHSS v Rogers [1997] NI 101 and Hood v Lowry (15 October 1997)(Unreported) regarding the exclusion of evidence in Magistrates' Court's proceedings. I am of the opinion that those observations are not applicable to the present circumstances. They relate to the general power to exclude evidence under Article 76 PACE. This differs considerably with the specific power to exclude confessions under Article 74 PACE. A wholly different rationale exists for the existence of Article 74 than that of Article 76 (for the rationale on the power to exclude confessions see further Cross and Tapper in Evidence (11th Ed.) page 666 et sec).

46. I therefore grant the defence application under Article 74(2) PACE and exclude the confession evidence contained in the defendant's police interview.

Application to Exclude Evidence Under Article 76(1) PACE:

47. As I have excluded the evidence under Article 74 PACE it is not necessary to determine the defence application made under Article 76 PACE.

Conclusion:

48. For the reasons set out herein the defendant's application to stay the proceedings as an abuse of process is refused; but the defendant's application for the confession evidence to be excluded under Article 74 PACE is granted.

POSTSCRIPT:

49. Following this ruling the prosecution offered no further evidence. The defendant applied for a direction of no case to answer to which the prosecution made no contrary submissions. I acceded to the application and directed that, on the evidence before the court, there was no case to answer and formally dismissed both charges against the defendant.

Appendix

SUMMARY OF TAPE RECORDED POLICE INTERVIEW

Q I conducted a house (sic) at your home address at 60 Mullaghteige Road on the 2 February 2012. Now during that search there was several items seized, the search was under Section 23 Misuse of Drugs and the other warrant was for the Theft Act. During the search of your bedroom there were two £20 notes recovered during that search, now they were sent off for examination and they have come back as being counterfeit, and I just want to ask you about the counterfeit notes. First one is the exhibit number MCI — one counterfeit £20 note and that was located in your bedroom, and it's an Ulster Bank note.

Solicitor — were they both located together

Q No, they weren't, this one was located in the bedroom doesn't say where, the other one was located in bedside locker, top drawer, that's exhibit KCI. Do you recognise that note?

A That long ago, no

Q Do you recognise the other note, it's a Northern Bank note?

A No

Q Could you account for how they came to be in your bedroom drawers?

A A member of the family (inaudible) had received them and I asked out of curiosity could I have them just to look at them, never had dud notes before

Q Sorry explain that to me again, I'm not getting it?

A A member of the family came into the house one day and he had received them as payment and I Just asked out of curiosity could I have them

Q Did he say at the time where he received them?

A He didn't say

Q So you asked for them out of curiosity, what was your intention?

A Nothing Just never seen them before

Q Had you intended at any point to use them?

A No. It's maybe lying there 2 years

Q Prior to us finding them?

A Yeah

Q Patrick, did you get, this member of the family, who was that?

A Haven't a clue it was that long ago

Q Seriously Patrick, who was it?

A I don't know

Q And were you given the two notes together?

A Yeah

Q And whenever you were given them, did you put them away immediately?

A I looked at them and just threw them in the drawer

Q Two in the drawer?

A Aye

Q But they weren't found in the same drawer?

A Right

Q So you can't remember which member of the family gave you counterfeit note, surely that would be something you would remember?

[No response]

Q Cause you knew they were counterfeit, I assume you knew they were counterfeit, that's what you were saying you knew they were counterfeit when you were given them?

A Yeah

Q And it's two years ago?

A About

Q Is there anything else you want to say about the counterfeit notes?

Q What do you think you should have done with them when you knew they were counterfeit?

A Dumped them

Q Or give them to the Police or gave them to the Bank?

A Aye well

Solicitor —it's not an offence to possess counterfeit currency is it, you see it cellotaped up to tills and windows and garages all the time

[Discussion over display of counterfeit currency]

Solicitor —he's saying he had no intention of circulating it, he's had it in his bedroom for two years

Q I don't believe a word of that

Solicitor — Well have you any reason not to believe that? You mean you don't want to believe a word of that

Q Well he got it from a relative, who he doesn't, who he can't remember, yet he can remember getting it from a relative so there's certain things he can remember and certain things he can't. Are you trying to protect a member of your family, whoever gave them to you?

A No

Q Ok Patrick is there anything else you want to say about these counterfeit notes?

A No