Neutral Citation no. [2004] NIMag 1

Ref: **Mag28**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered: **21.04.04**

P. SHIELDS CHIEF INSPECTOR Complainant DILLIN MARTIN Defendant	Petty Sessions District of Fermanagh County Court Division of Fermanagh and Tyrone

Ruling on Voir Dire

1. In this case, the Defendant, Dillin Martin, stands charged with the offence of assault occasioning grievious bodily harm, alleged to have occurred on 15th December 2002. At the outset, Mr. Fahy, B.L., for the Defendant, explained that there was an issue as to the admissibility of certain evidence. It had been agreed between himself and prosecuting counsel, Miss McCullough, B.L. that the most efficacious way of proceeding would be to have the evidence of the investigating officer taken, whereupon Mr. Fahy would make application that part of such evidence be excluded. I am obliged to both counsel for their initiative.

2. Constable Coates was then called. His investigations into the alleged assault led him and a Constable Porter to attend upon the Defendant in his home at 61 Kilmacormick Road on 8th January 2003. There, Constable Coates made Mr. Martin aware of the nature of his enquiries, arrested the Defendant on suspicion of assault occasioning grievious bodily harm and cautioned him. Mr. Martin made no reply in response to that caution. There was no questioning of the Defendant at that stage.

3. At this juncture, it is worth mentioning that the caution which was administered to the Defendant was in the following terms;

> You do not have to say anything, but I must 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.
> (Northern Ireland PACE Code, para. 10.5, Code C, operative since July 1996)

4. Mr. Martin was then conveyed to Enniskillen Police Station, a journey lasting some 5 or 6 minutes. There, he was presented to the Custody Sergeant and processed, during which the arresting officer gave an account of the incident, the

subject of this charge, of the arrest and of "…the evidence…" against Mr. Martin. The Defendant was then interviewed and, at the conclusion, was informed that the officer intended to report him with a view to prosecution. The constable prepared a summary of the taped interview, which he wrote out while listening to the tapes. He then read out to the Court the questions and answers recorded from that interview.

5. At an early stage of cross-examination, Mr. Fahy referred the arresting officer to the custody record, which was handed in at that point. To cut to the chase, Mr. Fahy's point was that, in the section detailing the circumstances of the arrest, as supplied by the arresting officer (this witness) – and before the Defendant's comment was entered - the custody sergeant had entered the following;

… A.P. admitted having hit out at the i.p., but in self-defence.

6. Given that the Defendant had made no reply at the time of the arrest, Mr. Fahy's point was that this record tied in with his client's instructions that, on the way into the Station, the constable had asked him, "So, what went on here?", or words to that effect, and that it was in response to this question that Mr. Martin had first made his remark about striking the injured party. How else could the constable have known that this was the Defendant's position?

7. The witness denied that any such intervening conversation took place; more precisely, his evidence to the court was that he had no recollection of any such conversation having taken place upon entering the Station. He disputed the perceived import of the custody record. The sentence entered at the end of the other remarks on his part, as above quoted, was entered for some unknown reason by the custody sergeant. The constable had no recollection of making the remark attributed to him by the custody sergeant, about the Defendant having struck in self-defence, and could only surmise that the custody sergeant had made a mistake. He did however point out that the sergeant had not undertaken his training in PACE procedures at that time. The constable seemed to suggest that the sergeant had recorded the Defendant's single remark, both at the designated place on page 1 of the record ("Comments made by detained person") and also at the end of the arresting officer's introductory comments, which had skipped over, for lack of space, from page 1 to page 6 of the custody record. He could not explain why the custody sergeant had taken such a course, nor, he pointed out, was it for him to do so.

8. At the conclusion of the arresting officer's evidence, Mr. Fahy opened his submissions. He contended that, with the constable having secured an admission from the Defendant at the Station doors by way of an ostensibly casual enquiry, he had thereby breached para. 10.2 of Code C of the Codes of Practice made by the Secretary of State under Article 65 of the PACE Order (the 1989 Order), which requires that where there is a break in interview, the caution should be repeated. I was referred in this regard to the case of Robinson v The Chief Constable, [2003] NICA 46 (judgment delivered on 28th November 2003). Further, since that admission was elicited in breach of the Code, it followed that the further

admissions – to the custody officer and during formal interview – also had to be disallowed, as "the fruit of the poisoned tree."

9. It seemed to me, however, that before one began to consider ruling upon such a submission, one would first have to make a determination as to whether a "preliminary" admission had in fact been elicited from the Defendant by the arresting officer at the Station doors, as alleged. I had taken evidence only from the constable, who denied it. The assertions of counsel could not constitute evidence. Indeed, one notes here the observations made by the House of Lords in R v Brophy [1981] All ER 705 at 709 (quoted more fully in *Cross & Tapper on Evidence,* (8th ed.) at p. 186);

> It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the voir dire of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge to its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the voir dire .

10. The judgment of the English Court of Appeal (Mustill, LJ, Hodgson and Potter, JJ) in R v Keenan [1990] 2 QB 54 seemed designed to effect a more equivocal approach to the matter of calling the Defendant to give evidence during the voir dire. Hodgson, J, on behalf of the Court, distinguished 3 situations which may face a judge where a defendant wishes to exclude evidence obtained by or in circumstances alleged to amount to breaches of the Act or Codes. (In that particular case, the Defendant had not given evidence at the voir dire. It had not been alleged that the confession was made in circumstances which rendered it unreliable; rather, the case being made on his behalf was that the admission of the confession would be unfair).

> (a) One or more breaches of the codes may be apparent in the custody record itself or from the witness statements. Examples of the first situation might be where an order has been made by an officer of insufficiently high rank or no meal has been offered at the proper time (Code C, paragraph 8.6). This case affords an example of the second. It was almost certain, on the evidence of the witness statements themselves, that there had been a breach of paragraph 11.3b(ii), and a glance at the officers' note books would have revealed breaches of the other two paragraphs.
>
> (b) There may be a prima facie breach which, if objection is taken, must be justified by evidence adduced by the prosecution. An order refusing access to a solicitor can only be justified by compelling evidence from the senior police officer who made the order: see Reg. v. Samuel [1988] Q.B. 615.
>
> (c) There may be alleged breaches which can probably only be established by the evidence of the defendant himself, e.g. cases of alleged oppression or in relation to paragraph 13 of Code C (persons at risk).
>
> Clearly the procedure appropriate to each case may vary. In (a) it may be that all that will be necessary will be an admission by the prosecution,

followed by argument. However in cases like the instant one, we do not think that the prosecution will often be content to take this course in cases where they wish to persuade the judge to allow them to adduce their evidence despite the breaches. We have in mind what this court said in Reg. v. Delaney in a passage from the judgment immediately following the one already cited. Lord Lane C.J. continued, according to the transcript:

> "The judge of course is entitled to ask himself why the officers broke the rules. Was it mere laziness or was it something more devious? Was it perhaps a desire to conceal from the court the full truth of the suggestions they had held out to the defendant? These are matters which may well tip the scales in favour of the defendant in these circumstances and make it impossible for the judge to say that he is satisfied beyond reasonable doubt, and so require him to reject the evidence."

In (b) the prosecution will clearly have to call evidence to justify the order made. In such cases the defence may wish to call evidence from, for example, the solicitor to whom the defendant sought to have access. On occasion the defence may feel it desirable to call the defendant himself as was done with disastrous results in Reg. v. Alladice (1988) 87 Cr.App.R. 380.
…
The judge in Reg. v. Alladice, 87 Cr.App.R. 380 did not consider section 78(1). We have been provided with the transcripts which were before this court and from them it does appear that section 78(1) was not in fact argued.
…
This court held that the judge was in error in finding that the refusal of access was justified under section 58(8), but held nevertheless that neither under section 76 nor section 78 did the refusal of access render the confessions inadmissible. As Lord Lane C.J. said, at pp. 386-387:

> "It may seldom happen that a defendant is so forthcoming about his attitude towards the presence of a legal adviser. That candour does however simplify the task of deciding whether the admission of the evidence 'would have such an adverse effect on the fairness of the proceedings' that it should not have been admitted."

We think it unlikely that in (a) and (b) situations the defendant will usually be called to give evidence at the stage of the proceedings when the Act and codes are under consideration.

Cases such as we have envisaged under (c) above are likely to be rare. The whole structure of the legislation, which has at its heart placing control in the hands of a uniformed station officer independent of the investigating officers, is aimed at preventing any abuse of powers by the police.

11. Having reviewed the case law, I remain of the view that it was right, in this instance, that the Defendant was, in effect, required to give evidence at the voir dire, in order to pursue the disputed allegation of fact that there had been a question put to him by the arresting officer at the door of Enniskillen Police Station, to which he had responded with an admission. To the extent that this issue of fact might, in other circumstances, be for a jury to decide is not something

which needs to be addressed at a hearing before a resident magistrate, who sits alone as arbiter of both fact and law.

12. The Defendant was then called to give evidence on the issues of fact arising in the voir dire. Mr. Martin confirmed that he remembered being arrested at home and being cautioned. He was then conveyed to the Police Station by car. There was another police officer in the car. The journey lasted 5 or 10 minutes. Constable Coates took him into the Station. As they were walking in, the constable asked him what happened. "I just told him: that I'd hit in self-defence." When asked by his counsel, he could not say what Constable Coates may have said to the custody sergeant; he was not really listening.

13. Neither Constable Porter, who had accompanied Constable Coates at the time of the Defendant's arrest and on the journey to the Station, nor the custody officer, was available to give evidence to the court.

14. Ms. McCullough, B.L. in her submissions invited the court to find that there was no such exchange at the doors of the Police Station, as alleged by the Defendant in his evidence. Alternatively, even if one did find a breach of the Code, it was quite common for the courts to admit the evidence in question, on the basis that a confession made in such circumstances was not unreliable and that to admit the evidence did not create any unfairness.

15. I turn now to the details contained in the custody record. The Defendant was arrested at 11.00 a.m. and arrived at the Station at 11.06. It is therefore apparent that the Defendant would have been given his caution, after being arrested, some 5 or 6 minutes before entering the Station.

16. The first substantive script is with regard to "Circumstances of arrest". Just 5 lines are allowed on the form for this, so one proceeds to page 6 of the form, where the Log begins, halfway down the page, to complete any longer entry, as was necessary in this instance.

17. When one turns to page 3 of this custody record, one finds that the Defendant's signature is timed at 11.16 a.m., confirming that he had been advised of his rights. Turning to page 6, immediately after the end of the overrun page on Circumstances of Arrest, there follows, on the next available line, an entry also timed at 11.16 a.m., where it is recorded that "… Rights given to A P as per page 3." I find that the custody sergeant most probably went back to page 6 in the Log, to make that entry, immediately after completing the requisite details on page 3, including Mr. Martin's signature. I do not find it plausible that, before making that next entry in the Log, the custody officer added a final sentence to the Circumstances entry; "A P admitted having hit out at i.p. but in self-defence."

18. There was no suggestion by the Defendant or on his behalf that the custody officer had acted in any way improperly. Para. 3.4 of Part C of the Code provides, insofar as relevant;

3.4 The custody officer shall:

- note on the custody record any comment the detainee makes in relation to the arresting officer's account but shall not invite comment.

It is of no little importance, as regards the balance being struck here between the rights of the accused, on the one hand, and the public interest in seeing offenders brought to justice, on the other, that neither the legislation nor the Code raises any difficulty about the admissibility of a comment (including an outright confession) made at this point, before the arrested person's right to legal advice has been articulated to him, including a confession, subject only to a proper record being made of it.

19. To return to the factual enquiry, we have a situation here where an arresting officer is recounting background, circumstances of arrest and evidence, while the accused person is standing nearby. The accused person makes a comment, uninvited. It may be that he waited until the arresting officer had finished his account before volunteering the comment; it may be that he did so by way of an interjection. One issue is as to whether, if Mr. Martin had made his comment by way of such interjection, while the custody sergeant was writing up the arresting officer's remarks, the sergeant kept on, adding to that record of the officer's remarks what the accused had meanwhile volunteered during the transcription. On the other hand, the custody officer, as required, did then go back to page 1 and proceeded to enter, separately – and expressly in inverted commas – the accused person's words; "No I hit out in self defence because he hit me." If the sergeant really had added the accused person's comment at the end of those attributed by him to the arresting officer erroneously, the task of going back to page 1 on the form would have served to remind him that there was a designated and separate place for recording the accused's own comment. One would have thought he might then have corrected the record. In any event, I note that the phrasing between the two references to the accused person's account is different. The direct quote, on page 1, asserts that the injured party hit him. That is not contained in the final sentence of the account attributed to the arresting officer. This is consistent with the respective accounts emanating from two different sources.

20. Art. 74(2) of The Police and Criminal Evidence (N.I.) Order, 1989 provides;

> (2) 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. (*My emphasis*)

21. Art. 70(1) provides

> (1) In this Part-
> "confession" includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise;

22. If this were a case where it appeared from witness statements, for example, that there may have been a breach of the Codes, it would be for the prosecution to call evidence to explain the circumstances and it might not have been necessary for the Defendant to give evidence at the voir dire. Where, however, the Defendant wishes to allege that he made a confession by reason of one of the matters set out in Art. 74(2), which is disputed by the prosecution, whereby any such confession was likely to have been rendered unreliable, then it is for him to establish prima facie evidence of it. When that is achieved, though, it is then for the prosecution to prove beyond reasonable doubt that the confession was not so obtained.

23. Constable Coates was quite correct in pointing out that it is not for him to suggest why the custody sergeant made the relevant entry in the manner he did, other than because that reflects what he was told by the constable. That would be for the custody officer. His evidence was not adduced by the prosecution, however.

24. I find, on the balance of probabilities, that Constable Coates did indeed use a form of words to the Defendant, at the time of entering the Station, which invited Mr. Martin to make a voluntary statement with regard to his involvement in the events under investigation. I now have to consider the implications arising from that fact, including, among other things, whether this casts a different light upon the comment made by Mr. Martin in answer to the arresting officer's account to the custody officer.

25. At or around 11.00 am on the day in question, Mr. Martin was arrested. At that point, he was thereupon cautioned, in accordance with para. 10.4 of Part C of the Code, which states;

> 10.4 A person who is arrested, or further arrested, must also be cautioned unless:
> (a) it is impracticable to do so by reason of their condition or behaviour at the time;
> (b) they have already been cautioned immediately prior to arrest as in paragraph 10.1

26. As already noted, no questions were asked of Mr. Martin at that point; no interview was commenced (and Mr, Martin volunteered no comment). Instead, he was conveyed to Enniskillen Station, pursuant to Art. 32 of the 1989 Order.

27. At the doors of the Station, the constable asked the Defendant, in terms, for his account of the incident. Para. 11.1 of Part C of the Code provides that an interview is "… the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences which, by virtue of paragraph 10.1 of Code C is required to be carried out under caution." What the constable was doing at the doors of the Station, therefore, was undoubtedly commencing an interview. (See also R v Cross (Unreported ruling by Shiel, J on voir dire, delivered on 26th February 1997, at pages 2 and 3; see also Zander, *The Police and Criminal Evidence Act 1984,* (4th ed.) 2003, p.p. 261 *et sequi.*)).

28. It was never suggested that the Defendant had been subjected to "oppression". The real issue, so far as Art. 74(2) be concerned, is as whether the conduct of the arresting officer was such as was likely to render unreliable any confession which might be made in reply to his enquiry of the Defendant at the entrance to the Station building.

29. Distinct from the facts in Robinson v The Chief Constable, and indeed those in R v Cross, the instant case is one where the caution had been delivered before the primary admission in issue. On the other hand, unlike the facts in both those cases, the primary admission was obtained before the arrested person was informed of his right to consult with a solicitor of his choice. The instant is a case where there is clear evidence that the arrested person might have elected to consult with a lawyer at the earliest opportunity permitted to him, which again contrasts with the facts in both those cases. The custody record shows that Mr. Martin elected to do so just as soon as the custody officer raised the subject with him.

30. There is an uneasy relationship, in our civil liberties regime, between the risk of an adverse inference being drawn from an accused's silence, on the one hand, and the right to access to legal advice. Devotees of American police dramas will appreciate that the caution administered to a person, upon his arrest, in the United Kingdom, does not include anything like: You have the right to an Attorney. If you cannot afford an Attorney, one will be provided for you.

31. The consequence has been highlighted in the European Court of Justice, in such cases as Averill v The United Kingdom, 20th June 2000. There, at para. 59 it is stated;

> 59. The Court recalls that in its John Murray judgment it noted that the scheme contained in the 1988 [Criminal Evidence (N.I.)]Order was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observed that, under the Order, an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course

> of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation (see the judgment cited above, p. 55, § 66).

32. For reference to "… the beginning of police interrogation" and "during the course of interrogation", read "…at the time of his arrest", and the issue raised in the instant case is brought to the fore.

33. To go back to the words of the caution (set out at para. 3, above), the reference to "when questioned" imbeds within the terms of the information as given to the arrested person an allusion to the protective scheme provided for in the Codes of Practice, of which the arrested person is likely to be, and remain, entirely ignorant. He is unlikely to grasp that, *semble,* no adverse inference may be drawn until he is questioned, following his arrest. He is unlikely to grasp that he will not in fact be questioned until he has been conveyed to a designated Police Station, nor that, even then, he will not be so questioned until, among other things, he has been afforded access to a lawyer of his choice, should he so wish.

34. The real problem here is not that Mr. Martin did not have the caution repeated to him at the doors of the Station. He had been given it only, literally, minutes before. The real problem here is that he was questioned while his silence could not properly have been made the subject of an adverse inference at any trial, though he might well not have known that. When he was questioned, he might well have had in his mind only the admonitory nature of that caution, which warned him that his defence might be harmed if he did not thereupon mention something upon which he wished to rely – such as self-defence.

35. In taking that course of action, the constable was, in effect, circumventing the functions imposed by Code and the Order upon the Custody Officer. Those are set out in Art. 40 of the 1989 Order;

> *Responsibilities in relation to persons detained*
> 40. - (1) Subject to paragraphs (2) and (4), it shall be the duty of the custody officer at a police station to ensure-
> (a) that all persons in police detention at that station are treated in accordance with this Order and any code of practice issued under it and relating to the treatment of persons in police detention; and
> (b) that all matters relating to such persons which are required by this Order or by such codes of practice to be recorded are recorded in the custody records relating to such persons.

36. The Code of Practice (at para. 12.1) stipulates that, where a police officer wishes to interview a detainee, it is for the custody officer to decide whether to deliver the detainee into the officer's custody. By commencing an interview on the way into the Station, the constable frustrated that provision.

37. Para. 3.1 of Code C also provides that:-

> 3.1 When a person is brought to a police station under arrest … the custody officer must make sure the person is told clearly about the following continuing rights which may be exercised at any stage during the period in custody:
> the right to have someone informed of their arrest as in section5;
> the right to consult privately with a solicitor and that free independent legal advice is available;
> the right to consult these Codes of Practice.

38. It is also expected that the arrested person is reminded of the terms of the caution (section 10 of the Code).

39. This is the kind of thing to which allusion is being made when it is said, in R v Keenan, quoted earlier, that "The whole structure of the legislation, which has at its heart placing control in the hands of a uniformed station officer independent of the investigating officers, is aimed at preventing any abuse of powers by the police."

40. When one returns to the custody record in this instance, one finds that all these matters were scrupulously addressed, by the custody officer. In particular, at 11.17 a.m., the Defendant signed an affirmation that he wished to see a solicitor as soon as possible, nominating Mr. Bernard Corrigan. Mr. Martin also confirmed, over his signature, that he did not require that anyone else be notified.

41. The next entry in the Log, at page 6, timed at 11.20 am, began recording the sequence of events whereby the police interview was delayed until 11.56 a.m. so that Mr. Corrigan could attend his client and have a consultation with him in the interview room, commencing at 11.50 a.m. In the meantime, Mr. Corrigan had also been permitted a supervised telephone conversation with his client at 11.28 a.m., when first telephoning the Station, upon learning that the sergeant had been attempting to contact him through his office about a person in custody.

42. In the course of the taped interview which ensued, Mr. Dillon affirmed the terms of his previous admission, at the doors of the Station, that it was he who had struck the injured party, albeit with a single blow and in self-defence.

43. The arresting officer in this instance was one of 7 years' experience. He has arrested a man upon the evidence of another person who was himself interviewed in regard to the offence and who had identified this person as the one who had committed the actual assault. There might well be difficulties in securing the co-operation of that other person at any trial, where this arrested person maintained silence. It is a case in which the arresting officer might well anticipate that if Mr. Martin elected to obtain the advice of a solicitor before being formally questioned such advice would almost certainly be that he should continue to say nothing, putting the prosecution to strict proof of their case against him, as is indubitably his right under our adversarial system of justice. It is difficult to resist the conclusion that the arresting officer, upon progressing through the doors of the Police Station, with a presentation to the custody officer, and all his protective

procedures, imminent, succumbed to the temptation to finesse a voluntary confession out of Mr. Martin and in breach of the Code.

44. In his Forward to the first edition of Professor Zander's *The Police and Criminal Act 1984,* the Home Secretary of the time wrote;

> The Act therefore forms a means of securing our general aim to equip the police to work in a way which commands public confidence: confidence that the law will be enforced effectively and confidence that it will be enforced fairly, responsibly and with proper regard to the rights of the individual who may be suspected of a crime … its success will in large part depend on the extent to which its provisions are generally understood by the public and to which its underlying philosophy is reflected in the actions of the individual police officer.

45. To quote from the judgment of Weir, J in Robinson;

> [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.

46. It is important, I think, to keep in mind - as emphasised in the passage just quoted - that whether a confession is "unreliable" is quite distinct from whether the confession made in the particular case is or is not actually true. I am not concerned here with whether or not it be true that Mr. Martin did strike the injured party. The issue, for the purposes of Art. 74(2)(b), is as to whether, given the multifarious breaches of the Code which I have found to have occurred (including those explicitly recited in the foregoing), any confession which ensued at the door of the Police Station was "unreliable". It is for the prosecution to disprove this, beyond reasonable doubt.

47. I must say that I have some difficulty with the proposition that all the procedural irregularities which I have found to have occurred in this case are such as render Mr. Martin's confession unreliable. I bear in mind that, to allow the confession to be admitted, I must have no lurking or significant doubt about its reliability (as distinct from its truth). But this is a case in which the caution - more particularly that portion which reminded him that he was not obliged to say anything - was duly administered minutes earlier, albeit at a very different location. The Defendant was under no misapprehension that he had been placed under arrest and was about to undergo all formalities, likely to lead to a prosecution. There was no false inducement or misrepresentation involved. He was simply asked a plain question, to which he was free to give or withhold comment, just as he had been in respect of the caution, back at his house, where he had opted to abstain from making any reply. I place limited significance on the fact that he proceeded to repeat his confession, uninvited, to the custody officer and, still less, that he did so again when formally interviewed, in the presence of his solicitor, to which matters I will be returning. But, when he came to give his account of the matter to the court, Mr. Martin struck me as being still quite unabashed and comfortable with the history of events. I sensed no feeling of resentment on his part, no feeling that he had been tricked into giving away his hand, no perception that he had been induced in any sense to abandon a resolution to hold to his silence, nor any inclination to disavow the terms of the response he made at the time. The actual perception of the particular Defendant is not determinative of the issue, but can assist in the more objective enquiry as to the likely effect upon the mind of an accused person in the circumstances in which the Defendant was placed. Putting myself hypothetically back at the point when the arresting officer made his ostensibly casual enquiry at the doors of the Police Station, I really cannot see that any confession or admission which resulted was, in all the circumstances, likely to be unreliable. In short, I conclude that the breaches of the Code do not go to the issue of reliability in this instance.

48. One must then move on to consider the quite distinct provision contained in Art. 76.

> *Exclusion of unfair evidence*
> 76. - (1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

49. Mr. Valentine's annotations to the 1989 Order, I note, points out that any significant and substantial breach of the Codes means that there has been prima facie unfairness, on the authority of C [1997] NIJB 37. Further, it has to be borne in mind that the Order refers to an adverse effect on the fairness of "the proceedings", not "the trial"; it embraces considerations considerably wider than those addressed in Art. 74(2)(b).

50. I also find it interesting that the equivalent English Codes of Practice, revised as recently as April 2003, contain, in Annex C to Code C, a rather complicated statement of circumstances in which the appropriate form of caution is in pre-PACE terms, i.e. one which omits reference to any possible adverse inference being drawn from the citizen's silence in response to questioning. This, in turn, is intended to reflect the terms of The Criminal Justice and Public Order Act 1994, sections 34, 36 and 37 as amended by the Youth Justice and Criminal Evidence Act 1999, section 58. As explained by Professor Michael Zander, Q.C., (*op. cit.,* 4th ed., 5-88), the amendment was introduced to bring the law into line with the ruling of the European Court of Human Rights in Strasbourg, in both Murray (John) v UK, (1996) 22 EHRR 29 and Averill v UK, (2001) 31 EHRR 839; [2000] Crim LR 682. In Averill, the Court considered that to caution a person to the effect that his silence might lead to the drawing of an adverse inference at his trial "… discloses a level of indirect compulsion", particularly in respect of a period during which he was being questioned without being afforded access to a lawyer. In my view, it follows that for the arresting officer to administer the PACE caution to Mr. Martin, including the warning as to a possible adverse inference to be drawn from his silence, and then to question him at the Police Station before allowing the custody officer to check whether he wished to consult a solicitor - whether or not this was deliberate or premeditated- constitutes an indirect compulsion to speak.

51. Article 59(1) of The Police and Criminal Evidence (Northern Ireland) Order 1989 makes clear that a person arrested and held in custody at a police station shall be entitled, if he so requests, to consult a solicitor privately at any time. To fail to do so is a serious and substantial breach of the Order and Code.

52. True, Mr. Martin had not made a request to consult with a solicitor before the arresting officer began his questioning. That is precisely because the questioning was begun before Mr. Martin was handed over to the control of the custody officer, whereupon advice would have been given in regard to access to a lawyer and this Defendant would almost certainly have chosen to exercise his right. Once again, the whole structure of the legislation, which has at its heart placing the control of such rights in the hands of a custody officer independent of the arresting officer, is aimed at preventing any abuse of power by the police. To quote again from Averill, "As a matter of fairness, access to a lawyer should have been *guaranteed* to the applicant before his interrogation began." (My emphasis). On that account, the U.K. Government was there held to be in breach of the applicant's rights under Art. 6.

53. Section 3 of the Human Rights Act 1998 provides;

> 3. *Interpretation of legislation*
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—

> (a) applies to primary legislation and subordinate legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

54. Section 6 of the Human Rights Act 1998 renders it unlawful for a public authority including a court to act in a way which is incompatible with the Convention right.

55. In all these circumstances, I have no difficulty in arriving at the view that I should exercise the discretion contained in Art. 76 of the Police and Criminal Evidence Order and refuse to allow the prosecution to give evidence of the admission attributed to the Defendant by the arresting officer in the Circumstances of Arrest, as recorded by the custody officer and, likewise, of the comment made by the detained person in rejoinder. Both flow directly, and almost immediately, from the *de facto* refusal of access to a lawyer during interrogation; to admit either in evidence would be to deny the Defendant his Convention rights under Article 6 of the European Convention. In any event, to do so would be to endorse or validate the conduct of the arresting officer in this instance and thereby drive coach and pair through the fundamental structure of the 1989 Order, so far as the questioning of arrested persons be concerned.

56. The formal interview which followed at the Station, commencing at 11.58 am, after a delay occasioned by understandable difficulties in securing the attendance of the Defendant's chosen Solicitor at such short notice, was carried out in accordance with PACE conditions. In it, the Defendant maintained his basic position and reiterated his admission that he had struck the injured party, on one occasion. One will never really know whether this would have been his line, had he first been afforded the opportunity to consult with his solicitor before questioning actually began. In circumstances where the critical admission had already been elicited before he was afforded access to his solicitor, I find it difficult to conceive of how he might then have effected so adroit a change of tactic as to repudiate all his previous remarks and refuse to comment when formally questioned.

57. By the same token, I do not see how his solicitor could be expected to discern, assess and advise his client fully and properly upon the irregularities which had arisen prior his attendance (of which he was unaware) – let alone do so in the course of a brief telephone conversation with the Defendant before coming down to the Station. In other words, the effect of those significant and substantial breaches of the Order and Code by the arresting officer had so deeply compromised the effective benefit and safeguards which are usually associated with access to independent legal advice as to render the proceedings *pro tanto*

unfair. I conclude that the recorded question and answer session must also be excluded.

Dated this 21st April 2004

……..
(John I. Meehan, R.M.)
Enniskillen Petty Sessions.